

*CR 2011/1*

**International Court  
of Justice**

**Cour internationale  
de Justice**

**THE HAGUE**

**LA HAYE**

**YEAR 2011**

*Public sitting*

*held on Tuesday 11 January 2011, at 10 a.m., at the Peace Palace,*

*President Owada presiding,*

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

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**VERBATIM RECORD**

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**ANNÉE 2011**

*Audience publique*

*tenue le mardi 11 janvier 2011, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Owada, président,*

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

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**COMPTE RENDU**

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

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

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***The Government of Costa Rica is represented by:***

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

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

*as Agent;*

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

*as Co-Agent;*

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

*as Co-Agent, Counsel and Advocate;*

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

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

Mr. Arnaldo Brenes, Senior Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica; member of the Costa Rican Bar,

*as Counsel and Advocates;*

Mr. Manuel Dengo, Ambassador and Chief of Mission of Costa Rica to the United Nations Office at Geneva,

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

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

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

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

Ms Juliette Marie Revell-Nussio, Research Associate at the Lauterpacht Centre for International Law, University of Cambridge, Barrister,

Ms Katherine Del Mar, Teaching and Research Assistant, Faculty of Law, University of Geneva,

Ms Lilliana Arrieta, Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica,

*as Advisers.*

***Le Gouvernement du Costa Rica est représenté par :***

S.Exc. M. René Castro Salazar, ministre des affaires étrangères et du culte du Costa Rica ;

S. Exc. M. Edgar Ugalde Álvarez, ambassadeur de la République du Costa Rica auprès de la République de Colombie,

*comme agent ;*

S. Exc. M. Jorge Urbina, ambassadeur de la République du Costa Rica auprès du Royaume des Pays-Bas,

*comme coagent ;*

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

*comme coagent, conseil et avocat ;*

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, avocat,

M. Marcelo 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. Arnaldo Brenes, conseiller principal auprès du ministère des affaires étrangères et du culte du Costa Rica, membre du barreau du Costa Rica,

*comme conseils et avocats ;*

M. Manuel Dengo, ambassadeur, représentant permanent du Costa Rica auprès de l'Office des Nations Unies à Genève,

M. Christian Guillermet, ambassadeur, représentant permanent adjoint du Costa Rica auprès de l'Office des Nations Unies à Genève,

M. Ricardo Otarola, ministre et consul général du Costa Rica en République de Colombie,

M. Gustavo Campos, ministre et consul général du Costa Rica au Royaume des Pays-Bas,

Mme Shara Duncan, conseiller à l'ambassade du Costa Rica au Royaume des Pays-Bas,

Mme Juliette Marie Revell-Nussio, *Research Associate* au Lauterpacht Centre for International Law de l'Université de Cambridge, avocat,

Mme Katherine Del Mar, assistante d'enseignement et de recherche à la faculté de droit de l'Université de Genève,

Mme Lilliana Arrieta, conseiller auprès du ministère des affaires étrangères et du culte du Costa Rica,

*comme conseillers.*

***The Government 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;*

H.E. Ms Juana Argeñal Sandoval, Minister of the Environment and Natural Resources of Nicaragua;

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

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

Mr. Paul S. Reichler, Attorney-at-Law, Foley Hoag LLP, Washington D.C., Member of the Bars of the United States Supreme Court and the District of Columbia,

*as Counsel and Advocates;*

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

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

Mr. Martin Lawrence H., Foley Hoag LLP, Washington D.C., Member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,

Ms Tania Elena Pacheco Blandino, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

*as Counsel;*

Ms Alina Miron, Researcher, Centre for International Law (CEDIN), University Paris Ouest, Nanterre-La Défense,

Ms Cicely Parseghian, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,

Mr. Edgardo Sobenes Obregon, First Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,

*as Assistant Counsel.*

***Le Gouvernement du Nicaragua est représenté par :***

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

*comme agent et conseil ;*

S. Exc. Mme Juana Argeñal Sandoval, ministre de l'environnement et des ressources naturelles de la République du Nicaragua ;

M. Stephen C. McCaffrey, professeur de droit international à la McGeorge School of Law de l'Université du Pacifique à Sacramento, 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, membre associé de l'Institut de 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,

*comme conseils et avocats ;*

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

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

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

Mme Tania Elena Pacheco Blandino, conseiller juridique au ministère des affaires étrangères de la République du Nicaragua,

*comme conseils ;*

Mme Alina Miron, chercheur au Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest, Nanterre-La Défense,

Mme Cicely Parseghian, cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,

M. Edgardo Sobenes Obregon, premier secrétaire à l'ambassade du Nicaragua aux Pays-Bas,

*comme conseils adjoints.*

The PRESIDENT: Please be seated. The sitting is open. The Court meets today under Article 74, paragraph 3, of the Rules of Court, to hear the observations of the Parties on the Request for the indication of provisional measures submitted by the Republic of Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*.

For reasons which he has duly conveyed to me, Judge Bennouna is unable to be present on the Bench this morning.

Each of the Parties in the present case, the Republic of Costa Rica and the Republic of Nicaragua, has availed itself of the possibility afforded to it by Article 31 of the Statute of the Court to choose a judge *ad hoc*. Costa Rica has chosen Mr. John Dugard, and Nicaragua, Mr. Gilbert Guillaume.

Article 20 of the Statute provides that “[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously”. Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Notwithstanding that both Mr. Dugard and Mr. Guillaume have been judges *ad hoc* and have made a solemn declaration in previous cases, Article 8, paragraph 3, of the Rules of Court provides that they must make a further solemn declaration in the present case.

In accordance with custom, I shall first say a few words about the career and qualifications of each judge *ad hoc* before inviting him to make his solemn declaration.

Mr. Gilbert Guillaume, of French nationality, has a degree in law, a post-graduate diploma from the Paris Institut d’études politiques and is an alumnus of the Ecole nationale d’administration. An eminent jurist, he has combined the careers of judge and diplomat. Mr. Guillaume is an honorary member of the French Council of State, after having served as a Councillor of State. He was France’s representative on the Legal Committee of the International Civil Aviation Organization (ICAO) and, as such, Chairman of the Committee from 1971 to 1975. He was Chairman of the Conciliation Commission of the Organisation for Economic Co-operation and Development (OECD) and subsequently became the Director of Legal Affairs of that organization. Mr. Guillaume has been the Director of Legal Affairs at the French Ministry of Foreign Affairs and, as such, acted *inter alia* as the Agent of France before the Court of Justice of



the European Communities and the European Court of Human Rights. He was a Member of the International Court of Justice from 1987 to 2005 and President of the Court from 6 February 2000 to 6 February 2003. Mr. Guillaume has been chosen as judge *ad hoc* in the case concerning *Certain Criminal Proceedings in France (Republic of Congo v. France)*, the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* and the case concerning *Maritime Dispute (Peru v. Chile)*. A member of the Permanent Court of Arbitration since 1980, Mr. Guillaume has sat as arbitrator in a large number of disputes. Mr. Guillaume is also the author of various books and articles and has been visiting professor at a number of academic institutions. He is, *inter alia*, member of the Institut de France and of the Institut de droit international, of which he has been Vice-President.

Mr. John Dugard, of South African nationality, is Professor Emeritus at the University of the Witwatersrand, and Honorary Professor at the University of Pretoria and the University of West Cape, and was until recently Professor of Public International Law at Leiden University. He has also acted as Director of the Lauterpacht Research Centre for International Law at the University of Cambridge and has been visiting professor at numerous universities around the world. Mr. Dugard has published works and articles in diverse fields of international law. In tandem with his outstanding academic achievements, Mr. Dugard has greatly contributed to the work of a number of international fora in the field of international law and human rights. He is a member of the Institut de droit international, a member of the International Law Commission and has been its Special Rapporteur on Diplomatic Protection. He has also been Special Rapporteur of the United Nations Human Rights Council. Mr. Dugard has in addition served as a judge *ad hoc* at this Court in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* and in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rock and South Ledge (Malaysia/Singapore)*. Mr. Dugard has been involved in the constitutional negotiations leading to the establishment of a democratic South Africa and has received various awards and honours for his work dedicated to the development of international humanitarian law.

In accordance with the order of precedence fixed by Article 7, paragraph 3, of the Rules of Court, I shall first invite Mr. Gilbert Guillaume to make the solemn declaration prescribed by the Statute, and I would request all those present to rise. Mr. Guillaume.

Mr. GUILLAUME: «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

The PRESIDENT: Thank you. I shall now invite Mr. John Dugard to make the solemn declaration prescribed by the Statute.

Mr. DUGARD: “I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”

The PRESIDENT: Thank you. Please be seated. I take note of the solemn declarations made by Mr. Guillaume and Mr. Dugard, and declare them duly installed as judges *ad hoc* in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*.

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The proceedings in the present case were instituted on 18 November 2010 by the filing in the Registry of the Court of an Application by the Republic of Costa Rica instituting proceedings against the Republic of Nicaragua with regard to an alleged “incursion into, occupation of and use by Nicaragua’s Army of Costa Rican territory as well as breaches of Nicaragua’s obligations towards Costa Rica” under a number of international treaties and conventions.

To found the jurisdiction of the Court, Costa Rica relies first in its Application on Article XXXI of the American Treaty on Pacific Settlement of 30 April 1948, also known as the “Pact of Bogotá”, which has been binding upon both Parties, respectively since 6 May 1949 and 21 June 1950. Secondly, Costa Rica invokes the respective declarations recognizing the

compulsory jurisdiction of the Court made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by Costa Rica on 20 February 1973 and by Nicaragua on 24 September 1979, as modified on 23 October 2001.

In its Application, Costa Rica contends that Nicaragua “has, in two separate incidents, occupied the territory of Costa Rica in connection with the construction of a canal across Costa Rican territory from the San Juan River to Laguna los Portillos (also known as Harbor Head Lagoon), and certain related works of dredging on the San Juan River”.

Costa Rica affirms that the first incursion occurred on or about 18 October 2010 and that “Nicaragua was reported felling trees and depositing sediment from the dredging works on Costa Rican territory”. Costa Rica contends further that “[a]fter a brief withdrawal, on or about 1 November 2010, a second contingent of Nicaraguan troops entered Costa Rican territory and established a camp”. According to Costa Rica, this “second incursion has resulted in the continuing occupation by [the armed forces of Nicaragua] of an initial area of around three square kilometres of Costa Rican territory, located at the northeast Caribbean tip of Costa Rica”. Costa Rica affirms also that “evidence shows that Nicaraguan military forces have ventured further inside Costa Rican territory, to the south” of the above-mentioned area and that “Nicaragua has . . . seriously damaged that part of Costa Rican territory under its occupation”, whereas the

“ongoing and planned dredging and the construction of the canal will seriously affect the flow of water by the Colorado River of Costa Rica, and will cause further damage to Costa Rican territory, including the wetlands and national wildlife protected areas located in the region”.

Costa Rica further contends that Nicaragua intends, by the ongoing artificial canalization of the San Juan river, “to modify the natural watercourse which forms the boundary” between the Parties.

I shall now ask the Registrar to read out the decision requested of the Court, as formulated in the Application of Costa Rica:

The REGISTRAR:

“For these reasons, and reserving the right to supplement, amplify or amend the present Application, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations referred to in paragraph 1 of this Application as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforest and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities

being carried out by Nicaragua on the San Juan River. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has breached:

- (a) the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;
- (b) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;
- (c) the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;
- (d) the obligation not to damage Costa Rican territory;
- (e) the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;
- (f) the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;
- (g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;
- (h) the obligations under the Ramsar Convention on Wetlands;
- (i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica's territorial integrity under international law.

The Court is also requested to determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to . . . above.”

The PRESIDENT: On the same day as the filing of the Application, Costa Rica submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court. In its Request for the indication of provisional measures, Costa Rica refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein. Costa Rica requests provisional measures to preserve its rights, pending the Court's judgment. Costa Rica explains in its Request that despite its

“regular protests and calls on Nicaragua not to dredge the San Juan River until it can be established that the dredging operation will not damage the Colorado River and other Costa Rican territory, Nicaragua has nonetheless continued with its dredging activities . . . and even announced . . . that it would deploy two additional dredges on the San Juan River”.

According to Costa Rica, this “demonstrate[s] the likelihood of damage to Costa Rica's Colorado River and to Costa Rica's lagoons, rivers, herbaceous swamps and woodlands”, the dredging

posing “a threat to wildlife refuges in Laguna Maquenque, Barra del Colorado, Corredor Fronterizo and the Tortuguero National Park”. Costa Rica affirms that Nicaragua has refused to comply with resolution 978 adopted on 12 November 2010 by the Permanent Council of the Organization of American States regarding the “situation in the border area between Costa Rica and Nicaragua” and that “all efforts to resolve the dispute by diplomatic negotiations have failed”.

I shall now ask the Registrar to read out the passage from the Request specifying the provisional measures which the Government of Costa Rica is asking the Court to indicate.

The REGISTRAR:

“On the basis of the facts and law set forth above and in order to prevent irreparable prejudice to its sovereign rights under the Charter of the United Nations and the 1858 Treaty of Limits, as well as with regard to internationally recognized standards of environmental protection, Costa Rica respectfully requests the Court as a matter of urgency to order the following provisional measures so as to rectify the present ongoing breach of Costa Rica’s territorial integrity and to prevent further irreparable harm to Costa Rica’s territory, pending its determination of this case on the merits:

1. the immediate and unconditional withdrawal of all Nicaraguan troops from the unlawfully invaded and occupied Costa Rican territories;
2. the immediate cessation of the construction of a canal across Costa Rican territory;
3. the immediate cessation of the felling of trees, removal of vegetation and soil from Costa Rican territory, including wetlands and forests;
4. the immediate cessation of the dumping of sediments in Costa Rican territory;
5. the suspension of Nicaragua’s ongoing dredging programme, aimed at the occupation, flooding and damage of Costa Rican territory, as well as at the serious damage to and impairment of the navigation of the Colorado River, giving full effect to the Cleveland Award and pending the determination of the merits of this dispute;
6. that Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court.”

The PRESIDENT: On 18 November 2010, immediately after the filing of the Application and Request for the Indication of Provisional Measures, the Registrar, in accordance with Article 40, paragraph 2, of the Statute and Articles 38, paragraph 4, and 73, paragraph 2, of the Rules of Court, transmitted certified copies thereof to the Government of Nicaragua. He also notified the Secretary-General of the United Nations.

According to Article 74 of the Rules of Court, a request for the indication of provisional measures shall have priority over all other cases. The date of the hearing must be fixed in such a way as to afford the Parties an opportunity of being represented at it. Consequently, following consultations, the Parties were informed that the date for the opening of the oral proceedings contemplated in Article 74, paragraph 3, of the Rules of Court, during which they could present their observations on the Request for the Indication of Provisional Measures, had been set at 11 January 2011, at 10 a.m.

On 4 and 5 January 2011, Costa Rica transmitted to the Court “certain documents to which Costa Rica will refer” during the oral proceedings on the Request for the Indication of Provisional Measures. A copy of these documents was sent to Nicaragua.

On 4 January 2011, Nicaragua also submitted to the Court certain documents to which Nicaragua will refer during the present hearings. A copy of these documents was sent to Costa Rica. In addition, Nicaragua deposited in the Registry electronic copies of an aerial photograph, a satellite image and a video. By a letter of 7 January, Nicaragua indicated that it intended to present those electronic copies, including the video, during the oral proceedings. By a letter of the same day, Costa Rica informed the Registrar that it “had no objection” to such a presentation and added that it did not intend, for its part, to present videos during the hearings. The Court has decided to authorize the presentation of the video deposited by Nicaragua.

On 4 January, Nicaragua moreover asked the Court, in the exercise of its discretion under Article 62, paragraph 1, of the Rules, to call upon Costa Rica to produce certain documents in advance of the hearings. On 7 January, Costa Rica produced a document in the Spanish language and transmitted on 10 January a certified translation thereof in French. Furthermore, on 10 January, Costa Rica provided the Court with electronic copies on CD-ROM of a Nicaraguan Atlas, specifying that some maps contained in this atlas would be used during the hearings. These documents were immediately transmitted to Nicaragua.

I note the presence before the Court of the Agents and counsel of the two Parties.

The Court will hear Costa Rica, which has submitted the Request for the Indication of Provisional Measures, this morning until 1 p.m. It will hear Nicaragua this afternoon at 3 p.m.

For the purposes of the first round of oral arguments, each of the Parties will have available to it a full three-hour sitting. Due to the length of this opening speech of the President, additional time will be allocated to Costa Rica after 1 p.m., as needed.

After the first round of oral arguments, the Parties will have the possibility to reply, if they deem it necessary; Costa Rica at 4.30 p.m. tomorrow and Nicaragua at 4.30 p.m. the day after tomorrow. Each of the Parties will have a maximum time of one-and-a-half hours in which to present its reply.

Before giving the floor to His Excellency Ambassador Edgar Ugalde, Agent of the Republic of Costa Rica, I shall draw the attention of the Parties to Practice Direction XI, which states, *inter alia*, that Parties should:

“[i]n their oral pleadings on requests for provisional measures . . . limit themselves to what is relevant to the criteria for the indication of provisional measures as indicated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose.”

I now call upon His Excellency Ambassador Edgar Ugalde, Agent of the Republic of Costa Rica.

M. UGALDE ALVAREZ :

1. Monsieur le président, distingués membres de la Cour, c'est un honneur pour moi de me présenter à nouveau devant vous comme agent du Costa Rica. Je le fais en présence du ministre des affaires étrangères de mon pays, S. Exc. M. René Castro. Sa présence témoigne de l'importance que mon gouvernement attache aux présentes audiences. Les raisons urgentes qui motivent le Costa Rica à demander à cette honorable Cour l'indication de mesures conservatoires sont l'occupation, l'utilisation et la transformation opérées actuellement par le Nicaragua sur le territoire costa-ricien. En ignorant la démarcation de la frontière terrestre avec le Costa Rica, pleinement et clairement établie depuis plus d'un siècle, le Nicaragua viole le droit international, et, en particulier, les instruments régissant les relations entre les deux pays. C'est la coexistence pacifique dans la région qui est ainsi compromise.

2. L'histoire de nos deux pays reflète nos désaccords en matière du régime frontalier. Le Costa Rica n'a toutefois jamais cessé d'utiliser les moyens diplomatiques et juridictionnels pour arriver à un règlement pacifique et définitif de ces différends. Il est malheureux que le Nicaragua

ait décidé continuellement de contester les termes du cadre juridique qui gouverne notre régime frontalier. A titre d'exemple, seulement quelques semaines après que cette honorable Cour ait rendu son arrêt du 13 juillet 2009, le Nicaragua a adopté un décret régissant de manière exclusive et discriminatoire la navigation costa-ricienne sur le fleuve San Juan, d'une manière non conforme à l'arrêt de cette Cour. Le Costa Rica a, encore une fois, été patient et a essayé de résoudre cette situation de manière bilatérale sans qu'aucun résultat positif n'ait pour le moment été obtenu.

3. Le Costa Rica réserve sa position sur cette question car cette situation n'est pas la raison pour laquelle mon pays se présente à nouveau devant votre Cour. Le Costa Rica comparait aujourd'hui devant votre haute juridiction en raison du comportement nicaraguayen suivant : l'occupation et la dévastation d'une portion du territoire costa-ricien, et le rejet par le Nicaragua du tracé frontalier établi par une sentence arbitrale liant les deux Etats.

4. Monsieur le président, l'occupation nicaraguayenne a commencé autour du 18 octobre passé. Depuis cette date, jour après jour, la situation s'aggrave. Le Nicaragua transgresse de manière consciente, délibérée et continue l'intégrité et la souveraineté territoriale du Costa Rica. Contrairement à l'argument élaboré à marche forcée par le Nicaragua, il ne s'agit absolument pas d'un différend frontalier ou d'un problème d'interprétation d'un traité ou d'une sentence arbitrale. Non : il s'agit d'un différend relatif aux activités que le Nicaragua mène illicitement sur le territoire du Costa Rica, ainsi qu'à celles qu'il projette de réaliser sur ce territoire ou ayant des répercussions négatives pour ce territoire à l'avenir. Je dis bien «en territoire costa-ricien» car le Nicaragua a, jusqu'à cette date, toujours reconnu que le territoire en question est effectivement costa-ricien. Le Nicaragua prétend ainsi changer, unilatéralement, la frontière avec le Costa Rica sur deux plans : sur le plan juridique, en déclarant le territoire en question nicaraguayen et sur le plan matériel, en modifiant la géographie de la région.

5. En installant ses forces militaires sur le territoire costa-ricien, la transgression du Nicaragua a causé d'importants dommages au Costa Rica. De plus, cette conduite se caractérise par l'utilisation des forces armées, et ce, dans le but d'imposer une situation sur le terrain en violation de l'ordre établi internationalement entre les deux Etats. Les faits sont d'autant plus graves que le Costa Rica ne dispose pas de forces armées, mon pays compte uniquement avec des forces pour protéger la loi et l'ordre. Ces forces policières n'ont absolument pas les capacités



défensives pour faire face aux incursions militaires. Cette transgression, comme nous le montrerons au cours de ces audiences, l'est non seulement au regard des instruments établissant les frontières entre les deux Etats, mais l'est également au regard de la Charte des Nations Unies et de la charte de l'Organisation des Etats Américains. De telle sorte que la présence nicaraguayenne sur le territoire du Costa Rica met non seulement en danger la stabilité et la paix entre deux pays frères, mais remet aussi en cause le cadre juridique qu'ils se sont engagés à respecter.

6. Monsieur le président, outre sa présence illicite et continue sur le territoire costa-ricien, le Nicaragua est également en train d'opérer une transformation planifiée d'une partie de notre territoire. Ainsi que la Cour pourra s'en rendre compte aujourd'hui, le Nicaragua a déjà causé des dommages importants à des écosystèmes fragiles, à des forêts et à des zones humides protégés tant au niveau national qu'au niveau international. La poursuite de ces actions entraînera des dommages irréparables. L'effet de cette dévastation met d'ailleurs en danger d'autres zones du territoire costa-ricien. Tout cela nous conduit en conséquence à demander en urgence l'indication de mesures conservatoires.

7. Outre les dommages déjà perpétrés sur son territoire, le Costa Rica fait également face à une autre menace. Selon des affirmations des fonctionnaires en charge du dragage du fleuve San Juan, ces travaux affecteront le fleuve Colorado qui se trouve entièrement en territoire costa-ricien. Les travaux de dragage altéreront aussi d'importantes parties du littoral nord costa-ricien sur la mer des Caraïbes. Il est bien entendu que le Costa Rica ne s'oppose pas à des travaux de nettoyage du fleuve San Juan, pourvu que ces travaux n'affectent pas son territoire, y compris le fleuve Colorado, ni son droit de navigation sur le fleuve San Juan, ni ses droits sur la baie de San Juan del Norte. En un mot, nous ne demandons ni plus ni moins que le respect du traité de limites du 15 avril 1858, de la sentence arbitrale Cleveland du 22 mars 1888, des sentences de l'ingénieur Alexander et de l'arrêt de cette honorable Cour du 13 juillet 2009. Le comportement actuel du Nicaragua porte atteinte de manière flagrante aux droits établis par tous ces instruments.

8. Mesdames et Messieurs les juges, même si les agissements nicaraguayens justifiaient une saisine du Conseil de sécurité des Nations Unies, le Costa Rica, motivé par la mise en œuvre et le respect des mécanismes régionaux pour la sauvegarde de la paix et la sécurité internationales, s'est présenté en première instance devant l'Organisation des Etats Américains (OEA). Malgré les

résolutions de l'OEA, le Nicaragua a persisté dans son action, allant même jusqu'à rejeter ces résolutions. Le Gouvernement nicaraguayen a systématiquement refusé de satisfaire aux obligations découlant du cadre de l'OEA, et a même nié tout rôle à cette organisation dans le règlement pacifique de ce conflit dont il est en outre à l'origine.

9. Monsieur le président, le Costa Rica ne peut passer sous silence les propos nicaraguayens visant à salir la longue tradition institutionnelle et démocratique costa-ricienne, résultat d'un effort constant et permanent de son peuple. J'invite les juges à lire le *Livre blanc* sur les prétendues «vérités sur le fleuve San Juan» produit par le Gouvernement nicaraguayen. Ce n'est pas la manière selon laquelle deux Etats voisins qui se considèrent comme frères doivent se traiter mutuellement. Cette publication est tout simplement de la propagande enflammée. Les injures lancées par le Nicaragua, les affirmations de ses dirigeants selon lesquelles la décision du Costa Rica de défendre son intégrité territoriale obéit à des actions en faveur du trafic de drogues, tout comme les affirmations de M. le président du Nicaragua, le 13 novembre 2010 dernier, selon lesquelles, je cite, «les narcotrafiquants dirigent la politique extérieure costa-ricienne»<sup>1</sup>, s'inscrivent dans une politique d'attaque sur tous les fronts contre mon pays.

10. Par respect pour ce haut tribunal, je ne souhaite pas abonder dans ces affirmations blessantes et sans fondement. Elles démontrent toutefois clairement la manière avec laquelle le Nicaragua a décidé de se conduire internationalement vis-à-vis du Costa Rica.

11. De nouvelles provocations ont récemment eu lieu en mer, au moment même où votre Cour délibère sur la requête à fin d'intervention du Costa Rica dans l'affaire *Nicaragua c. Colombie*. Malgré les provocations et agressions nicaraguayennes constantes, le Costa Rica ne s'écartera pas du strict respect du principe du règlement pacifique des différends internationaux. Mais le Costa Rica ne se laissera pas non plus intimider et n'acceptera pas que l'on essaie de lui imposer des faits accomplis.

12. Le Costa Rica vous exposera la souveraineté sur le territoire occupé, les dommages déjà produits et les dommages imminents et irréparables qui peuvent se produire, ainsi que le risque d'une aggravation sérieuse du conflit du fait du comportement nicaraguayen. Le Costa Rica est

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<sup>1</sup> Référence au discours du président Ortega du 13 octobre 2010.

confiant dans le fait que cette honorable Cour trouvera que l'indication des mesures conservatoires sollicitées est urgente et nécessaire, et ce, dans le seul but de sauvegarder l'intégrité territoriale du Costa Rica, la flore, la faune et les ressources hydriques de la région, et, ce qui est aussi de la plus grande importance, de protéger des vies humaines costa-riciennes et nicaraguayennes. Si l'on n'a pas, jusqu'à présent, eu à déplorer de victimes du fait de l'action militaire du Nicaragua, cela est dû à l'attitude responsable dont ont fait preuve mon gouvernement et mon peuple, à savoir celle de ne pas répondre à la force par la force.

13. Monsieur le président, je me permets respectueusement de vous présenter le programme de ce matin. En premier lieu, M. Arnaldo Brenes présentera les aspects historiques et géographiques de la situation. Ensuite, M. Sergio Ugalde expliquera les faits par rapport à l'incursion, l'occupation et l'utilisation du territoire costa-ricien par le Nicaragua. Le professeur Marcelo Kohén exposera les droits que le Costa Rica cherche à préserver par l'indication des mesures conservatoires. Pour finir, le professeur James Crawford exposera les aspects relatifs à l'objet des mesures conservatoires sollicitées par le Costa Rica et les raisons de l'urgence qui justifient leur indication.

14. Mesdames et Messieurs les juges, je vous remercie beaucoup de votre attention. Monsieur le président, je vous prie de donner la parole à M. Arnaldo Brenes.

The PRESIDENT: I thank Ambassador Edgar Ugalde for his presentation. I now give the floor to Mr. Arnaldo Brenes to make his presentation.

Mr. BRENES:

#### **GEOGRAPHICAL AND HISTORICAL CONTEXT OF NICARAGUA'S INCURSION AND OCCUPATION**

1. Mr. President, distinguished Members of the Court, it is my great honour to appear before you on behalf of Costa Rica this morning.

2. Mr. President, in the long years between 1897 and 2010 Nicaragua had never questioned Costa Rica's sovereignty over the portion of land which it is currently occupying and abusing. Never in that period had Nicaragua disputed the location of the boundary along the lower San Juan. Never before had Nicaragua produced such stories as to lost channels cutting across Costa Rican

territory. It is only today, and to be precise, this afternoon, that Costa Rica and this Court will learn what the basis of Nicaragua's alleged claim is. My task this morning is to refer to certain geographical and historical issues relating to the area now occupied.

3. Before I begin, however, I would like to note that all the graphics we will be showing this morning are contained in Volume III of your folders, so you will only need to refer this volume.

### **Historical and geographical facts of the occupied area**

4. The territory occupied by Nicaragua is located at the north-eastern tip of Costa Rica in a region that in Costa Rican cartography is identified as Isla Portillos. The larger area is commonly known as Isla Calero, as can be seen in the graphic on the screen, which is at tab 45 of your folders. In turn, this larger area is divided into two: Isla Calero proper, south of what once was the Taura river; and Isla Portillos, to the north of the Taura river. Although the events we will be referring to are taking place in Isla Portillos, specifically in the area known as Finca Aragón, in popular terms this whole area is referred to as Isla Calero and indeed not only the press and general public, but even diplomatic correspondence have used this name to locate the area occupied by Nicaragua. As a matter of fact, the Taura river which used to divide Isla Portillos from Isla Calero has nearly dried up, thus rendering them into a single land mass.

5. As can be appreciated from the projection, Isla Calero and Isla Portillos are continental areas, located between the San Juan and the Colorado rivers and bound by the Caribbean Sea. The waters of the San Juan are Nicaraguan and the Costa Rican bank defines the boundary between the two countries, while the Colorado is entirely Costa Rican.

6. As the Court will recall from the proceedings in the *Navigational and Related Rights* case, in 1858 the Treaty of Limits definitively settled the territorial limits between Costa Rica and Nicaragua. As stated in its Article 2:

“The dividing line between the two Republics, beginning at the North Sea (Caribbean Sea), shall start at the extremity of Punta de Castilla, at the mouth of the river San Juan de Nicaragua, and shall run along *its* right bank [that is to say, the right bank of the San Juan] to a point 3 English Miles distant from Castillo Viejo . . .”<sup>2</sup>

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<sup>2</sup>Treaty of Limits between the Republics of Costa Rica and Nicaragua, San José, 15 April 1858, (*Costa Rica v. Nicaragua*, MCR, Vol. 2, Ann. 7 (b)).

From that point, the boundary runs through land until it reaches the common Bay of Salinas in the Pacific Ocean.

7. In the aftermath of the 1888 Cleveland Award both countries agreed to demarcate the boundary. This was achieved through the Demarcation Commission established by the 1896 Pacheco-Matus Convention<sup>3</sup>. The two countries agreed each to name commissioners who would be engineers or surveyors<sup>4</sup>. The Commission thus created was to be completed by a neutral engineer appointed by the President of the United States of America. He would act as an Arbitrator of any disputed points. In the words of Article 2 of the Pacheco-Matus Convention: “The engineer shall have ample authority to decide any kind of dispute that may arise, and his decision shall be final as to the operations in question.”<sup>5</sup>

8. The appointment made by the President of the United States fell upon Edward Porter Alexander. Between 1897 and 1900, acting together with the representatives of each country, he accomplished the task of demarcating the boundary line of the entire Costa Rican-Nicaraguan border. The complete proceedings of the Demarcation Commission, including the five Arbitral Awards and 27 Minutes recording the complete work of the Commission and the precise points where the boundary would run, are contained in two volumes. As provided by the Pacheco-Matus Convention,

“[t]he minutes of the work, which shall be kept in triplicate and which the commissioners shall duly sign and seal constitute, without the necessity of approval or any other formality on the parts of the signatory Republics, the proof of the final demarcation of their boundaries”<sup>6</sup>.

According to Article 9 of the Convention, a manuscript copy of the Minutes was given to Costa Rica, another to Nicaragua, and the third to the Arbitrator. Certified copies of this important document are found in Volume II of your folders.

9. Mr. President, Members of the Court, one cannot read the proceedings of the Commission without being impressed by two things. First, the meticulous care taken by the Commission and

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<sup>3</sup>Convention for the Demarcation of the Boundary Line between the Republics of Costa Rica and Nicaragua (Pacheco-Matus) San Salvador, 27 March 1896, 182 *CTS* 359

<sup>4</sup>*Ibid.*, Art. 1

<sup>5</sup>*Ibid.*, Art. 2.

<sup>6</sup>*Ibid.*, Art 8.

the complete professionalism of Alexander, who spent three years of his life devoted to this task. Second, the high degree of accuracy and clarity in the determination of the boundary, which — subject to the five awards given by Alexander on disputed points — was agreed by all members of the Commission and signed on multiple occasions. Nor were the proceedings any secret. The first key award of 1897 was published in 1898, with its accompanying map, in John Basset Moore's well-known compilation of international arbitral awards<sup>7</sup>.

10. I shall not review at this point the whole findings of the Commission, or all of the awards rendered by the Arbitrator. Nevertheless, I must mention the first Alexander Award, since it established not only the location of the starting point of the boundary at Punta Castilla, but also the boundary at the region that today is occupied by Nicaragua.

### **The origin of the official boundary**

11. The graphic on screen is a sketch-map that accompanies the first Alexander Award, rendered on 30 September 1897. As can be observed, starting at Punta Castilla, the boundary follows the margin of Harbor Head Lagoon, known in Spanish as “Laguna Los Portillos”, until it reaches “the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty.”<sup>8</sup> From that point, the boundary follows the right margin of the San Juan up to a point “3 English Miles distant from Castillo Viejo” in accordance with Article 2 of the 1858 Treaty of Limits. Clearly, every portion of land located on the right margin of the San Juan river and Harbor Head Lagoon is Costa Rican. It can be observed that Alexander applied strictly the spirit of the 1858 Treaty of Limits, since he awarded the water of Harbor Head Lagoon to Nicaragua in so far as it was connected to the San Juan river, while all the territory located on the right margin of the river and the Lagoon was recognized as Costa Rican. You can find this map at tab 46 of your folders.

12. In accordance with the criteria established in Alexander's First Award, the Demarcation Commission proceeded to define on site the exact boundary. The graphic on screen, tab 47 of your folders, is a photograph of a sketch-map contained in Minute No. 10 of 2 March 1898, which is

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<sup>7</sup>John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, Vol. V, Washington, 1898, Government Printing Office, p. 5074.

<sup>8</sup>United Nations, *Reports of International Arbitral Awards (RIAA)*, 2007, Vol. XXVIII, p. 220.

found in page 33 of Volume I of the records of the Demarcation Commission. It can be clearly observed that this sketch-map portrays the way the boundary was defined on the actual terrain. This sketch-map reflects the boundary as defined by the different landmarks, co-ordinates, angles, distances and directions contained in the actual text and charts of Minute No. 10. This has been the basis of both Costa Rica's and Nicaragua's official cartography in this specific area ever since. If the map is looked at carefully, one can even see the name "Hacienda Aragon" on it, which shows that this Costa Rican region has existed at least since 1898 when the map was drafted.

### **Contemporary cartography shows the occupied area is Costa Rican**

13. The map presented on screen is an official map produced by the National Geographic Institute of Costa Rica in 1988, scale 1:50,000. You can find it at tab 48 of your folders. A remarkable coincidence can be observed in the boundary portrayed in this official map and the sketch-map contained in Minute No. 10. This is no surprise since this official map was drawn in accordance with the limits established in Minute No. 10 and with the aid of aerial photography contemporary to the drawing of the official map. The morphology of the lower San Juan has not suffered significant changes between the end of the nineteenth century and the mid-1980s.

14. Nicaragua's official cartography faithfully reflects the same boundary and topography. In fact the official cartography of both countries is based on the same legal, historical and factual elements. The map on screen is a 1988 official map produced by the National Institute of Territorial Studies of Nicaragua — INETER — scale 1:50.000. I refer you to tab 49 of your folders. It can be observed that what is shown as blank is not Nicaraguan territory. The territory currently occupied is shown in blank. As a matter of fact, both maps can be superimposed and they match perfectly.

15. This official map by Nicaragua's National Institute of Territorial Studies could be easily downloaded from its website until quite recently, before the Nicaraguan Government decided to block the website's access to its official cartography. The Court may be interested to know that, like the canal, this website states that it is "currently under construction"<sup>9</sup>. However, Nicaragua's

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<sup>9</sup>[Http://www.ineter.gob.ni/](http://www.ineter.gob.ni/).

attempt to hide its own maps is useless, since there are many official maps still around. Professor Kohen will show you some of them.

16. But not only Nicaraguan and Costa Rican official cartography undoubtedly recognize the area of Isla Portillos as Costa Rican. Third-party official maps do the same. The map projected on the screen is a 1988 official map produced by the Defence Mapping Agency of the Inter American Geodetic Survey, which you will find at tab 52 of your folders. It reflects exactly the same boundary as Nicaraguan and Costa Rican official cartography.

17. This other map on the screen was produced by the Army Map Service of the United States Army Corps of Engineers in 1966. It is at tab 54 of your folders. Again, it fully coincides with the Nicaraguan and Costa Rican official cartography. There is no doubt that the boundary between Costa Rica and Nicaragua in this region has been unaltered since it was authoritatively depicted in 1897.

18. Finally, this graphic on the screen, which is at tab 55 of your folders, shows the precise area where Nicaragua's army and personnel are currently occupying Costa Rican territory. You can see the area where the trees have been felled and where the artificial canal is being built. The precise zone is identified in Costa Rican official cartography as Aragón, a name that, as we have already seen, existed in 1898 when the Demarcation Commission drafted and approved the sketch-map contained in Minute No. 10.

19. It is important to note that the occupied area in Isla Portillos is part of Costa Rica's Border Zone Wildlife Reserve, created by Costa Rican legislation since 1994. This area is part of an important biological corridor that joins different protected areas in Costa Rica. The land, in accordance with Costa Rican legislation, belongs to the Costa Rican State, although private individuals may hold possession rights and make use of the land in ways which do not conflict with its character of Wildlife Reserve. Professor Kohen will return to this point.

20. Mr. President, Members of the Court, there were, and there are, no doubts of any kind about the demarcation between the two countries. Since the first Alexander Award of 1897, and until the incursion by Nicaraguan military forces on Costa Rican territory in October 2010, Nicaragua had never questioned Costa Rica's sovereignty over that area. Anything Nicaragua says this afternoon will be news not only to you, but to Costa Rica as well.



21. Mr. President, distinguished members of the Court. I thank you all for your kind attention. Mr President, I would be grateful if you could please call on my colleague Mr. Sergio Ugalde.

The PRESIDENT: I thank Mr. Arnaldo Brenes for his presentation. I now invite Mr. Sergio Ugalde to take the floor.

Mr. UGALDE:

#### **NICARAGUA'S INCURSION AND OCCUPATION AND ITS EFFECTS**

1. Mr. President, distinguished Members of the Court, it is a great honour to appear before you representing Costa Rica at this hearing.

2. My task today is to present to the Court the factual information surrounding the occupation and use — or misuse — of Costa Rican territory by Nicaragua, and, an account of the efforts by Costa Rica to resolve the conflict.

#### **The Facts of the Incursion and Occupation**

##### **Antecedents**

3. Mr. President, although the facts that are the core of the dispute and the request for provisional measures mainly concern the occupation and use by Nicaragua of Costa Rican territory, it is nonetheless necessary to give a brief account of the antecedents of the dredging works that Nicaragua is currently carrying out on the San Juan river.

4. Whether Nicaragua can carry out works of improvement on the San Juan river, and the legal conditions under which it may do so, are questions governed by the 1888 Cleveland Award. This issue was briefly considered by the Court in its recent Judgment of 13 July 2009<sup>10</sup>. Nicaragua then requested the Court to declare that it had “the right to dredge the San Juan [river] 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”<sup>11</sup>.

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<sup>10</sup>Case concerning the *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, pp. 51-52, paras. 153 and 155: <http://www.icj-cij.org/docket/files/133/15321.pdf>.

<sup>11</sup>*Ibid.*, p. 52, para. 153.

To this, the Court stated, and I quote:

“In any event it suffices for the Court to observe that the two questions thus raised were settled in the decision made in the Cleveland Award. It was determined in paragraphs 4 to 6 of the third clause of the Award that Costa Rica is not bound to share in the expenses necessary to improve navigation on the San Juan river and that Nicaragua may execute such works of improvement as it deems suitable, provided that such works do not seriously impair navigation on tributaries of the San Juan belonging to Costa Rica.

As Nicaragua has offered no explanation why the Award does not suffice to make clear the Parties’ rights and obligations in respect of these matters, its claim in this regard must be rejected.” (*Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, p. 52, para. 155.)

5. I would now like to refer the Court to certain diplomatic exchanges between Costa Rica and Nicaragua, on the subject of the works of improvement that Nicaragua had previously announced it intended to carry out on the San Juan. The first was sent by Costa Rica’s then Foreign Minister, Roberto Tovar, on 26 January 2006<sup>12</sup>. In response to press statements about the dredging of the San Juan river by Nicaragua, and pursuant to Article 3, paragraph 6, of the 1888 Cleveland Award, the Minister requested that Nicaragua provide technical information in relation to the possible effect of the dredging, in particular in connection to its effects on the Colorado river.

6. Nicaragua responded on 17 February 2006<sup>13</sup>, rejecting the request for technical information. Nicaragua did state that certain infrastructure works were being carried out in the vicinity of San Juan de Nicaragua, but no technical information related to these or other works was provided.

7. Costa Rica responded on 5 May 2006<sup>14</sup>, stating that any works of improvement must be carried out without any damage to Costa Rica’s territory, as stipulated by the Cleveland Award.

8. On 8 May 2006<sup>15</sup>, Nicaragua responded in turn, again refusing to provide any technical information and simply reaffirming its previous Note. The next three years passed without event, as Nicaragua did not pursue any works on the river.

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<sup>12</sup>Tab 21, Vol. 1, judges’ folders: Note from the Minister of Foreign Affairs and Worship of Costa Rica to the Minister of Foreign Affairs of Nicaragua; original and English translation, 26 Jan. 2006.

<sup>13</sup>Tab 22, Vol. 1, judges’ folders: Note from the Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs and Worship of Costa Rica; original and English translation, 17 Feb. 2006.

<sup>14</sup>Tab 23, Vol. 1, judges’ folders: Note from the Minister of Foreign Affairs and Worship of Costa Rica to the Minister of Foreign Affairs of Nicaragua; original and English translation, 5 May 2006.

9. On 25 August 2009, both the manager of Nicaragua's Port Company, Virgilio Silva, and the new head of the dredging works on the San Juan, Edén Pastora, informed two different news organizations<sup>16</sup> of Nicaragua's intention to dredge the San Juan river. Both were reported as stating that Nicaragua's intention was to recover 1,700 cubic metres of water per second<sup>17</sup>, allegedly lost to the Colorado river, a river wholly Costa Rican.

10. Concerned by the implications of Silva's and Pastora's words, on 27 August 2009<sup>18</sup>, Costa Rica requested that Nicaragua clarify its intentions in relation to the works and the statements thus made. Considering that the Colorado river only carries — in total — between 1,400 and 1,700 cubic metres per second, Nicaragua's purported plans implied the complete devastation of the Colorado river. In his Note, Foreign Minister Stagno stated:

“It is evident that the public declarations of the mentioned functionaries, who indicate that Nicaragua intends to divert 1,700 metres per second from the flow that the Colorado River currently has, constitute unquestionable proof of the intention to cause irreparable damage to the territory of Costa Rica.”<sup>19</sup>

11. The Minister warned of the serious environmental impact that the intended works would have on Costa Rican territory, and urged Nicaragua not to carry out any of these works until there was technical scientific evidence that they would not cause harm to Costa Rica<sup>20</sup>.

12. Recently, in an unusual testimonial given 15 months after the original press report, Mr. Silva appears to retract his August 2009 statement. However, it seems that Mr. Pastora does not. It is noteworthy that, despite Mr. Silva's backflip<sup>21</sup>, Nicaragua has never responded to Costa Rica's letter.

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<sup>15</sup>Tab 24, Vol. 1, judges' folders: Note from the Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs and Worship of Costa Rica; original and English translation, 8 May 2006.

<sup>16</sup>Tab 77, Vol. 3, judges' folders: English translation of extract from *La Prensa*, 25 Aug. 2009, “They are going for the flow of the San Juan River”; original available at: <http://archivo.laprensa.com.ni/archivo/2009/agosto/25/noticias/nacionales/345585.shtml>. See also tab 78, Vol. 3, judges' folders: English translation of extract from *La Nación*, 25 Aug. 2009, “Nicaragua will dredge the San Juan to recover earlier flow”; original available at: [http://www.nacion.com/ln\\_ee/2009/agosto/25/pais2069754.html](http://www.nacion.com/ln_ee/2009/agosto/25/pais2069754.html).

<sup>17</sup>*Ibid.*

<sup>18</sup>See Attachment PM 1, Request for the Indication of Provisional Measures submitted by the Republic of Costa Rica, 18 Nov. 2010: Note from the Minister of Foreign Affairs and Worship of Costa Rica (DM-637-9), dated 27 Aug. 2009, and addressed to the Minister of Foreign Affairs of Nicaragua.

<sup>19</sup>*Ibid.*

<sup>20</sup>*Ibid.*

<sup>21</sup>See Document 15, Declaration of the Executive President of the National Port Company, Virgilio Silva Munguía, documents submitted by Nicaragua on 4 Jan. 2011.

13. On 12 July 2010, after learning that the dredging of the San Juan would take place in the coming weeks, the Costa Rican Minister of Foreign Affairs *ad interim*, yet again, requested environmental impact assessment reports from Nicaragua<sup>22</sup> that would indicate that no damage would be caused to Costa Rican territory.

14. Nicaragua's President, Commander Daniel Ortega, reacted to this note in a speech given on 15 July<sup>23</sup>, stating that Costa Rica's Foreign Ministry "mistakenly" informed Nicaragua's Foreign Ministry that Nicaragua needed permission from Costa Rica to undertake works on the San Juan. The Nicaraguan President stated that he had given instructions to his Foreign Minister to provide a "fraternal" response to Costa Rica. Again, no response, "fraternal" or otherwise, was ever issued.

15. In fact Costa Rica had said nothing about the need for permission. But the desire to maintain a good relationship with Nicaragua prompted the new Costa Rican Foreign Minister, René Castro, to visit Nicaraguan Foreign Minister, Samuel Santos, on 21 July 2010, in order to address Costa Rica's concerns regarding the effect of the dredging on Costa Rican territory, among other bilateral matters. At that meeting, Foreign Minister Santos assured Foreign Minister Castro that Nicaragua was planning only to undertake a minor cleaning job on the river, and that such modest work would in no way entail any damage to Costa Rican territory. Foreign Minister Castro accepted those assurances<sup>24</sup>. But in fact it appears that Nicaragua had decided to carry out much more than minor cleaning works. Indeed, it has just announced its intention to move a further three dredges to the San Juan<sup>25</sup>, bringing the total to four.

16. Naturally the prospect of having the flow of the Colorado river devastated greatly concerned Costa Rica. But Nicaragua's next acts took Costa Rica entirely by surprise, as they came, in layman's terms, wholly out of the blue.

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<sup>22</sup>Tab 25, Vol. 1, judges' folders: Note from acting Minister of Foreign Affairs and Worship of Costa Rica to the Minister of Foreign Affairs of Nicaragua; original and English translation, 12 Jul. 2010.

<sup>23</sup>Tab 16, Vol. 1, judges' folders: English translation of extract from *El Nuevo Diario*, 15 Jul 2010, "Ortega rejects permission request to Costa Rica to dredge the San Juan River"; original available at: <http://www.elnuevodiario.com.ni/imprimir/78950>.

<sup>24</sup>Document 19, statement by Mr. Rene Castro Salazar, Costa Rican Minister of Foreign Affairs and Culture (*sic*), to the Environmental Commission of Costa Rica's Legislative Assembly, on 8 Sep. 2010, documents submitted by Nicaragua on 4 Jan. 2011.

<sup>25</sup>Tab 79, Vol. 3, judges' folders: English translation of extract from *La Prensa*, 9 Jan. 2011: "Another three dredges to the [San Juan] river"; original available at: <http://www.laprensa.com.ni/2011/01/09/nacionales/48512>.

### **Nicaragua's Incursion: the Facts**

17. So, Mr. President, I turn now to the incursion, occupation and use of Costa Rican territory by Nicaragua.

18. Costa Rica's Ministry of Public Security conducted an inspection on the area of Finca Aragón in Isla Portillos, on 20 October 2010, and found that the Nicaraguan dredge named "Soberania" was depositing sediments from the San Juan river onto Costa Rican territory, to be precise, on Isla Portillos; and that a sizeable area of forest had been felled there as well. A picture taken that day showing the sediments being deposited is now on the screen, and at tab 57 in your folders. The next day, on 21 October, a protest note was transmitted to the Nicaraguan Ambassador<sup>26</sup>, who was also informed that Costa Rica would be sending its police forces to the site.

19. The following day, on 22 October, Costa Rica's police forces did enter Finca Aragón, on Isla Portillos, prior to the inspection. Once there, the Costa Rican officials raised the Costa Rican flag.

20. On that same day, members of the Costa Rican Ministries of Public Security, Foreign Affairs and Environment inspected the area of Isla Portillos by means of a rented helicopter, and found that sediments had been deposited on Costa Rican soil, and that a sizeable area of forest had been levelled. That same day, the Regional Attorney General's office inspected the area and opened a criminal enquiry<sup>27</sup>. A second inspection was also carried out by the Ministry of Environment on 25 October. The Nicaraguan Army, posted on boats along the San Juan river and on the dredge itself, did not react to Costa Rica's presence on either date.

21. The inspections made clear that Nicaragua had been depositing a great deal of dredged sediment on Costa Rica's territory. The amount of sediment deposited equalled about 1,680 cubic metres, or 240 truck loads<sup>28</sup>. The pictures of the sediment taken at that occasion are now being shown on screen, and are at tab 58 of your folders.

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<sup>26</sup>Tab 26, Vol. 1, judges' folders: Note from acting Minister of Foreign Affairs and Worship of Costa Rica to the Minister of Foreign Affairs of Nicaragua; original and English translation, 21 Oct. 2010.

<sup>27</sup>Regional Attorney's General Office of Guapiles, file number 10-004110-485 PE.

<sup>28</sup>Tab 37, Vol. 1, judges' folders: *Misión Ramsar de Asesoramiento No. 69, Humedal de Importancia Internacional Caribe Noreste, Costa Rica* and English translation ("Ramsar Report") 17 Dec. 2010, p. 25.

22. The inspection also made clear that an area of some 16,700 square metres of primary forest had been felled — at least 197 trees had been cut down by that date. Among these, there were some about 200 years old. Pictures of the deforested area are now being shown, and are found at tab 59. Furthermore, approximately 40,800 square metres of forest had been prepared to be cut down<sup>29</sup>, as the projected picture shows, which can be found at tabs 60 to 62.

23. On 26 October, Nicaragua responded to Costa Rica's note of protest of 21 October<sup>30</sup>, raising, among other things, an entirely irrelevant allegation that two officers from the Costa Rican Judicial Police had penetrated Nicaraguan territory some 200 km away from the site of the Nicaraguan incursion. The note appeared to be the first — ever — Nicaraguan attempt to deny Costa Rica's ownership of the area of Finca Aragón, in Isla Portillos. It further indicated that Nicaragua would continue with the “clean up” work on the San Juan River<sup>31</sup>.

24. On 31 October, Costa Rican police conducted another reconnaissance flight over Isla Portillos, and found that Costa Rica's flag had been removed, and that the Nicaraguan flag rose in its place. They also observed that several military camps had been established. The following day, on 1 November, a further fly-over determined the presence of armed Nicaraguan Army soldiers. You can see, from the projection that, as the aircraft carrying Costa Rican police passed, Nicaraguan soldiers pointed their weapons at it, in a sign of imminent confrontation: the photograph is at tab 63. One of the Nicaraguan Army personnel appears to be pointing an anti-aircraft type of weapon. Several other soldiers can be observed pointing their AK-47s at the aircraft as well. Given the potential for armed conflict — something that Costa Rica wished by all means to avoid — the Ministry of Public Security ceased all flights over in the area the following days.

25. On 1 November, the Foreign Minister protested the second incursion and occupation of Costa Rican territory at the site of Finca Aragón, and demanded the immediate withdrawal of all

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<sup>29</sup>Tab 37, Vol. 1, judges' folders: *Misión Ramsar de Asesoramiento No. 69, Humedal de Importancia Internacional Caribe Noreste, Costa Rica* and English translation (“Ramsar Report”) 17 Dec. 2010, p. 25.

<sup>30</sup>Tab 27, Vol. 1, judges' folders: Note from acting Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs of and Worship of Costa Rica, original and English translation, 26 Oct. 2010.

<sup>31</sup>*Ibid.*

Nicaraguan personnel from Costa Rica's territory<sup>32</sup>. Nicaragua did not respond to this protest, or withdraw its Army personnel from the occupied territory.

26. At the request of Costa Rica and on the basis of Articles 21 and 62 of the Charter of the Organization of American States, an immediate Special Session of the Organization was scheduled for 3 November 2010. At that meeting, the Nicaraguan Ambassador to the OAS argued that no occupation had occurred, and gave co-ordinates for the location of certain Nicaraguan operations and for the dredge itself. However, those co-ordinates did not correspond to any of the locations where the Nicaraguan Army had established camps on Costa Rican territory<sup>33</sup>.

27. Following the first OAS meeting, an invitation was issued to the Secretary General of the OAS to visit both countries. The visit took place between 5 and 8 November. The Secretary General met with both Presidents and flew over the occupied area. On the Secretary General's initiative, on 8 November, Presidents Ortega and Chinchilla held a telephone conversation<sup>34</sup>. The purpose of the phone call was to agree that Nicaragua would withdraw its troops from the occupied area and that Costa Rica would not send its police to the same area, thus creating a conflict-free zone, as a pre-condition for the conduct of a bilateral meeting to take place on 26 November, to discuss other relevant points of the bilateral agenda. However, despite the sense that an understanding had been reached with Nicaragua, no Nicaraguan troops were withdrawn.

28. On 9 November, the Secretary General presented his report to the Permanent Council of the OAS. His four recommendations can be seen projected on the screen and can be found at tab 64. There was general agreement between the Parties as to recommendations 1, 2 and 4, but not recommendation 3, which was to avoid the presence of military or security forces in the area of Isla Portillos. Nicaragua refused to accept this recommendation because it implied the withdrawal of its troops from the occupied Costa Rican territory. In an attempt to reach a negotiated solution, the meeting of the Permanent Council was suspended for three days. However, Nicaragua's

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<sup>32</sup>Tab 28, Vol. 1, judges' folders: Note from the Minister of Foreign Affairs and Worship of Costa Rica to the Minister of Foreign Affairs of Nicaragua, original and English translation, 1 Nov. 2010.

<sup>33</sup>Tab 4, Vol. 1, judges' folders: Extracts of transcript from the OAS Permanent Council meeting held on 3, 4, 9 and 12 Nov. 2010, Nicaragua's Ambassador Denis Moncada, OAS Speech, 3 Nov. 2010, p. 17. Ambassador Moncada provided the following co-ordinates: "10°, 54 minutes, 55.9 seconds, North Latitude; and 0.83°, 40 minutes, 43.2 seconds, West Longitude", and: "10°, 54 minutes, 77.1 seconds, North Latitude; and 0.83°, 41 minutes, 28.3 seconds West Longitude."

<sup>34</sup>Tab 80, Vol. 3, judges' folders: Extract of transcript from the OAS Permanent Council meeting held on 3, 4, 9 and 12 Nov. 2010, Costa Rica's Ambassador Enrique Castillo, 9 Nov. 2010, pp. 48-49.

continuous objection to the withdrawal of its troops made a solution impossible. Accordingly, the Secretary General's recommendations were put to a vote. The Permanent Council, by a majority of 22 votes in favour, two against (Nicaragua and Venezuela) and three abstentions, adopted all four recommendations<sup>35</sup>.

29. Nicaragua immediately vowed not to comply with the resolution. Nicaragua's Ambassador Denis Moncada<sup>36</sup>, as well as Nicaragua's President, Commander Daniel Ortega<sup>37</sup>, refused to comply with the OAS recommendations. President Ortega went further, accusing Costa Rica, along with a number of other American countries and the OAS itself, of serving the cause of narco-trafficking<sup>38</sup>. These baseless allegations were firmly rejected by Costa Rica<sup>39</sup> and the other countries.

30. On 18 November, and as a result of Nicaragua's clear and adamant refusal to comply with the recommendations of the OAS, in particular the call for the withdrawal of its troops; and further considering Nicaragua's intensification of canal building by that date, Costa Rica decided to file the Application instituting these proceedings, together with the present Request for the Indication of Provisional Measures.

31. On that same day, the OAS Permanent Council adopted a further resolution, convening a Consultation Meeting of Foreign Ministers at OAS headquarters<sup>40</sup>.

32. Meanwhile, Nicaragua continued with the construction of a canal on Costa Rica's territory. Nicaragua had also started to cut across a meander located on its side of the border, with the intention of straightening the naturally curved course of the San Juan, thus increasing the speed of water flow in that part of the river, as is now being shown. This picture is found at tab 65.

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<sup>35</sup>Resolution of the Permanent Council of the OAS, 12 Nov. 2010; Application of the Republic of Costa Rica, 18 Nov. 2010, Attachment 7.

<sup>36</sup>Statement of Denis Ronaldo Moncada, Nicaraguan Ambassador to the Organization of American States, as reported in "Call for troop withdrawal in Nicaragua, Costa Rica dispute"; *CNN International*, 13 November 2010, available at: <http://edition.cnn.com/2010/WORLD/americas/11/12/nicaragua.costarica.dispute/>; Application of the Republic of Costa Rica, 18 Nov. 2010, Attachment 8.

<sup>37</sup>English translation by Costa Rica of a speech given by President Ortega on national Nicaraguan television on 13 Nov. 2010; Application of the Republic of Costa Rica, 18 Nov. 2010, Attachment 6.

<sup>38</sup>*Ibid.*

<sup>39</sup>Tab 30, Vol. 1, judges' folders: Note from the Minister of Foreign Affairs and Worship of Costa Rica to the Minister of Foreign Affairs of Nicaragua, original and English translation, 14 Nov. 2010.

<sup>40</sup>Resolution of the OAS Permanent Council, 18 November 2010, available at: <http://www.oas.org/consejo/resolutions/res979.asp>.



Cutting across the meander would enable Nicaragua to more easily divert the waters of the San Juan through the canal built on Costa Rica's territory.

33. A bilateral meeting scheduled for 26 November was hosted by Costa Rica, but Nicaragua did not attend and the meeting had to be cancelled. That same day, OAS members took part in a flight over the occupied territory to report back to the Secretary General of the OAS<sup>41</sup>.

34. Further evidence in the form of aerial and satellite pictures showed that Nicaragua had accelerated the construction of the artificial canal and the felling of more forest, this time closer to Laguna Los Portillos. Illustrations of this, now being projected, can be found at tabs 66 and 67. On 29 November, the acting Costa Rican Minister of Foreign Affairs sent a note reminding Nicaragua,

“that the fundamental principle of good faith requires that once the International Court of Justice has received a request for provisional measures for its consideration, the parties should suspend all action on the field relating to the subject of the measures, to prevent the aggravation of the situation and to provide an opportunity for the Court to hear the parties and decide on the merits of the requested measures, so as to avoid that the Court's decision be obstructed by a *fait accompli* situation”<sup>42</sup>.

35. In response, Nicaragua indicated that the issues raised by Costa Rica were *sub judice* and refused any interim solution<sup>43</sup>. Indeed, it intensified and accelerated the construction of the canal. On 7 December, the Nicaraguan authorities announced the completion of the canal and their intention to widen it<sup>44</sup>. They still did not withdraw from Costa Rica's territory.

36. On 7 December, the Consultation Meeting of Foreign Ministers took place at the OAS headquarters. The Secretary General presented a report, which outlined recent developments in the occupied area. Of interest is the account by Ambassador Dante Caputo, Special Adviser to the Secretary General of the OAS and former Minister of Foreign Affairs of Argentina, who stated:

“My impression is that the area where trees have been felled is greater than during the previous observation, tents can be seen in the location, the Nicaraguan flag, and the entrance of the river course in the Río San Juan can be clearly distinguished— better than during our previous flyover. I photographed this entire area and these

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<sup>41</sup>See *infra* para. 36.

<sup>42</sup>Tab 31, Vol. 1, judges' folders: Note from acting Minister of Foreign Affairs and Worship of Costa Rica to the Minister of Foreign Affairs of Nicaragua, original and English translation, 29 Nov. 2010.

<sup>43</sup>Tab 32, Vol. 1, judges' folders: Note from acting Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs of and Worship of Costa Rica, original and English translation, 30 Nov. 2010.

<sup>44</sup>Tab 17, Vol. 1, judges' folders: English translation of extract from *La Prensa*, 8 Dec. 2010: “Alexander's Channel gets cleaned”; original available at: <http://www.laprensa.com.ni/2010/12/08/nacionales/45805>.

comments can be checked against the photos. I saw no members of the armed forces on the ground. That does not necessarily mean that there were none. In contrast, the military presence on board the dredger was obvious. It can be clearly seen in one of the photographs.”<sup>45</sup>

37. Photographs attached to his report are now being shown on the screen. They are found at tab 68.

38. The result of this meeting was the adoption of a resolution calling for the parties to implement, without delay, the recommendations adopted in the resolution of 12 November<sup>46</sup>. The resolution was passed with the vote of 24 countries in favour, two votes against and five abstentions. Nicaragua has not complied with either resolution.

### **Effects of the occupation and use of Costa Rica’s territory**

39. Mr. President, from the beginning of the occupation, Edén Pastora, the “Contra” commander, now in the service of the Sandinista Government and in charge of the dredging work of the San Juan river, held himself out as responsible for a novel “interpretation” given to the Alexander Awards<sup>47</sup>.

40. The astonishing contention is that the occupied Costa Rican territory is Nicaraguan, and that the artificially constructed canal was the channel that Umpire Alexander referred to in his first Award as connecting Harbour Head Lagoon with the San Juan river. This staggering conclusion flies in the face of more than 100 years of Nicaragua’s settled and constant recognition of the true agreed boundary. Of all things, this position was supported by nothing more than an incorrect map sourced on “Google”; all official Nicaraguan maps were seemingly set aside. Indeed, Mr. Pastora affirmed:

“It is enough to revise the Cleveland Award and the border agreements. On 24 July 1900 it was decided as such. The sediments are in Nicaraguan territory and the felling of trees, to discover the channel, is in Nicaraguan territory. Look at the satellite photo from Google and there the border can be seen. In the last 3,000 meters

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<sup>45</sup>Tab 7, Vol. 1, judges’ folders: Report of the OAS Secretary General, Pursuant to Resolution CP/Res. 979 (1780/10), Presented to the Twenty-Sixth Meeting of Consultation of Ministers of Foreign Affairs, 7 Dec. 2010.

<sup>46</sup>Resolution of the OAS Permanent Council, 7 Dec. 2010, available at: <http://scm.oas.org/IDMS/Redirectpage.aspx?class=II.26%20RC.26/RES&classNum=1&lang=e>.

<sup>47</sup>Tab 18, Vol. 1, judges’ folders: English translation of *Confidencial.Com.Ni*, 30 Nov. 2010: “Pastora: I interpreted the Alexander Award”; original available at: <http://www.confidencial.com.ni/articulo/2522/pastora-ldquo-yo-interprete-el-laudo-alexander-rdquo>.

the two banks are Nicaraguan. From there to El Castillo, the border is the right hand bank, it is very clear.”<sup>48</sup>

41. Alerted to the mistake, and despite Nicaragua’s protests, Google acknowledged the error<sup>49</sup> and amended their map on Google Earth.

42. To complete this factual narrative, I would like to show you pictures of the digging of the artificial canal through Costa Rican territory; these can be found at tabs 69 to 72.

43. I note that this area is a wetland which on 20 March 1996 was registered by Costa Rica on the List of Wetlands of International Importance under the Ramsar Convention of 1971. Obviously, Nicaragua did not protest the inclusion of Isla Portillos as part of that Costa Rican wetland at the time of registration. On 15 November 2010, Costa Rica requested that the Ramsar Secretariat send an Advisory Mission to assess the ecological changes in the occupied Costa Rican wetland.

44. The Ramsar Advisory Mission was made up of experts in the fields of limnology, hydrology, hydrogeology, geology, aquatic ecology, water resources and ecosystem management. The Advisory Mission received a substantial body of documentary evidence, including recent satellite and aerial photographs and other related information.

45. The Ramsar Mission’s report, dated 17 December 2010<sup>50</sup>, acknowledges the serious damage thus far inflicted on the protected wetlands.

46. To this day, Nicaragua has continued to increase its military presence in the occupied territory. The pictures now being projected are found at tabs 73 to 76, demonstrate how the military presence in the occupied territory has steadily increased.

47. Nicaragua’s presence in the occupied area coincided with new incidents, such as the illegal intrusion by its naval vessels into Costa Rica’s maritime waters. I would like to underline that the inhabitants of the region are extremely worried and scared, as there have already been

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<sup>48</sup>Tab 19, Vol. 3, judges’ folders: English translation of extract from *La Nación*, 3 Nov. 2010: “The dredge is financed by ALBA in Venezuela”; original available at: <http://www.nacion.com/2010-11-03/EIPais/NotasSecundarias/EIPais2576449.aspx>.

<sup>49</sup>See Tab 20, Vol. 1, judges’ folders: English translation of extract from Google’s statement by Daniel Helft, Google’s Senior Manager for Public Policies, 5 Nov. 2010; original available at: <http://googleamericalatinablog.blogspot.com/2010/11/aclaraciones-sobre-los-alcances-de.html>.

<sup>50</sup>Tab 37, Vol. 1, judges’ folders: Ramsar Report, 17 Dec. 2010.

negative effects on the economy of Barra del Colorado, a community heavily dependent on fishing and tourism, activities now seriously affected by the present situation.

48. Mr. President, distinguished Members of the Court, this concludes my presentation. I thank you for your kind attention.

49. Mr. President, I would be grateful if you could call on Professor Marcelo Kohén.

The PRESIDENT: I thank Mr. Sergio Ugalde for his presentation. Before calling Professor Marcelo Kohén who is the next speaker, I believe this is an appropriate moment for the Court to have a brief recess for a coffee break for ten minutes because we are somewhat delayed, behind the time schedule. I would like to ask you to come back in ten minutes. The session will resume at 11.35 a.m. Thank you.

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

The PRESIDENT: Please be seated. I now give the floor to Professor Marcelo Kohén to make his presentation.

M. KOHEN :

**LES DROITS QUE LE COSTA RICA DEMANDE DE SAUVEGARDER SONT AMPLEMENT PROUVÉS  
ET MÊME RECONNUS PAR LE NICARAGUA**

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un honneur de comparaître devant cette haute juridiction pour défendre une nouvelle fois les droits du Costa Rica. Je le fais avec amertume car notre présence devant vous aujourd'hui est motivée par des comportements graves qui se déroulent en Amérique centrale depuis trois mois.

**Introduction**

2. Il m'appartient de vous exposer sommairement les droits que le Costa Rica vous prie de sauvegarder en attendant une décision sur le fond, conformément à l'article 41 du Statut de la Cour. Selon votre jurisprudence constante, «la Cour doit se préoccuper de sauvegarder par de telles mesures [des mesures conservatoires] les droits que l'arrêt qu'elle aura ultérieurement à rendre pourrait éventuellement reconnaître, soit au demandeur, soit au défendeur» (*Application de la*

*convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie)*, mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993, p. 19, par. 34)<sup>51</sup>. Comme nous le verrons, la spécificité de cette affaire est que, même à ce stade liminaire, il devient absolument patent que les droits fondamentaux du Costa Rica sont bafoués, qu'il n'existe aucun droit pour le Nicaragua d'agir de la sorte et qu'aucun droit nicaraguayen éventuel et connexe à l'affaire n'est susceptible d'être affecté par les mesures conservatoires demandées par le Costa Rica.

3. Il ne sera pas difficile de démontrer que les droits du Costa Rica apparaissent plausibles, comme l'exige désormais clairement votre jurisprudence pour l'indication de mesures conservatoires<sup>52</sup>. En réalité, ces droits sont bien plus que plausibles. Ils sont établis par des instruments conventionnels et juridictionnels déjà connus par la Cour ou reconnus devant vous par les deux Parties dans l'affaire relative aux *Droits de navigation et des droits connexes*. Ils ont également trait à des principes fondamentaux du droit international incorporés dans les Chartes des Nations Unies et de l'Organisation des Etats américains.

4. Monsieur le président, peut-être conviendrait-il de commencer par distinguer notre demande en indication de mesures conservatoires d'autres demandes de ce genre que vous avez connues par le passé. Mon collègue et ami James Crawford reviendra là-dessus ultérieurement. Nous ne sommes pas, contrairement aux affaires *Burkina Faso/Mali* et *Cameroun c. Nigéria*, devant un recours à la force qui intervient dans un contexte d'un différend frontalier porté devant votre Cour. Non, Monsieur le président, ce différend n'en est pas un concernant l'établissement des frontières. Je démontrerai dans quelques instants que le Nicaragua est pleinement conscient de cette situation et qu'il a tout simplement prétendu inventer *ex post facto* un différend frontalier inexistant comme ultime recours justificatif de son occupation et utilisation illicites du territoire costa-ricien.

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<sup>51</sup> *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria)*, mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I), p. 21, par. 35 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, ordonnance du 15 octobre 2008, p. 388, par. 118 ; *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, demande en indication de mesures conservatoires, ordonnance du 28 mai 2009, par. 56.

<sup>52</sup> *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, demande en indication de mesures conservatoires, ordonnance du 28 mai 2009, par. 57. Voir aussi opinions individuelles des juges Abraham et Bennouna, *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006, p. 141, par. 10-11 et p. 143-144, par. 5-6.

5. Ce différend ne ressemble pas non plus à ceux du *Passage par le Grand-Belt (Finlande c. Danemark)* ou des *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, dans lesquels les Etats concernés avaient autorisé ou procédé à la construction des ouvrages sur un territoire qui était le leur. Dans son aspect le plus grave, il s'agit ici de la dévastation d'une forêt costa-ricienne et de la construction d'un canal artificiel par un Etat étranger en territoire costa-ricien, sans le consentement du Costa Rica. En ce qui concerne le dragage que le Nicaragua entreprend sur le fleuve San Juan, il est explicitement régi par des dispositions conventionnelles et juridictionnelles, y compris par ce que votre Cour a établi dans l'arrêt du 13 juillet 2009<sup>53</sup>.

6. La présente demande de mesures conservatoires a des traits communs mais se distingue aussi de celles ordonnées dans l'affaire des *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*. Votre ordonnance du 1<sup>er</sup> juillet 2000 a reconnu que la souveraineté et l'intégrité territoriale de la République démocratique du Congo étaient des droits en cause en vertu de la requête congolaise<sup>54</sup>. L'une des mesures conservatoires indiquées par votre Cour a été que les deux Parties devaient immédiatement prendre toutes mesures nécessaires pour se conformer à la résolution 1304 du Conseil de sécurité<sup>55</sup>, laquelle demandait le retrait complet et immédiat des forces ougandaises de Kisangani<sup>56</sup>. Dans la présente affaire, le Conseil de sécurité n'a pas été saisi, mais le conseil permanent et la réunion de consultation des ministres des affaires étrangères de l'OEA ont adopté des résolutions recommandant le retrait des forces armées et de sécurité de la zone objet du différend<sup>57</sup>.

7. Dans le présent exposé, je vais d'abord montrer que les droits costa-riciens satisfont haut la main le plus sévère test que l'on puisse imaginer quant à leur plausibilité de se voir reconnus lors de l'examen du fond. Deuxièmement, j'exposerai comment la revendication territoriale *ex post facto* de l'Etat occupant, dans le but de créer un «différend frontalier», n'est qu'une invention

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<sup>53</sup> *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt du 13 juillet 2009, par. 155.

<sup>54</sup> *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, mesures conservatoires, ordonnance du 1<sup>er</sup> juillet 2000, C.I.J. Recueil 2000, p. 127, par. 40.

<sup>55</sup> *Ibid.*, p. 129, par. 47.

<sup>56</sup> Résolution 1304 (2000) du Conseil de sécurité des Nations Unies du 16 juin 2000, par. 3, reproduite *in ibid.*, p. 124-126, par. 35.

<sup>57</sup> Résolution 978 (1777/10) du conseil permanent de l'OEA du 12 novembre 2010, requête introductive d'instance introduite par la République du Costa Rica, annexe 7 ; et résolution 1/10 de la réunion de consultation des ministres des affaires étrangères de l'OEA du 7 décembre 2010 (dossiers de plaidoiries, vol. I, onglet n° 6).

nicaraguayenne de dernière minute afin de justifier ses actes illicites et qu'elle ne peut pas empêcher la Cour d'ordonner les mesures conservatoires demandées par le Costa Rica.

**A. Le droit du Costa Rica d'exercer sa souveraineté sur Isla Portillos et de voir son intégrité territoriale respectée, y compris par la non-occupation de celui-ci**

8. Commençons par le droit du Costa Rica d'exercer sa souveraineté sur Isla Portillos et de voir son intégrité territoriale respectée.

**a) La souveraineté du Costa Rica sur Isla Portillos est incontestable : elle est reconnue par une sentence arbitrale ayant force de chose jugée**

9. La question est simple. Il y a une frontière établie par un traité qui a été interprétée par une sentence arbitrale avec force de *res iudicata* entre les parties. En effet, la question de la souveraineté costa-ricienne sur Isla Portillos est réglée depuis plus d'un siècle entre les parties.

10. M. Brenes vous a rappelé l'article II du traité de limites du 15 avril 1858, qui détermine que la frontière commence «à l'extrémité de Punta de Castilla, à l'embouchure du fleuve San Juan de Nicaragua, puis suivra la rive droite dudit fleuve»<sup>58</sup>. La sentence arbitrale du président Cleveland, après avoir confirmé la validité du traité a aussi confirmé la délimitation comme suit :

«La frontière entre la République du Costa Rica et la République du Nicaragua du côté de l'Atlantique commence à l'extrémité de Punta de Castilla à l'embouchure du fleuve San Juan de Nicaragua, en leur état respectif au 15 avril 1858. L'appartenance de toute accréation à Punta Castilla sera régie par le droit applicable en la matière.»<sup>59</sup>

M. Brenes a déjà mentionné la création par la convention Pacheco-Matus de 1896 d'une commission binationale chargée de la démarcation de la frontière<sup>60</sup> et le fait que par la même occasion les parties ont demandé au président des Etats-Unis de nommer un arbitre pour trancher avec force obligatoire tout différend entre les commissaires des deux parties<sup>61</sup>.

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<sup>58</sup> Traité de limites entre le Costa Rica et le Nicaragua conclu le 15 avril 1858. Traduction en français du Greffe dans l'affaire du *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, mémoire du Costa Rica (MCR), vol. 2, annexe 7 b).

<sup>59</sup> Sentence arbitrale du président des Etats-Unis relative à la validité du traité de limites entre le Costa Rica et le Nicaragua du 15 juillet 1858, décision du 22 mars 1888. *Droits de navigation et droits connexes*, MCR, vol. 2, annexe 16. Traduction du Greffe, à l'exception de la dernière phrase, laquelle dans la traduction du Greffe se lit comme suit : «La propriété de tous atterrissements à Punta Castilla sera régie par le droit applicable en la matière».

<sup>60</sup> Convention de délimitation Costa Rica-Nicaragua (Pacheco-Matus), San Salvador, 27 mars 1896, 182 CTS 359, *Droits de navigation et droits connexes*, MCR, vol. 2, annexe 17, requête introductive d'instance du Costa Rica, 18 novembre 2010, annexe 3. Aussi dans Nations Unies, *Recueil des sentences arbitrales*, vol. XXVIII, p. 211-213.

<sup>61</sup> Article III de la convention Pacheco-Matus.

11. La frontière dans la zone envahie par le Nicaragua a été délimitée avec précision par la première sentence arbitrale rendue par l'ingénieur Alexander le 30 septembre 1897. Elle constitue l'interprétation obligatoire pour les parties de l'article II du traité Cañas-Jeréz et de l'article 3, paragraphe 1, de la sentence Cleveland. Vous avez au volume II du dossier de plaidoiries les comptes rendus des travaux de la commission<sup>62</sup>, dans lesquels on trouve le texte manuscrit des sentences Alexander, la liste des coordonnées et un croquis établi par l'arbitre, que vous voyez maintenant à l'écran. Ce croquis *constitue la transcription graphique de la décision de l'arbitre et des coordonnées établies par les commissaires et l'arbitre*. Pas l'ombre d'un doute sur l'interprétation à donner au texte ni sur la souveraineté costa-ricienne du territoire aujourd'hui occupé par le Nicaragua.

12. La sentence Alexander indique qu'une carte est jointe à la décision arbitrale, dans laquelle sont montrées les revendications des parties<sup>63</sup>. Vous la voyez maintenant à l'écran, reproduite une année plus tard avec la sentence arbitrale dans l'ouvrage déjà cité de John Basset Moore<sup>64</sup>. On voit clairement que le Nicaragua revendiquait Isla Portillos, incluant la région aujourd'hui occupée. On voit également que la délimitation opérée par l'arbitre déclare clairement ces territoires comme étant costa-riciens. Cette carte a été reproduite avec le texte de la sentence arbitrale dans le *Recueil des sentences arbitrales* des Nations Unies en 2007<sup>65</sup>. Le Nicaragua, naturellement, n'a soulevé aucune objection à cette reproduction.

13. J'attire votre attention Mesdames et Messieurs les juges sur la valeur juridique des deux cartes que je viens de vous présenter. Si l'on applique votre jurisprudence, ces deux cartes possèdent «une valeur juridique intrinsèque aux fins de l'établissement des droits territoriaux» (*Différend frontalier (Burkina Faso/Mali), arrêt, C.I.J. Recueil 1986, p. 582, par. 54*)<sup>66</sup>. Cette

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<sup>62</sup> Procès-verbaux des travaux de la commission de démarcation (dossier de plaidoiries, vol. II, onglet n° 41, *Acta X*, p. 33 de la version originale).

<sup>63</sup> Nations Unies, *Recueil des sentences arbitrales*, vol. XXVIII, p. 216 (dossier de plaidoiries, vol. II, onglet n° 38).

<sup>64</sup> John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. V, Washington, 1898, Government Printing Office, p. 5074.

<sup>65</sup> Nations Unies, *Recueil des sentences arbitrales*, vol. XXVIII, p. 221 (dossier de plaidoiries, vol. II, onglet n° 38).

<sup>66</sup> Voir aussi : *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999, p. 1098, par. 84* ; affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002, p. 667, par. 88*.



situation se produit selon vous lorsque les cartes «ont été intégrées parmi les éléments qui constituent l'expression de la volonté de l'Etat ou des Etats concernés. Ainsi en va-t-il, par exemple, lorsque des cartes sont annexées à un texte officiel dont elles font partie intégrante.»

(*Ibid.*) Dans le cas d'espèce, ces cartes font partie intégrante des procès-verbaux des travaux communs de démarcation et de la décision d'un arbitre ayant un caractère obligatoire et définitif.

14. D'autres cartes pertinentes de l'époque, que vous avez dans vos dossiers, y compris des relevés topographiques effectués par les marines américaines et britanniques, ainsi que des cartes officielles nicaraguayennes et du bureau international des Républiques américaines, montrent toutes la frontière qui commence à la mer des Caraïbes telle que nous l'avons présentée<sup>67</sup>.

15. Dans son opuscule de propagande intitulé «Le fleuve San Juan de Nicaragua. Les vérités que le Costa Rica cache»<sup>68</sup>, le Nicaragua présente une photographie dans laquelle on décrit prétendument la frontière établie par la première sentence Alexander comme passant par un «canal Harbor Head» qui, de toute évidence, n'existait pas en 1897. C'est le premier dragueur nicaraguayen, Edén Pastora, qui, prétendant interpréter à sa manière la sentence Alexander, est en train de construire un canal artificiel en plein territoire costa-ricien, canal qui n'a auparavant existé que dans sa riche imagination<sup>69</sup>. Le professeur Crawford se référera aux paragraphes pertinents de l'entretien du commandant Pastora dans quelques instants.

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<sup>67</sup> Voir *Plano de la Bahía de San Juan del Norte marcando el punto de partida de la línea divisoria entre Costa Rica, Nicaragua, levantado por las Comisiones respectivas, 30 septiembre 1897* (dossier de plaidoiries, vol. III, onglet n° 106) ; *Greytown Harbor from Survey by Officers of USGB Newport, B.F.Tilley, Com'd'r USN, Commanding, 1898*, reproduit in : Francisco Xavier Aguirre Sacasa, *Un atlas histórico de Nicaragua* (Managua, Nicaragua: Fundación Vida, 2002) (dossier de plaidoiries, vol. III, onglet n° 107) ; *San Juan del Norte or Greytown, Chart, Londres : Admiralty, 1899* (British Library Map Collection, Section 8 (2012)) (dossier de plaidoiries, vol. III, onglet n° 110) ; *Official Map of Nicaragua*, compiled by order of His Excellency the President General Don Jose Santos Zelaya from surveys by Maximiliano Sonnenstern, Government Civil Engineer, assisted by William P. Colins G.C.E. Revised to Date 1898. Published by H. G. Chalkley, Chicago, 1898), reproduit in : Francisco Xavier Aguirre Sacasa, *ibid.*, 2002) (dossier de plaidoiries, vol. III, onglet n° 108) ; *Línea Divisoria Costa Rica y Nicaragua Demarcada según el Tratado Cañas Jeréz de 1858, de acuerdo con el Laudo de Mr. Grover Cleveland de 1888 y el Tratado Pacheco-Matus de 1896*, par Lucas Fernandez, Ing°, 1900. Source : Nicaragua, Ministerio de Relaciones Exteriores, *Situación Jurídica del Río San Juan* (Managua, Nicaragua, Publicaciones del Ministerio de Relaciones Exteriores 1954 and *ibid.*, 1974) ; (dossier de plaidoiries, vol. III, onglet n° 109) ; *Nicaragua*, from Official and other Sources prepared in the International Bureau of the American Republics, William Woodville Rockhill, Director, 1903, reproduit in : Francisco Xavier Aguirre Sacasa, *op. cit.* (dossier de plaidoiries, vol. III, onglet n° 111).

<sup>68</sup> *Río San Juan de Nicaragua. Las verdades que Costa Rica oculta*, novembre 2010, p. 4 et 60, disponible sur le site internet de la présidence de la République du Nicaragua (<http://www.presidencia.gob.ni/documentos/activos/descarga/Verdades%20que%20Costa%20Rica%20oculta.pdf>). Version anglaise disponible sur le site internet de la présidence de la République du Nicaragua ([http://www.el19digital.com/documentos/TruthsCostaRicaHides\\_webVersion.pdf](http://www.el19digital.com/documentos/TruthsCostaRicaHides_webVersion.pdf))

<sup>69</sup> «Pastora : «Yo interpreté el laudo Alexander»» (traduction : «Pastora : «J'ai interprété la sentence arbitrale Alexander»», *Confidencial.Com*, 30 novembre 2010, disponible sur : <http://www.confidencial.com.ni/articulo/2522/pastora-ldquo-yo-interprete-el-laudo-alexander-rdquo> (dossier de plaidoiries, vol. I, onglet n° 18).

**b) *La cartographie officielle des deux pays reconnaît systématiquement la souveraineté costa-ricienne***

16. Les deux Parties — je souligne : les *deux* Parties — ont durant plus d'un siècle reconnu ce tracé de la frontière. Systématiquement, toutes les cartes officielles produites de part et d'autre ont montré la frontière telle qu'établie par l'arbitre Alexander et plaçant ainsi Isla Portillos en territoire costa-ricien. A vrai dire, Monsieur le président, j'ai l'embarras du choix avec la cartographie. Pour ne pas abuser de votre patience, je vais vous montrer uniquement quelques cartes qui sont particulièrement significatives. Pour faciliter la compréhension, je montrerai sur quelques cartes que vous aurez à l'écran l'emplacement du canal artificiel que le Nicaragua construit illicitement en territoire costa-ricien.

17. Voici, Mesdames et Messieurs les juges, une carte officielle nicaraguayenne du département du rio San Juan<sup>70</sup>. Son auteur est le «Gouvernement de la République du Nicaragua. Institut nicaraguayen d'études territoriales.» Elle date d'avril 2003. Vous voyez de manière très claire que la frontière place le territoire occupé par le Nicaragua comme relevant du Costa Rica. Mais ce n'est pas tout. Regardez ici : il ne s'agit pas de ce qu'on appelle en anglais un «disclaimer». C'est tout le contraire : c'est un «claimer», si vous me permettez l'expression. La phrase se lit comme suit : «Los límites fueron revisados por la Dirección General de Ordenamiento Territorial INETER.» Je traduis : «Les limites ont été vérifiées par la direction générale de l'aménagement du territoire INETER (Institut nicaraguayen d'études territoriales).»

18. A en croire la déclaration du directeur de l'INETER présentée par le Nicaragua dans sa documentation soumise à la Cour mercredi dernier, je dirais que le directeur ne connaît pas très bien la cartographie de son institut, puisqu'il affirme que les cartes officielles de la région signalent qu'elles n'ont pas été vérifiées sur le terrain<sup>71</sup>. En voici une qui dit exactement le contraire.

19. Dans l'affaire *Malaisie/Singapour*, votre Cour a conclu que les cartes officielles de la Malaisie montrant Pedra Branca/Pulau Batu Puteh entre 1962 et 1975 «tend[aient] à confirmer que la Malaisie considérait que Pedra Branca/Pulau Batu Puteh relevait de la souveraineté de

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<sup>70</sup> Gobierno de la República de Nicaragua. Instituto Nicaraguense de Estudios Territoriales, Departamento de Río San Juan, avril 2003 (dossier de plaidoiries, vol. III, onglet n° 85).

<sup>71</sup> Declaration of Executive Director of Nicaragua's Institute of Territorial Studies (INETER), Alejandro Rodríguez Alvarado, 1 décembre 2010. Documentation présentée par le Nicaragua à la Cour le 5 janvier 2011, doc. n° 11.

Singapour» (*Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour)*, arrêt, C.I.J. Recueil 2008, p. 95, par 272). Il s'agissait de cartes contenant des «disclaimers» à propos des frontières. Que dire alors de la cartographie officielle nicaraguayenne publiée durant plus d'un siècle ? La réponse saute aux yeux. Il y a une reconnaissance claire, constante, dépourvue d'ambiguïté, irréfragable, que le territoire d'Isla Portillos relève de la souveraineté du Costa Rica.

20. Je vais arrêter mon exercice cartographique bientôt, Monsieur le président, parce que votre Cour connaît très bien cette acceptation constante et uniforme de la frontière par les deux Parties avant l'occupation nicaraguayenne. Dans le *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, les cartes que les deux Parties vous ont présentées concordaient elles aussi. Le croquis n° 5 dans le mémoire du Costa Rica reproduisait le tracé de la frontière à l'endroit de son commencement, tel que l'arbitre l'avait établie en 1897. Dans une note de bas de page de son contre-mémoire, le Nicaragua a indiqué que la frontière décrite dans le croquis n° 5 n'était pas correcte et s'est borné à faire une réserve générale de ses droits, sans aucune indication précise<sup>72</sup>. Vraisemblablement, il ne devait pas s'agir de la souveraineté sur Isla Portillos car les cartes produites par le Nicaragua dans le même contre-mémoire et dans la duplique montrent systématiquement et uniformément le territoire aujourd'hui occupé comme relevant de la souveraineté costa-ricienne. A titre d'exemple, je mentionnerai les cartes suivantes :

- *Nicaragua Sovereignty over the Whole Course of the San Juan de Nicaragua River*<sup>73</sup>;
- *The Sarapiquí Route Envisioned before 1858*<sup>74</sup>;
- *Costa Rican Tourism Route from 1990s to the Present*<sup>75</sup>;
- *The Indio Maíz Biological Reserve (Dark Green) and the San Juan River Wildlife Refuge (Yellow)*<sup>76</sup>;

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<sup>72</sup> Contre-mémoire du Nicaragua (CMN), p. 9, note de bas de page 14.

<sup>73</sup> CMN, p. 265, croquis n° 1.

<sup>74</sup> DN, p. 116, croquis n° 1.

<sup>75</sup> DN, p. 175, croquis n° 3.

<sup>76</sup> DN, p. 181, croquis n° 4.

— *Alleged Locations where Costa Rican Public Vessels Navigated*<sup>77</sup>.

21. Mesdames et Messieurs de la Cour, la preuve de la souveraineté costa-ricienne est donc accablante. Elle a été, entre autres, déjà fournie par le Nicaragua lui-même et devant votre même Cour, il y a à peine deux ans et demi.

**c) *Les droits du Costa Rica d'exercer sa souveraineté, de voir son intégrité territoriale respectée et de ne pas avoir une partie de son territoire occupée par un Etat étranger***

22. Monsieur le président, après cent quatorze années de reconnaissance ininterrompue par les deux Parties de cette frontière, le Nicaragua l'a d'abord violée et l'a ensuite contestée. Cette séquence chronologique d'événements mérite d'être relevée. Le Nicaragua a d'abord occupé le territoire costa-ricien et ce n'est qu'ensuite qu'il a avancé pour la première fois, et encore de manière elliptique, une revendication de souveraineté sur ce territoire, le 26 octobre 2010, en réponse à une note de protestation costa-ricienne<sup>78</sup>. C'est une revendication appuyée sur le recours et la menace du recours à la force, en violation de l'article 2, paragraphe 4, de la Charte des Nations Unies et de l'article 22 de la Charte de l'OEA.

23. Il est un fait incontestable que le Nicaragua a déployé ses forces armées sur le territoire en question. Mes collègues vous ont déjà montré le déploiement des troupes nicaraguayennes. Dans son opuscule de propagande précité<sup>79</sup>, le Gouvernement nicaraguayen affirme que — je cite en traduction — «L'armée du Nicaragua a effectué ses activités militaires dans la zone de Harbor Head et le canal du même nom, territoire souverain et indiscutable du Nicaragua.»<sup>80</sup> Vous voyez à l'écran la carte nicaraguayenne qui illustre ces propos dans l'opuscule mentionné<sup>81</sup> : la région occupée d'Isla Portillos est présentée comme «zone revendiquée par le Costa Rica 3 km<sup>2</sup>» et l'on y voit un «poste de contrôle frontalier de l'armée du Nicaragua» qui n'a jamais existé avant l'occupation. Vous le savez, Mesdames et Messieurs de la Cour, puisque dans votre arrêt du

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<sup>77</sup> DN, p. 256, croquis n° 8.

<sup>78</sup> Note du ministre des affaires étrangères par intérim du Nicaragua au ministre des affaires étrangères du Costa Rica du 26 octobre 2010, en réponse à la note du ministre costa-ricien au ministre nicaraguayen du 21 octobre 2010 (dossier de plaidoiries, vol. I, onglets n<sup>os</sup> 27 et 26).

<sup>79</sup> Traduction anglaise : «The San Juan de Nicaragua River. The Truths that Costa Rica Hides.»

<sup>80</sup> *Rio San Juan de Nicaragua. Las verdades que Costa Rica occulta*, novembre 2010, p. 15, disponible sur le site internet de la présidence de la République du Nicaragua (<http://www.presidencia.gob.ni/documentos/activos/descarga/Verdades%20que%20Costa%20Rica%20oculta.pdf>).

<sup>81</sup> *Ibid.*

13 juillet 2009 vous avez inclus un croquis montrant les postes frontière existants<sup>82</sup>. Il y en a certainement un à la localité nicaraguayenne de San Juan del Norte, pas à Isla Portillos.

24. C'est donc dans cette brochure de propagande que le Nicaragua a produit pour la première fois une carte montrant une partie d'Isla Portillos comme relevant de sa souveraineté. Mais ce n'est pas tout. Même si cette carte était correcte — *quod non* —, le canal construit par le Nicaragua se trouverait toujours en territoire costa-ricien ! Il s'agit d'une preuve supplémentaire des activités nicaraguayennes en territoire costa-ricien, tout comme de l'incohérence de la revendication nicaraguayenne.

25. Messieurs et Mesdames les juges, je laisse à votre réflexion l'affirmation selon laquelle l'armée nicaraguayenne a effectué ses activités «en territoire souverain et indiscutable du Nicaragua». Evidemment, Edén Pastora, le commandant «Zéro» bien connu de la Cour<sup>83</sup>, et les officiers de l'armée nicaraguayenne ne se sont pas servis de la carte officielle nicaraguayenne de 1905 — quelques années après la sentence arbitrale Alexander donc — dont le titre est précisément «Carte pour être utilisée par les officiers de l'armée du Nicaragua»<sup>84</sup> et qui place Isla Portillos bien évidemment en territoire costa-ricien !

26. Revenons donc à l'occupation militaire. Il est incontestable que le Nicaragua se trouve aujourd'hui, grâce au concours de son armée, en possession d'un territoire sur lequel il n'exerçait pas auparavant sa juridiction ou contrôle. Que ses troupes n'aient pas rencontré de résistance militaire n'est pas un obstacle pour qualifier cette situation d'occupation, comme l'établit l'article 2 de la quatrième convention de Genève de 1949<sup>85</sup>. Je rappellerai par ailleurs que le Costa Rica n'a pas de forces armées.

27. La déclaration de principes de droit international contenue dans la résolution 2625 (XXV) résume clairement l'état du droit en la matière : «Le territoire d'un Etat ne peut faire l'objet d'une occupation militaire résultant de l'emploi de la force contrairement aux

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<sup>82</sup> Voir croquis n° 2 dans l'arrêt en l'affaire du *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)* et croquis n° 5 du mémoire du Costa Rica.

<sup>83</sup> *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, fond, arrêt, C.I.J. Recueil 1986, p. 54, par. 94.

<sup>84</sup> Mapa para uso de los Oficiales del Ejército de Nicaragua, 1905. Reproduit in : Francisco Xavier Aguirre Sacasa, *Un atlas histórico de Nicaragua* (Managua, Nicaragua, 2002) (dossier de plaidoiries, vol. III, onglet n° 100).

<sup>85</sup> *Convention de Genève relative à la protection des personnes civiles en temps de guerre* (convention de Genève IV), 12 août 1949, entrée en vigueur le 21 octobre 1950, 75 RTNU 287.

dispositions de la Charte.»<sup>86</sup> La Charte de l'OEA, quant à elle, reconnaît aux Etats membres un droit plus spécifique encore. Son article 21 se lit comme suit : «Le territoire d'un Etat est inviolable, il ne peut être l'objet d'occupation militaire ni d'autres mesures de force de la part d'un autre Etat, directement ou indirectement, pour quelque motif que ce soit et *même de manière temporaire.*»<sup>87</sup> Ainsi, le Costa Rica a droit à ce que son territoire ne soit pas occupé, même temporairement. Un droit qui deviendrait illusoire s'il fallait attendre la fin de la procédure pour voir la fin de l'occupation nicaraguayenne.

28. Le Costa Rica a droit aussi à ce que l'on respecte son intégrité territoriale. Comme votre devancière l'a relevé, «la limitation primordiale qu'impose le droit international à l'Etat est celle d'exclure — sauf l'existence d'une règle permissive contraire — tout exercice de sa puissance sur le territoire d'un autre Etat» (*Lotus, arrêt n° 9, 1927, C.P.J.I. série A n° 10, p. 18*). Au moment où je vous parle, le Nicaragua continue d'ignorer cette «limitation primordiale» et oublie, comme vous l'avez souligné il y a plus de soixante ans qu'«[e]ntre Etats indépendants, le respect de la souveraineté territoriale est l'une des bases essentielles des rapports internationaux» (*Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949, p. 35*)<sup>88</sup>.

29. Le Nicaragua certainement n'ignore pas ces principes de base qui régissent les relations internationales puisqu'il vous a demandé, et votre Cour a indiqué en 1984, la mesure conservatoire suivante :

«Que le droit à la souveraineté et à l'indépendance politique que possède la République du Nicaragua, comme tout autre Etat de la région et du monde, soit pleinement respecté et ne soit compromis d'aucune manière par des activités militaires et paramilitaires qui sont interdites par les principes du droit international, notamment par le principe que les Etats s'abstiennent, dans leurs relations internationales, de recourir à la menace ou à l'emploi de la force contre l'intégrité territoriale ou l'indépendance politique de tout Etat, et par le principe relatif au droit de ne pas intervenir dans les affaires relevant de la compétence nationale d'un Etat, consacrés par la Charte des Nations Unies et la Charte de l'Organisation des Etats américains.» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 10 mai 1984, C.I.J. Recueil 1984, p. 187, par. 41 B) 2*.)

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<sup>86</sup> Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les Etats conformément à la Charte des Nations Unies, en annexe de la résolution 2625 (XXV) de l'Assemblée générale des Nations Unies, *Documents officiels de l'Assemblée générale, vingt-cinquième session, supplément n° 18*, Nations Unies, doc. A/8010, p. 133.

<sup>87</sup> Les italiques sont de nous.

<sup>88</sup> Voir aussi *Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo*, avis consultatif du 22 juillet 2010, par. 80.

A l'époque, le Nicaragua invoquait que les Etats-Unis d'Amérique ne respectaient pas sa souveraineté et son intégrité territoriale par l'intermédiaire d'une armée de mercenaires<sup>89</sup>. Dans la situation actuelle, le Nicaragua a stationné *sa propre armée* en territoire costa-ricien et y a entrepris ses actions de dévastation forestière et de tentative de déviation du fleuve San Juan. Le Costa Rica a lui aussi droit à ce que sa souveraineté et son intégrité territoriale soient respectées.

30. Mesdames et Messieurs les juges, j'attire votre attention sur un autre fait important : l'Etat qui exerçait juridiction sur Isla Portillos avant l'invasion était incontestablement le Costa Rica. Une manifestation claire et dépourvue d'ambiguïté de cette juridiction est l'octroi par les autorités costa-riciennes de permis de possession de la région concernée inscrits au cadastre costa-ricien. Vous voyez à l'écran l'un de ces permis, et vous en avez dans vos dossiers d'autres qui correspondent à d'autres zones de la région occupée aujourd'hui par le Nicaragua<sup>90</sup>.

31. Le résultat de cette occupation, en dehors de la dévastation importante produite par le Nicaragua sur le territoire costa-ricien, est que le Costa Rica se voit privé d'exercer ses prérogatives de puissance publique sur ce territoire.

32. Le Costa Rica prie la Cour de préserver son droit de voir son territoire libre d'occupation étrangère, de voir son intégrité territoriale respectée et de pouvoir exercer la juridiction et le contrôle sur son territoire aujourd'hui occupé par le Nicaragua.

**d) *La revendication de souveraineté nicaraguayenne n'empêche pas d'ordonner des mesures conservatoires***

33. Monsieur le président, fort probablement, les représentants de l'Etat occupant nous diront cet après-midi que le Nicaragua n'a pas agi en territoire costa-ricien, que ce territoire est nicaraguayen. Ce ne sera pas hélas la première fois dans l'histoire qu'un Etat invente de toutes pièces un prétendu différend pour justifier une intervention militaire ou l'occupation d'un territoire étranger. Chacune et chacun trouvera dans sa mémoire de tristes exemples pour illustrer mes propos.

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<sup>89</sup> *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 10 mai 1984, C.I.J. Recueil 1984, p. 180, par. 28.*

<sup>90</sup> *Permiso de uso a : José Alberto Alvarez Nuñez, T°14317, F°174, annexe 10 de la documentation présentée le 5 janvier 2011 (dossier de plaidoiries, vol. III, onglet n° 102). Voir aussi les autres permis d'utilisation dans le volume I, onglets n°s 11 à 15 du dossier de plaidoiries.*

34. Nous croyons avoir apporté sommairement la preuve de la souveraineté costa-ricienne. Mais même si, par impossible, il existait l'ombre d'un doute, cela n'empêcherait pas la Cour d'ordonner des mesures conservatoires. Comme je l'ai déjà indiqué, l'Etat qui exerçait la juridiction sur le territoire aujourd'hui occupé était le Costa Rica. La frontière internationalement reconnue était celle que les deux Etats vous ont montrée dans l'affaire précédente. Ces données sont fondamentales. Certains pourront évoquer que, même si la revendication nicaraguayenne est totalement infondée, elle constitue néanmoins une revendication et qu'en tant que telle, elle doit être tranchée par la Cour au stade du fond. Or, les mesures conservatoires ne préjugeront en rien des droits — vrais ou totalement infondés — soulevés par l'une ou l'autre des Parties. Les mesures demandées relatives aux droits du Costa Rica de voir sa souveraineté et son intégrité territoriale préservées visent à rétablir le *statu quo ante*. Si le Nicaragua souhaite formuler une revendication territoriale, fût-elle absurde, visant à modifier la situation factuelle existante, personne ne peut l'en empêcher. Ce que le Nicaragua ne peut pas faire, c'est de modifier unilatéralement la situation existante par la menace ou le recours à la force et de vouloir imposer dans les faits sa nouvelle revendication territoriale, fût-ce de manière transitoire.

35. Monsieur le président, le Costa Rica souhaite préserver son droit à l'exercice de sa juridiction sur le territoire occupé en attendant la fin de la procédure. Votre Cour devrait-elle s'abstenir d'ordonner le retrait du Nicaragua à ses positions antérieures à l'occupation du fait de sa revendication extemporanée de souveraineté ? La réponse est certainement négative. Ce serait la fin de l'interdiction du recours à la force, du principe de l'intégrité territoriale et du droit applicable à l'occupation militaire si, par le fait que l'occupant prétend que le territoire qu'il contrôle relève de sa souveraineté, toutes ces règles devenaient inapplicables si on ne détermine pas préalablement qui en est le souverain. Comme le disait Oscar Schachter : «the expression «territorial integrity» in Article 2 (4) refers to the State which actually exercises authority over the territory, irrespective of disputes as to the legality of that authority»<sup>91</sup>.

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<sup>91</sup> Oscar Schachter, «International Law in Theory and Practice. General Course in Public International Law», *RCADI*, 1982-V, t. 178, p. 143 (Ma traduction : «l'expression «intégrité territoriale» à l'article 2, paragraphe 4, fait référence à l'Etat qui exerce effectivement son autorité sur le territoire, sans tenir compte des différends qui pourraient exister au regard de la légalité d'un tel exercice»).



36. Isla Portillos se trouvait au moment de l'occupation nicaraguayenne sous la juridiction du Costa Rica. Le Nicaragua avait l'obligation de respecter cette situation. S'il voulait soulever une revendication territoriale, il avait les moyens pacifiques de règlement des différends à sa disposition, par ailleurs fort nombreux entre les deux Etats.

### **B. Le droit du Costa Rica au respect et à la préservation de ses ressources naturelles et à son environnement**

37. Dans sa demande de mesures conservatoires, le Costa Rica souhaite protéger aussi ses droits au respect et à la préservation de ses ressources naturelles et de son environnement. Les sources et le contenu de ses droits sont tant bilatéraux que multilatéraux. Je vais distinguer le droit au respect et à la préservation de ses zones humides — le territoire occupé par le Nicaragua en est un — et le droit à ce que les activités de dragage sur le fleuve San Juan ne causent pas des dommages au territoire costa-ricien ni n'affectent la navigation de ses affluents ni l'exercice de son droit de navigation sur le fleuve San Juan.

#### **a) *Le droit du Costa Rica de préserver le site Ramsar occupé par le Nicaragua***

38. Le territoire costa-ricien occupé a été désigné comme «zone humide d'importance internationale» depuis le 20 mars 1996 et il est à ce titre soumis au régime établi par la convention Ramsar de 1971<sup>92</sup>. Le Costa Rica et le Nicaragua en sont parties respectivement depuis le 27 avril 1992 et le 30 novembre 1997. Le site Ramsar concerné est le «Humedal Caribe Noreste»<sup>93</sup>. Comme vous pouvez l'apprécier à l'écran, le territoire occupé par le Nicaragua se trouve clairement sur ce site, sans que le Nicaragua ait formulé aucune réserve. Je signale en passant que le Nicaragua n'y a pas inclus Isla Portillos lorsqu'il a inscrit son site Ramsar intitulé «Refugio de Vida Silvestre Río San Juan» qui se trouve immédiatement de l'autre côté du San Juan<sup>94</sup>.

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<sup>92</sup> Convention relative aux zones humides d'importance internationale particulièrement comme habitats de la sauvagine (convention Ramsar), 2 février 1971, entrée en vigueur le 21 décembre 1975, 996 *RTNU* 245.

<sup>93</sup> Liste des zones humides d'importance internationale costa-ricienne disponible à partir du site internet du Ramsar ([http://www.ramsar.org/cda/en/ramsar-pubs-annolist-annotated-ramsar-16460/main/ramsar/1-30-168%5E16460\\_4000\\_0\\_](http://www.ramsar.org/cda/en/ramsar-pubs-annolist-annotated-ramsar-16460/main/ramsar/1-30-168%5E16460_4000_0_)).

<sup>94</sup> Liste des zones humides d'importance internationale nicaraguayenne disponible à partir du site internet du Ramsar ([http://www.ramsar.org/cda/fr/ramsar-pubs-annolist-annotated-ramsar-16106/main/ramsar/1-30-168%5E16106\\_4000\\_1\\_](http://www.ramsar.org/cda/fr/ramsar-pubs-annolist-annotated-ramsar-16106/main/ramsar/1-30-168%5E16106_4000_1_)).

39. Le Costa Rica a le droit de préserver son site Ramsar, en exerçant ses droits et en accomplissant ses obligations découlant de la convention de 1971. En particulier, il s'agit de la conservation de la zone humide incluse dans la liste Ramsar et de son utilisation rationnelle<sup>95</sup>.

40. Conformément à l'article 3, paragraphe 2, de la convention, le Costa Rica a immédiatement notifié les altérations de la zone humide provoquées par le Nicaragua. La mission Ramsar n° 69 envoyée en conséquence par le secrétariat a produit un rapport avec des recommandations que le Costa Rica a le droit de mettre en œuvre<sup>96</sup>.

41. Le Costa Rica a également le droit de voir le Nicaragua respecter son obligation découlant de l'article 5 de la convention, à savoir d'être consulté sur l'exécution des obligations découlant de la convention, particulièrement dans le cas d'une zone humide s'étendant sur les territoires de plus d'une partie contractante ou lorsqu'un bassin hydrographique est partagé entre plusieurs parties contractantes, comme c'est le cas dans la région frontalière en question. A ce jour, le Nicaragua a obstinément refusé de s'acquiescer de cette obligation et poursuit son œuvre de canalisation et d'abatage de la forêt en territoire costa-ricien.

42. Mesdames et Messieurs les juges, en tant qu'Etat partie à la convention Ramsar, le Nicaragua a reconnu que «les zones humides constituent une ressource de grande valeur économique, culturelle, scientifique et récréative, dont la disparition serait irréparable»<sup>97</sup>. Son mépris pour cette zone et pour les droits et obligations découlant de la convention Ramsar à Isla Portillos ne peut et ne doit pas continuer.

**b) *Le droit du Costa Rica à ce que toute activité de dragage du San Juan n'affecte pas son territoire, y compris ses voies navigables, ni n'empêche son droit de navigation sur le San Juan***

43. Je passe maintenant, Monsieur le président, au droit du Costa Rica à ce que toute activité de dragage du San Juan n'affecte pas son territoire, y compris ses voies navigables, ni n'empêche son droit de navigation sur le fleuve San Juan.

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<sup>95</sup> Convention Ramsar, art. 4, par. 1.

<sup>96</sup> Rapport de la mission Ramsar n° 69, 17 décembre 2010 (dossiers de plaidoiries, vol. I, onglet n° 37).

<sup>97</sup> Convention Ramsar, préambule.

44. En sus de l'utilisation du territoire costa-ricien aux fins de la déviation artificielle du cours du San Juan, le Nicaragua s'est engagé dans une activité de dragage du fleuve qui entraîne l'inondation du territoire costa-ricien et qui pourrait altérer le flux du fleuve Colorado.

45. Le comportement du Nicaragua — qui se poursuit au moment où je vous parle — est en contradiction avec la sentence arbitrale du président Cleveland. Son article 6, énonce en particulier que

«La République du Costa Rica ne peut empêcher la République du Nicaragua d'exécuter à ses propres frais et sur son propre territoire de tels travaux d'amélioration, à condition que le territoire du Costa Rica ne soit pas occupé, inondé ou endommagé en conséquence de ces travaux et que ceux-ci n'arrêtent pas ou ne perturbent pas gravement la navigation sur ledit fleuve ou sur l'un quelconque de ses affluents en aucun endroit où le Costa Rica a le droit de naviguer.»<sup>98</sup> [Traduction du Greffe.]

46. Permettez-moi de répéter une fois encore, Monsieur le président, que le Costa Rica respecte le droit du Nicaragua de draguer le fleuve, dans la mesure où il respecte les conditions définies par la sentence Cleveland. Le Nicaragua peut entreprendre ces travaux uniquement sur son propre territoire et sans affecter les droits costa-riens. A cet effet, le Costa Rica a le droit de demander que des études d'impact lui soient transmises, ce que le Nicaragua n'a pas fait avant l'occupation.

47. L'article 9 de la sentence Cleveland dispose pour sa part que

«La République du Costa Rica peut refuser à la République du Nicaragua le droit de dévier les eaux du fleuve San Juan lorsque cette déviation arrêterait ou perturberait gravement la navigation sur ledit fleuve ou sur l'un quelconque de ses affluents en tout endroit où le Costa Rica a le droit de naviguer.»<sup>99</sup> [Traduction du Greffe.]

48. Il est entendu que cette possibilité de refus de la part du Costa Rica s'entend des déviations du fleuve que le Nicaragua ferait sur son propre territoire. Que dire alors lorsque la déviation se produit par un canal que le Nicaragua construit en territoire costa-ricien !

49. Le professeur James Crawford vous exposera le préjudice irréparable aux droits du Costa Rica que le comportement nicaraguayen produit et risque de continuer à produire dans ce domaine.

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<sup>98</sup> Sentence Cleveland, art. 6 ; les italiques sont dans l'original. *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, MCR, vol. 2, annexe 16.

<sup>99</sup> Sentence Cleveland, art. 9 ; les italiques sont dans l'original. *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, MCR, vol. 2, annexe 16.

### Conclusions

50. Mesdames et Messieurs les juges, j'arrive à mes conclusions. Nous croyons avoir amplement démontré le caractère plus que plausible des droits costa-riens en jeu, tout comme le caractère «absolument non plausible» de la revendication nicaraguayenne *ex post facto* d'une partie d'Isla Portillos.

51. Quelles sont pour autant les conséquences de cette démonstration pour l'ordonnance de mesures conservatoires ? Qu'ici il y a sans l'ombre d'un doute des droits costa-riens de premier ordre à protéger et que la Cour, en ordonnant des mesures conservatoires pour leur préservation, ne met en péril aucun droit du Nicaragua. Oui, Monsieur le président, si l'exigence du *fumus boni iuris* doit être appliquée à la Partie qui demande des mesures conservatoires, elle joue aussi par rapport aux prétendus droits de l'autre Partie qui pourraient être affectés si l'on adopte des mesures conservatoires. Le Nicaragua ne peut invoquer aucun droit pour occuper, modifier, endommager et utiliser le territoire soumis avant l'occupation à la juridiction incontestée du Costa Rica.

52. Mesdames et Messieurs les juges, ce n'est pas au Costa Rica d'attendre la fin de cette procédure. C'est au Nicaragua, Etat qui veut modifier la situation existante et qui n'a pas hésité à utiliser son armée pour le faire, avant même de rendre publique pour la première fois sa prétendue revendication territoriale. En ordonnant le rétablissement du *statu quo ante*, vous préserverez non seulement les droits costa-riens objet de ce différend, mais aussi le maintien de la paix et de la sécurité internationales.

53. Je vous remercie de votre attention et vous prie, Monsieur le président, de donner la parole au professeur James Crawford.

The PRESIDENT: I thank Professor Marcelo Kohen for his presentation. Now I give the floor to Professor James Crawford.

Mr. CRAWFORD:

#### THE PRECONDITIONS FOR PROVISIONAL MEASURES ARE MET

1. Mr. President, Members of the Court, it is an honour to represent Costa Rica again. Costa Rica's request today is prompted by Nicaragua's incursion, continuing occupation and construction of a canal through what has hitherto been unquestioned Costa Rican territory,

involving dredging and other activities affecting that territory and the environment. Of course, Mr. President, we take your point. We are not here today to establish Nicaragua's responsibility for these breaches of the established boundary régime between the two States. Costa Rica merely seeks today appropriate orders to preserve its rights pending the Court's final judgment.

2. The question presented in this phase of the case is simple. Can State A resist provisional measures, after taking unilateral action on territory occupied under claim of right by State B for many years — territory never previously claimed by State A — on the ground that State B, if it is correct in its claim to title, will eventually get its territory back plus damages? I repeat: can State A resist provisional measures, after taking unilateral action on territory occupied under claim of right for many years by State B — territory never previously claimed by State A — on the ground that State B, if it is correct in its claim to title, will eventually get its territory back plus damages? The answer to that question is: obviously not. Any other answer would ratify the politics of the *fait accompli* and would be inconsistent with international law's strong preference for the peaceful settlement of disputes over unilateral action. And the position is *a fortiori* when State A is engaged in chopping down trees, depositing sediment, and digging a canal in a continuing experiment on nature, all at the expense of State B.

#### **A. The criteria for provisional measures**

3. Mr. President, Members of the Court, the criteria for the indication of provisional measures are firmly settled in your case law.

4. There are four conditions for the exercise of this power:

1. first, that your jurisdiction over the dispute is established *prima facie* (*Anglo-Iranian Oil Co Case, Order 5 July 1951, I.C.J. Reports 1951, pp. 89, 93; Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 137, para. 14*);
2. second, that the measures sought are necessary “in order to ensure that irreparable prejudice shall not be caused to rights which are the subject of dispute in [the] judicial proceedings” (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Request for the Indication of Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 388, para. 118*);

3. third, that the rights requiring protection are asserted “at least plausibly”<sup>100</sup>;
4. and fourth, that “there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision” (*Georgia v. Russian Federation* case, p. 392, para. 129)<sup>101</sup>.

My colleague, Professor Kohen, has dealt with the third of these conditions; I will deal with the first, second and fourth.

**(a) First condition: prima facie jurisdiction of the Court**

5. Turning to prima facie jurisdiction.<sup>102</sup>, this involves a relatively low threshold. As you put it in the *Nuclear Tests* cases, in terms repeated on later occasions, the question is whether “the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded” (*Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 138, para. 18 ; emphasis added)<sup>103</sup>.

6. In the present case it is clear, and indeed it seems to be uncontested, that the Court has more than prima facie jurisdiction over the merits of the dispute. Certainly, that is the case under the Pact of Bogotá. It is true that Nicaragua has made a reservation to the effect that its ratification “cannot be alleged as an acceptance of any arbitral decisions that Nicaragua has contested and the validity of which is not certain”. But three points can be made as to this reservation. First, Nicaragua has never contested the *validity* of the Alexander Awards; indeed, until recently it had never contested their interpretation. As you know, Nicaragua has a long and distinguished record of unilaterally declaring the invalidity of treaties and arbitral awards, but this has not been the case with the Alexander Awards. Secondly, there is a very good reason why it has never challenged

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<sup>100</sup>“Whereas the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible.”; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), request for the indication of provisional measures, Order of 28 May 2009*, para. 57.

<sup>101</sup>See also *Aegean Sea Continental Shelf (Greece v. Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 11, para. 33.

<sup>102</sup>See, e.g., *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 33, para. 16; *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996 (I), I.C.J. Reports 1996*, p. 21, para. 33. See on *forum prorogatum* in general *Case Concerning the Frontier Dispute (Burkina Faso/Mali), Order of 10 January 1986, I.C.J. Reports 1986*, p. 3.

<sup>103</sup>See most recently to this effect *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 377, para. 85.

these, because the validity of those Awards is patent, clear, certain, and they have been expressly accepted by Nicaragua at the time and since. And thirdly, even if Nicaragua had contested them, and had had grounds to contest the validity of the Alexander Awards, its reservation to the Pact of Bogotá does not qualify compulsory jurisdiction under the Pact. It is a saving clause: ratification of the Pact of Bogotá does not,

“prejudice any position assumed by the Government of Nicaragua with respect to arbitral decisions the validity of which it has contested on the basis of the principles of international law . . . . Consequently, the signature of the Nicaraguan Delegation to the Treaty in question [that is, to the Pact of Bogotá] cannot be alleged as an acceptance of any arbitral decisions that Nicaragua has contested and the validity of which is not certain.”

As it stands, the reservation merely preserves Nicaragua’s position on substantive matters. It does not go to jurisdiction: it is simply that Nicaragua reserves the right to continue to contest certain arbitral decisions on the merits. But Costa Rica does not rely on the Pact of Bogotá as the reason for claiming the existing boundary. We make no allegation that Nicaragua’s acceptance of the Pact of Bogotá has any implications for the Alexander Awards.

7. Prima facie jurisdiction having been established under the Pact of Bogotá, there is strictly speaking no need to consider jurisdiction under the Optional Clause. Here the issue is the reservation made by Nicaragua, to the effect that it will: “not accept the jurisdiction or competence of the Court in relation to any matter or claim based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1901”. I do not know what position Nicaragua takes as to the application of the reservation in the present case. All I need say is that Costa Rica’s claim is based *inter alia* on the United Nations and OAS Charters, protecting its territorial integrity and preventing even temporary occupation.

8. But in fact Nicaragua has already officially expressed its acceptance of the jurisdiction of the Court in its Diplomatic Note of 30 November 2010, it is at tab 32 in your first binder, but we promised we would not take you to the first binder. You simply have it, but the text appears on screen. There Nicaragua’s acting Foreign Minister stated:

“Nicaragua considers that the matters stated by the Government of Costa Rica . . . are sub judice before the International Court of Justice, reason for which it does not consider it proper to make comments about them outside from the mentioned forum . . . . Nicaragua reserves its rights to respond to the topics expressed in the

mentioned letter at [its] due moment before the International Court of Justice, the Judicial Organ of the United Nations competent to discern over those matters.”<sup>104</sup>

The language is unequivocal: this Court is “the Judicial Organ of the United Nations competent to discern over those matters” — that is to say, matters of substance.

**(b) *Second condition: the measures sought are necessary in order to ensure that irreparable prejudice shall not be caused to the rights which are the subject of the dispute***

9. I turn to the second condition, which is that irreparable prejudice not be caused to the rights forming the subject of the pending proceedings. As you stated in the most recent Order granting provisional measures: “the preservation of the respective rights of the parties pending the decision of the Court, in order to ensure that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings . . .” (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 118). That is the criteria.

10. In the same Order you referred to the need for a “link . . . between the alleged rights, the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case” *Ibid.*, p. 389, para. 118). In your practice, you refer to the Application in order to establish such a link. Thus, for example, in *Congo v. Uganda*, you noted that,

“the rights which, *according to the Congo’s Application*, are the subject of the dispute are essentially its rights to sovereignty and territorial integrity and to the integrity of its assets and natural resources . . . and . . . it is upon the rights thus claimed that the Court must focus its attention in its consideration of this request for the indication of provisional measures” (*Armed Activities on the Territory of the Congo v. Uganda (Democratic Republic of the Congo v. Uganda), Order of 1 July 2000, I.C.J. Reports 2000*, p. 127, para. 40; emphasis added).

11. In *Congo/Uganda* you prescribed provisional measures, unanimously, ordering the parties to prevent and refrain from any action which might aggravate or extend their dispute and to take all measures necessary to comply with all of their obligations under international law, in particular under the Charter (*Armed Activities on the Territory of the Congo v. Uganda*

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<sup>104</sup>Note from acting Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs and Worship of Costa Rica, original and English translation, 30 Nov. 2010.



(*Democratic Republic of the Congo v. Uganda*), *Order of 1 July 2000*, *I.C.J. Reports 2000*, p. 127, para. 40; emphasis added).

12. In the present case, the rights under threat of irreparable harm are set out in Part D of the Request for the Indication of Provisional Measures. They were elaborated by Professor Kohen. Specifically, Costa Rica has the following rights, among others:

1. the right to sovereignty and territorial integrity;
2. the right not to have its territory occupied;
3. the right not to have its trees chopped down by a foreign force;
4. the right not to have its territory used for depositing dredging sediment or as the site for the unauthorized digging of a canal; and
5. the several rights corresponding to Nicaragua's obligation not to dredge the San Juan if this affects or damages Costa Rica's land, environment or the integrity and flow of the Colorado river.

I could go on, but that is a sufficient basis for present purposes.

13. In its Application, Costa Rica seeks both the cessation of these activities and reparation for the damage they have caused. In the meantime, Costa Rica requests that the *status quo ante* be restored pending the Court's judgment. As you said in the *Hostages* case:

“a request for provisional measures must by its very nature relate to the substance of the case since . . . their object is to preserve the respective rights of either party; and . . . in the present case the purpose of the United States request appears to be not to obtain a judgment, interim or final, on the merits of its claims but to preserve the substance of the rights which it claims *pendente lite*” (*Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *Request for the Indication of Provisional Measures, Order of 15 December 1979*, p. 16, para. 28).

14. It is entirely appropriate for Costa Rica to seek to preserve the *status quo ante* or, in this particular case, as in the *Hostages* case, to “temporarily undo a violent [and] sudden alteration of the *status quo*”<sup>105</sup>. As noted by Professor Collins in his Hague lectures, there is “nothing exceptional or contrary to principle” in doing so<sup>106</sup>. So those are the rights asserted.

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<sup>105</sup>L. Collins, “Provisional and Protective Measures in International Litigation” 234 *Recueil des Cours*, 1992-III, 232.

<sup>106</sup>*Ibid.*

15. The scope is to be finally determined on the merits, but they are asserted and asserted plausibly. They are under threat of irreparable prejudice from Nicaragua's conduct<sup>107</sup>.

16. The first point to make in this regard, as to prejudice, is that you are faced with a situation where the prospects of the occurrence are certain, because the events have already taken place and are continuing. This brings to mind again the situation before the Court in the *Hostages* case<sup>108</sup> — or that before the Permanent Court in *Denunciation of the Treaty of 2 November 1865 between China and Belgium*<sup>109</sup>. In each of those cases, provisional measures were ordered in favour of the applicant party on the basis of events that had already taken place. Here, too, the question of prejudice is not contingent or speculative: Nicaragua proclaims, however implausibly, the right to do what it is doing, and it refuses to desist.

17. At this stage it is necessary to take the Court briefly through the conduct of Nicaragua that is causing irreparable prejudice to the rights of Costa Rica. Though the facts and the graphics largely speak for themselves.

18. As you have seen, Isla Portillos is a small area of approximately 16.8 sq km, located between the San Juan river and the Laguna Los Portillos. It is here that a contingent of Nicaraguan soldiers has encamped, occupying an area of about 3 sq km, and embarked on a campaign of dumping, digging and destruction.

19. This particular part of Isla Portillos is made up of primary rainforests and fragile wetlands, and since 1996 has been listed on the Ramsar Convention's List of Wetlands of International Importance<sup>110</sup>. The area provides habitat for many endangered species. It is home to the only local population of manatees — a species under threat of extinction<sup>111</sup>. In addition, the

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<sup>107</sup>*Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 103; Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 139; Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Request for the Indication of Provisional Measures, Order of 15 December 1979, para. 36; Application of the Convention on the Prevention and Punishment of the Crime of Genocide, para. 34; LaGrand; Case concerning Armed Activities on the Territory of the Congo, para. 39; Avena, paras. 49, 55.*

<sup>108</sup>*Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Request for the Indication of Provisional Measures, Order of 15 December 1979.*

<sup>109</sup>*Denunciation of the Treaty of 2 November 1865 between China and Belgium, Order of 8 January 1927, P.C.I.J., Series A, No. 8, p. 7.*

<sup>110</sup>The Ramsar List of Wetlands of International Importance, available at: [http://www.ramsar.org/cda/en/ramsar-documents-list/main/ramsar/1-31-218\\_4000\\_0\\_\\_](http://www.ramsar.org/cda/en/ramsar-documents-list/main/ramsar/1-31-218_4000_0__).

<sup>111</sup>Misión Ramsar de Asesoramiento No. 69, Humedal de Importancia Internacional Caribe Noreste, Costa Rica and English translation ("Ramsar Report") 17 December 2010, p. 15.

beach areas provide food and a breeding site for the green sea turtle and the leatherback turtle<sup>112</sup>. The lagoon provides a stopover site for species of migratory fish such as the Atlantic tarpon and bull shark, and a breeding site for some 26 species of fish. One third of Costa Rica's species declared under threat of extinction are present in the region<sup>113</sup>.

20. At tab 9 in Volume 1 of your Binder — I do not take you to it because you do not need to read the document now — there is a study overseen by the Costa Rican Ministry of Environment, Energy and Telecommunications produced in December 2010. Bearing in mind that more damage has been inflicted since, this report indicates already the clearance of 1.67 hectares of primary, old-growth wetland forest amounting to nearly 200 significant trees<sup>114</sup> as well as approximately 4.8 hectares of forest undergrowth<sup>115</sup>. Turning to tab 117, which is in Volume 3, a quarter of the felled trees were over 100 years old, and some were even older, more than 200 years<sup>116</sup>. The graphic on the screen demonstrates clearly the significance of the older trees on the site.

21. Mr. President, Members of the Court, your Court has been in existence for 65 years, together with your predecessor a total of 90 years. If someone chopped this Court down that would be an irreparable loss. And that is true even if in the fullness of time another Court was created to replace it. No doubt forests, like courts, can regenerate, at least to some extent. But not in our lifetime, I am afraid. It takes a lifetime to establish a permanent court; it takes hundreds of years to establish old-growth forest. Cutting down such a forest, or a significant part of it, is irreparable harm for our purposes.

22. The Court has before it a series of maps, illustrations and photographs which demonstrate visually what Nicaragua is doing and proposes to continue doing. That Nicaraguan troops are present on Isla Portillos is the first undeniable fact. Incursion and occupation of this area presents a relatively straightforward situation. Nicaraguan troops are present on Costa Rican

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<sup>112</sup>Ramsar Report, pp. 15-16.

<sup>113</sup>Ramsar Report, p. 25.

<sup>114</sup>Costa Rica, Ministry of Environment, Energy and Telecommunications and Sistema Nacional de Áreas de Conservación Area de Conservación Tortuguero, "*Estimación de edad máxima aproximada de los árboles cortados en áreas de bosque primario en el sector de Punta Castilla, Colorado, Pococí, Limón, Costa Rica a raíz de la ocupación de ejército nicaragüense para el aparente restablecimiento de un canal existente*", December 2010 ("SINAC Report"), p. 1.

<sup>115</sup>SINAC Report, p. 2.

<sup>116</sup>SINAC Report, p. 10.

territory. Turning to tab 118 of your binder, you can see a series of four photographs taken on 1 November 2010. The establishment of the camp is clearly visible. At least five soldiers are there, armed and wearing camouflage gear. In the final photograph, it is evident that the Nicaraguan soldiers are pointing their weapons at the civilian aircraft in which the Costa Rica delegation is travelling. Moving to tab 119 of your binder, you can see a further two photographs taken on 11 November 2010. It can be seen that the military camp is well-established. Finally, at tab 120 of your binder, we see a series of four photographs taken on 14 November 2010. These provide a view of the camp in relation to the broader area and the canal. In the first two, the camp can be seen in relation to the canal, construction of which at this stage is significantly advanced. In the third, we have moved slightly to the left of the camp, and can see the Nicaraguan flag planted at the intersection of the river and the canal. Finally, we see again the camp, which by now comprises a number of structures and tents — even a clothesline for hanging out the washing, and one can assume in due course that there will be a laundry!

23. Turning to tab 121, in an independent report prepared by the Secretary General of the OAS on 7 December 2010<sup>117</sup>, following a fly-over conducted on 26 November 2010, it was reported:

“You can see . . . the San Juan, the river course that has been opened, the felled trees, the cleared area with tents and clothing out to dry, although no soldiers are to be seen, the dredger with three or four armed men in uniforms.

In addition, the felling of trees and the opening of a river channel in the area can be seen.”<sup>118</sup>

So that is the first fact.

24. The second fact that cannot be denied is that the Nicaraguan armed forces — or persons acting under their direction and control — are involved in the felling of trees in the significant area of what I might describe as canal-shaped land.

25. In tab 122 of your binder you can see a series of photographs, which again speak for themselves. The photographs are in chronological order, and show clearly the progression of the damage caused. Starting in late October, you can see the dredge, the progression of the canal and

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<sup>117</sup>Report of the OAS Secretary General, Pursuant to resolution CP/Res. 979 (1780/10), Presented to the Twenty-Sixth Meeting of Consultation of Ministers of Foreign Affairs, 7 Dec. 2010.

<sup>118</sup>*Ibid.*

the large deposit of sedimentary waste. Two hectares of forest have already been cleared. Moving to 11 November 2010, tab 123, we see the progression of tree felling and the development of the canal.

26. At tab 124 of your binder, you will see the photographs taken by the OAS representative during the 26 November 2010 fly-over. Construction of the canal is now well-advanced, and the waters of the San Juan have already begun to flow through it.

27. At tab 125 of your binder, there is a satellite picture taken on 14 December 2010. The San Juan river runs on its natural course to the left, and Laguna Los Portillos can be seen on the right. The canal is visible between the two — not visible from the moon, I grant you, but visible from a satellite photograph — the image on screen has circled the canal. The cleared forest is visible here and here.

28. Nicaragua well understands the impact that such activities may have. In its Rejoinder in the *Navigational Rights* dispute, Nicaragua referred to the San Juan Wildlife Reserve, which sits directly across the river from Isla Portillos, and submitted that: “Apart from their natural beauty, these and other sought-after trees are critical to maintaining the delicate ecological balance of the reserves.” (*Dispute regarding Navigational and Related Rights, (Costa Rica v. Nicaragua)*, Rejoinder of Nicaragua, 15 July 2008, para 4.52.) That is a Nicaraguan quote. There is very little sign of delicacy or balance here!

29. Mr. President, Members of the Court, Nicaragua does not deny that it is engaged in the construction of a canal on Isla Portillos, or that it is felling trees in large numbers. Instead, it seeks to justify its conduct by reference to completely novel and frankly fanciful interpretations of the Treaty of Limits and the Alexander Awards.

30. In short, Nicaragua’s plan to build a canal in Costa Rica’s territory and to divert waters of the San Juan through that canal, is causing and will continue to cause flooding and damage to Costa Rica’s territory, contrary to Costa Rica’s rights as a sovereign under general international law and specifically pursuant to the Cleveland Award and the Alexander Awards<sup>119</sup>. The felling of trees, the clearing of vegetation, the removal of soil, and the diversion of the waters of the San

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<sup>119</sup>Cleveland Award, p. 458.

Juan river across this cleared territory not only violate Costa Rica's territorial integrity but also its right not to have its territory "flooded or damaged in any other way"<sup>120</sup>. Moreover, not merely is this irreparable, in the terms I have explained, it is *intended* by Nicaragua to be irreparable. They are not doing this for temporary purposes.

31. Between 27 November and 1 December 2010, the Ramsar Convention Secretariat sent an independent Mission to assess the changes in the ecological character of the Isla Portillos segment of the Ramsar site. This was done at Costa Rica's request. The Mission's full Report is at tab 37 of Volume 1, and I commend it to you, but not now. Turning to tab 127, in Volume 3, the Mission concluded,

"land clearing is a process that has an irreversible impact on vegetation cover in the wetland . . . since in areas with high rainfall rates, such as this [Isla Portillos], the soil and seed bank are lost. The process is exacerbated by the effect of fluvial erosion . . . The clearing and flooding of the wetland could affect the distribution and abundance of terrestrial species due to water stress, caused by excess water, and the subsequent drying out of the wetland if the sandbank is breached." [That is a reference to the sandbank at the coast.] "The effect of water stress on terrestrial plants is a reduced growth rate . . . a process ending in the death of individual species."<sup>121</sup>

And again at tab 128 from the same Report:

"The construction of the artificial canal will transform the Laguna Los Portillos and wetland island . . . from an ecosystem with numerous habitats . . . to a single, more extensive habitat dominated by the condition imposed by the San Juan River . . . The partial flooding of the wetland due to the construction of the artificial canal and the clearing of vegetation would alter the distribution and abundance of terrestrial species through the loss of habitat and reduction in water supply and wetland; [it would isolate an important zone of wetland] from the remainder of the wetlands located on the Isla Portillos, turning it into a barrier for terrestrial fauna with reduced mobility."<sup>122</sup>

32. In other words, the potential effects on this environment could be serious and long-term.

The Court has stressed the significance of respect for the environment, and I quote your words in the Advisory Opinion:

"the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of*

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<sup>120</sup>Cleveland Award, p. 458.

<sup>121</sup>Ramsar Report, pp. 29-30.

<sup>122</sup>*Ibid.*, pp.30-31.

*the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29; see also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 78, para. 140.)

Mr. President, Members of the Court, the circumstances of the present case give the Court the opportunity to give effect to this general statement, all the more so given that the actions of Nicaragua are not “within [its] jurisdiction” but directly “*in and against*” the territory of another State, if I may paraphrase the title of the *Nicaragua* case.

33. This case is not at all like the *Passage through the Great Belt* case, where Finland alleged that Denmark by its construction work for the bridge was seeking to impose a fait accompli. That was activity on Denmark’s own territory, taken after due notice and consultation with Finland, affecting only a small fraction of ships transiting the Great Belt; moreover, the construction would not be completed prior to the final judgment on the merits. A clearer contrast with the facts of the present case can hardly be imagined — here, a military occupation, no consultation, no licit use of any kind, immediate and harmful impacts on the territory of another State — a clear attempt to impose a fait accompli on the hitherto unquestioned territorial sovereign.

34. The head of the dredging operations, Mr Edén Pastora, has confirmed in television interviews that the purpose of the planned canal is “to restore the Nicaraguan border river to its historic channel to the sea” and that the 1858 Treaty of Limits proves that Isla Portillos “is part of Nicaragua, not Costa Rica”<sup>123</sup>. I quote Mr Pastora:

“I studied the awards and I made it easy to interpret . . . I made it easy to interpret them because I know that area in situ, channel by channel, lagoon by lagoon. I know where Punta Castilla is. I walked on the right bank of Harbour Head. Then I made it easy to interpret the awards . . . We started at that point . . . because the border is there. We started dredging by what was said once about the exchange of trade . . . I am familiar with the issues, without the need to be an engineer.”<sup>124</sup>

That, to this date, is the most coherent explanation we have of what Nicaragua was doing. We will see what happens this afternoon.

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<sup>123</sup>Report of interview with Edén Pastora on Nicaraguan television channel 100% Noticias, in Tim Rogers, ‘Nicaragua Denies Reports of Intrusion into Costa Rica’, *Tico Times*, 2 Nov. 2010, available at: [http://www.ticotimes.net/News/Daily-News/Nicaragua-Denies-Reports-of-Intrusion-into-Costa-Rica\\_Tuesday-November-02-2010/](http://www.ticotimes.net/News/Daily-News/Nicaragua-Denies-Reports-of-Intrusion-into-Costa-Rica_Tuesday-November-02-2010/): Application Att. 9.

<sup>124</sup>Confidencial.Com, 30 Nov. 2010: “Pastora: I interpreted the Alexander Award”, available at: <http://www.confidencial.com.ni/articulo/2522/pastora-ldquo-yo-interprete-el-laudo-alexander-rdquo>: English translation, tab 18.

The reporter responded: “But you talked about Google Maps, said that you had used those maps.”

Mr. Pastora explained,

“because Google had used the Alexander awards to draw the border there. They say that they were wrong, but all things have their reason for being. Why did they make a mistake? Because they applied the Cleveland and Alexander awards. And now Costa Rica was asked where they wanted to put the markers and they corrected the matter. Who is going to believe Google in mapping [matters] now?”<sup>125</sup>

“Who is going to believe Google in mapping matters now?” Who indeed?

35. It seems from this and other statements that Nicaragua believes that the international boundary lies upon a hitherto unnamed canal, newly baptized “Harbour Head Caño”, not shown on any of the relevant maps and which appears to have co-existed with trees several hundred years old. In fact, the canal is an artifice, newly created, whose construction raises unresolved questions of possible long-term harm. Let me read two passages from the Ramsar Report — the extracts are at tab 131:

“It is estimated that the changes in the hydrographic network of the San Juan River are minimal at the river basin level, but significant at the wetland level. By connecting the San Juan River hydraulically with the Laguna los Portillos, the network’s surface run-offs will be altered . . . if the San Juan River is also dredged upstream of the site, its volume of water will increase and there would be a wider effect.

Given the artificial hydraulic connection between the San Juan River and the Laguna los Portillos, it is evident that there is, and will continue to be, further changes in the local surface-water hydrology. The changes are apparent in the change in the river’s rates of discharge and transportation of sediment between the river and the lagoon. Similarly, the consequent effect will be a possible change in the local water balance . . . the existing hydrodynamic balance in this area . . . will be altered, with a consequent change in the water quality . . . the process and capacity to retain sediments and nutrients in and around the island wetland affected will be altered and there will be a drastic change in flood control and sedimentation flux.”<sup>126</sup>

36. Now, these possibilities may not all occur — there is the usual uncertainty, and this makes the failure of Nicaragua to conduct an environment impact assessment as to the canal even more egregious. And there are indications that geomorphological change is occurring. I refer to a joint UNITAR/UNOSAT Report, done at Costa Rica’s request, which is included in full at tab 113 of Volume 3 of your binders and is in the public domain. According to that Report:

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<sup>125</sup>Confidencial.Com, 30 Nov. 2010: “Pastora: I interpreted the Alexander Award”, available at: <http://www.confidencial.com.ni/articulo/2522/pastora-ldquo-yo-interprete-el-laudo-alexander-rdquo>: English translation, tab 18.

<sup>126</sup>Ramsar Report, pp. 26-27.



“The new channel has increased to an average diameter of 15m, showing a 5m increase between 19 November and 14 December 2010. This increase of channel width was likely due to erosion as new water flow cuts into the soil. Removal of vegetation along the channel has helped facilitate the erosion processes as it develops. This high rate of erosion is additionally facilitated with the high velocity of water flowing in from the San Juan River. As a result the banks of the channel appear to have also increased in width from the erosion process to an average of 23m in width. It is likely that as the water cuts through the soil, the existing banks will continue to widen as sediment washes out into Los Portillos lagoon.”<sup>127</sup>

Thus the possibility of “a drastic change in flood control and sedimentation flux” is not to be underestimated. This is immediately prejudicial to Costa Rica’s rights.

**(c) *Fourth condition: there is urgency to stop Nicaragua’s actions given the likelihood of prejudicial acts and aggravation of the dispute in the event of continuing presence of the Nicaraguan Army in the occupied territory pending the judgment***

37. Mr. President, Members of the Court, the final requirement that has to be satisfied is that of urgency. As you have recently put it: “the power of the Court to indicate provisional measures will be exercised only if there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision” (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 392, para. 129*)<sup>128</sup>.

38. In the *Frontier Dispute* case, a Chamber of the Court assessed the possibility of irreparable damage to the rights of the parties *pendente lite*, taking into account: “that the armed actions that gave rise to the requests for the indication of provisional measures . . . took place within or near the disputed area as defined by the Special Agreement” (case concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986, p. 9, para. 16). The Chamber concluded that the incidents which occurred,

“not merely are likely to extend or aggravate the dispute but comprise a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes, there can be no doubt of the Chamber’s power and duty to indicate, if need be, such provisional measures as may conduce to the due administration of justice”

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<sup>127</sup>UNITAR/UNOSAT, “Morphological and Environmental Change Assessment: San Juan River Area (including Isla Portillos and Calero), Costa Rica” (Geneva, 2011) p. 2.

<sup>128</sup>The Court there recalled the line of jurisprudence affirming this requirement, including *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 17, para. 23; Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003, p. 107, para. 22; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I), p. 11, para. 32.*

(case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Provisional Measures, Order of 10 January 1986*, *I.C.J. Reports 1986*, p. 9, para. 19).

The Chamber accordingly and unanimously ordered the withdrawal of troops. It should be stressed that that was a case of a bona fide pre-existing notified territorial dispute, which had been the subject of extensive negotiations prior to the conclusion of the special agreement. Here we have a new, and we say entirely artificial, claim that was raised for the first time *after* the occupation of Costa Rican territory. Grab first and claim later. I note that every one of the witness statements filed last Thursday by Nicaragua was given *after* Costa Rica's Application was filed.

39. Rosenne, after examining your jurisprudence on provisional measures since 1920, notes that:

“In territorial disputes the Court will indicate provisional measures if there have been incidents, including incidents involving the use of armed force, if there is a *likelihood* of their recurrence, or if there is a *risk* that they could exacerbate the dispute.”<sup>129</sup>

The position must be *a fortiori* when there was not, as there was not here, any genuine prior dispute as to sovereignty over the territory concerned, any specific statement of claim, any attempt at negotiations; just a naked exercise in self-help buttressed by a reference to Google Maps.

40. The Court has also ruled on the matter of urgency in cases involving the risk of environmental damage. In the *Nuclear Tests* case, the Court concluded that there was “an *immediate possibility* of a further . . . nuclear test being carried out by France in the Pacific” (*Nuclear Tests (New Zealand v. France)*, *Interim Protection, Order of 22 June 1973*, p. 140, paras. 26-27; emphasis added) and that “for the purpose of the present proceedings it suffices to observe that the information submitted to the Court . . . *does not exclude the possibility* that damage to New Zealand might be shown to be caused” (*ibid.*, p. 141, para. 30; emphasis added). Substitute for that statement in the present case for “immediate possibility” the phrase “virtual certainty”; for “does not exclude the possibility that damage to New Zealand might be shown to be caused” substitute the phrase “makes it quite clear that actual damage to Costa Rica will continue to be caused”. In this case there is no contingency, there is no need for speculation, for not excluding possibilities, for measuring harm in tiny traces of background radiation. Yet you ordered

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<sup>129</sup>Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, 4th ed., Martinus Nijhoff Publishers, Leiden, 2006, Vol. III, p. 1410; emphasis added.

that France avoid nuclear tests causing the deposit of radioactive fall-out on the territory of New Zealand. Again, I use the phrase repeatedly, the present case is *a fortiori*.

**(d) Conclusion**

41. Mr. President, Members of the Court, to conclude on the general question of the satisfaction of the criteria, the conditions for provisional measures are met, and plainly met, here. This can be seen by comparing the respective impact on the Parties of provisional measures in the present case. If the measures sought by Costa Rica are granted, this will in no way prejudice the final determination of the respective rights and duties of the Parties in relation to the subject-matter of the dispute. If Nicaragua's continuous occupation of the right bank of the lower San Juan were eventually to be upheld as lawful, Nicaragua would be free to build canals and to chop down trees, provided of course it complied with its other international obligations. But contrast the position of Costa Rica if the measures sought are not indicated. That would amount, with all respect, to the ratification by the Court of Nicaragua's policy of the *fait accompli*. How many more trees will be chopped down in this old-growth forest in the period prior to your judgment? How much more mayhem will be caused to the wetlands? How much modification of the existing geomorphology will Nicaragua's canal continue to produce, and how much more sediment will be dumped? As noted in the Ramsar Report, which is at tab 133, should Nicaragua continue uninterrupted with the construction of the canal:

“[i]t is estimated that within an approximate period of one hydrological cycle [that is one year] there will be partial or total loss of the Laguna los Portillos . . . The sandbank currently separating the Laguna los Portillos from the Caribbean Sea is in danger of being breached due to the change in the hydrodynamic balance that maintains it between the flow of the San Juan River and the tidal limit. By connecting the San Juan River with the lagoon hydraulically by means of the artificial canal, both water flow and sediment transportation would increase and could destroy the sandbank. This could change the behaviour and morphology of the Laguna los Portillos, which is currently an estuarine lagoon, into a bay with higher salinity . . . On the wetland island, the flood zone might be extended, which will produce fluctuations in level depending on the hydrological dynamics of the San Juan River. This process could increase the water stress on tree and undergrowth vegetation due to flooding, giving rise to a growing halo of dead vegetation, with a loss of habitat for terrestrial fauna.”<sup>130</sup>

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<sup>130</sup>Ramsar Report, p. 32; emphasis added.

In short, both Costa Rica and the environment face the real and appreciable risk of immediate harm in the period prior to your judgment on the merits.

### **B. The Provisional Measures requested by Costa Rica**

42. Mr. President, Members of the Court, for these reasons, the general conditions for provisional measures are met in this case. It remains to justify the specific measures we seek. There are six of these.

#### **(a) *The immediate and unconditional withdrawal of all Nicaraguan personnel from the territory of Costa Rica***

43. The first is the immediate and unconditional withdrawal of all Nicaraguan personnel from the right bank of the San Juan. Such measures are necessary to protect the Costa Rican right not to have its territory occupied even temporarily, as set out in Article 21 of the OAS Charter. Scheduled meetings and mediations, due to be overseen by the OAS, could not take place due to Nicaragua's refusal to remove its military from positions recently occupied<sup>131</sup>. The OAS has repeatedly called for withdrawal, but Nicaragua has rejected those calls, calling instead for the OAS to be wound up<sup>132</sup>.

44. I have already referred to cases where military withdrawal from a disputed area has been ordered by way of provisional measures. That is — with great respect — absolutely required in the present case.

45. Now, it is true in some cases there may be difficulty in requiring reversion to the *status quo ante* because the parties may disagree as to what the *status quo ante* was, and the Court may not be in a position to tell for itself at this stage. That was the situation in *Cameroon/Nigeria*. You nonetheless ordered provisional measures in that case, in the following terms: “Both Parties should ensure that the presence of any armed forces in the Bakassi Peninsula does not extend beyond the positions in which they were situated prior to 3 February 1996.” (*Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I. C. J. Reports*

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<sup>131</sup>Report of the OAS Secretary General, Pursuant to Resolution CP/Res. 979 (1780/10), Presented to the Twenty-Sixth Meeting of Consultation of Ministers of Foreign Affairs, 7 Dec. 2010.

<sup>132</sup>Spanish original transcript of speech given by President Ortega on 13 Nov. 2010, *Application*, Attachment 6 and English translation.

1996, p. 24, para. 49 (3).) The Court was not unanimous in doing so, but the lack of unanimity did not arise from any doubts as to the principle of return to the *status quo ante*. Rather, it arose from the fact that the Court could not — as it admitted — work out what the *status quo ante* was, given the conflicting evidence, the shroud of mystery that surrounded the Bakassi Peninsula. The point was made by Judge Shahabuddeen in a passage which, given the time, I will not read but it is at page 28 of his [Declaration] (*ibid.*, p. 28, declaration of Judge Shahabuddeen, citing *Frontier Dispute Burkina Faso/Mali (Provisional Measures)*, *I.C.J. Reports 1986*, pp. 10-11, para. 27, p. 12, para. 32 (1) (D))<sup>133</sup>.

46. There is no difficulty here of this kind because the *status quo ante* is perfectly well-defined. It was presented to you by Nicaragua itself in the *Navigational Rights Dispute* just over two years ago; Marcelo Kohen has shown you their maps. The *status quo ante* is Costa Rican civil administration of the territory on the right bank of the San Juan river. The *status quo ante* is that Nicaragua had no soldiers or other personnel encamped there. The *status quo ante* is that Nicaragua has no right to enter the territory on the right bank of the lower San Juan except as provided in the Treaty of Limits and for the purposes there laid down. The *status quo ante* is: no canal on that territory. In this respect Costa Rica expressly reserves the right to close the canal. Every minute the canal flows, the effect of Nicaragua's occupation is manifested and continued, and the environmental damage aggravated.

**(b) *The immediate cessation of the construction of the canal across Costa Rican territory and deviation of waters***

47. Mr President, Members of the Court, the second provisional measure sought is a corollary of the first. Nicaragua is not entitled, without Costa Rican consent, to divert the river, the right bank of which constitutes the common boundary, or to build a diversion canal on Costa Rican territory. It is a fairly elementary proposition. You should correspondingly order Nicaragua not to construct or maintain a canal in the area in question pending the final judgment of the Court.

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<sup>133</sup>See also, joint declaration of Judges Weeramantry, Shi and Vereschchetin, *ibid.*, p. 31; declaration of Judge Koroma, *ibid.*, p. 30).

**(c) *The immediate cessation of the felling of trees, removal of vegetation and of soil from Costa Rican territory, including its wetlands and forests***

48. A further corollary, and this is the third request, is an order for the cessation of all activities of felling of trees, removal of vegetation and of soil from Costa Rican territory, including its wetlands and forests. This too is urgently required. I have referred already to the number and ecological value of the trees, and you have seen pictures of them. This activity must stop immediately.

**(d) *The immediate cessation of the dumping of sediment in Costa Rican territory***

49. The fourth request: likewise must stop immediately the dumping of sediments on Costa Rican territory. No doubt Nicaragua has the right to dredge the San Juan, provided it complies with condition 6 of the Cleveland Award. What it has no right to do is to dump the resulting sediments on Costa Rican territory without Costa Rica's consent. Its doing so causes damage to the territory which, in a wetland, is effectively irreversible. It should be stopped, by your order, now.

**(e) *The suspension of Nicaragua's dredging programme aimed at the occupation, flooding and damage of the territory of Costa Rica, as well as at the serious impairment of the navigation of the Colorado River***

50. Fifthly, I turn to the question of Nicaragua's dredging programme. The position with respect to dredging of the San Juan itself is different in principle, in that under the Treaty of Limits and the Cleveland Award, such activity on Nicaraguan territory may, provided it otherwise complies with Nicaragua's international obligations under the relevant instruments, be lawful. Moreover, while there was no prior notice whatever of the incursion into Costa Rican territory, the matter of Nicaraguan dredging of the San Juan had been discussed at some level of generality in the diplomatic correspondence, as Mr. Sergio Ugalde has shown.

51. Nonetheless, the dredging programme is currently part of a programme of digging, deviating and destroying Costa Rica's territory and environment, and it infringes on Costa Rica's express rights under the Cleveland Award not to have any "works of improvement" undertaken which "result in the occupation or flooding or damage to Costa Rican territory"<sup>134</sup>. Moreover,

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<sup>134</sup>Cleveland Award (Tab 2), p. 458, para. 6.

Nicaragua has expressly stated that it intends to divert 100 per cent of the Colorado River<sup>135</sup>, as again you have been told. For this reason, the dredging too should be the subject of a provisional measures order of the Court.

**(f) *That Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may further aggravate or extend the dispute before the Court***

52. Finally, Nicaragua should refrain from any other action which might prejudice the rights of Costa Rica, or which may further aggravate or extend the dispute before the Court. The protean character of Nicaragua's conduct, covert, concealed and careless of Costa Rica's rights, calls for a more general measure, ordering it to refrain from any other action which might prejudice Costa Rica's rights, or further aggravate or extend the dispute before the Court. You discussed the point in your second provisional measures Order in the *Pulp Mills* case:

“Whereas the Court has on several occasions issued provisional measures directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult its settlement . . . ; whereas in those cases provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated.”<sup>136</sup>

I take this to mean that non-aggravation in the generic sense is unlikely to be ordered except in conjunction with other more specific measures. But I would make two points. First, Costa Rica does in fact seek other specific measures as well. Secondly, the situation has indeed been aggravated by Nicaragua since the introduction of these proceedings on 18 November 2010.

### **C. Conclusions**

53. Mr. President, Members of the Court, to conclude, the measures requested by the Republic of Costa Rica are the only ones capable of preserving its rights and of avoiding the creation of an irremediable *fait accompli* pending your decision on the merits. All the conditions are satisfied to enable you to indicate them.

54. Mr. President, Members of the Court, this may seem to be a small dispute between two small countries a long way away. I use the phrase a long way away, it was used by

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<sup>135</sup>See Attachment PM 1, 18 Nov. 2010. Note from the Minister of Foreign Affairs and Worship of Costa Rica (DM-637-9) addressed to the Minister of Foreign Affairs of Nicaragua, 27 Aug. 2009.

<sup>136</sup>*Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007, p. 16, para. 49.*

Neville Chamberlain in relation to Czechoslovakia. But it raises a fundamental issue of principle, to do with respect for territorial sovereignty. I began this morning by asking a question, and I will repeat it. Can State A resist provisional measures, after taking unilateral action on territory occupied under claim of right for many years by State B — territory never previously claimed by State A — on the ground that State B, if it is correct in its claim to title, will eventually get its territory back plus damages? The answer is, as I have said, obviously not. Otherwise the State As of this world have a privilege to act unilaterally, to seize and to hold, to establish *fait accomplis* by whatever physical means, and to rely on the contingency of quantum assessment as a ground for projecting their unilateralism years into the future.

Mr. President, that closes the first round of Costa Rica's presentations. I thank the Court for its careful attention.

The PRESIDENT: I thank Professor James Crawford for his presentation. Now, that ends the first round of oral observations of the Republic of Costa Rica. The Court will meet again this afternoon, at 3 p.m., to hear the first round of oral observations of Nicaragua. The sitting is closed.

*The Court rose at 1.10 p.m.*

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