

CR 2011/4

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2011

Public sitting

held on Thursday 13 January 2011, at 4.30 p.m., at the Peace Palace,

President Owada presiding,

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

VERBATIM RECORD

ANNÉE 2011

Audience publique

tenue le jeudi 13 janvier 2011, à 16 h 30, au Palais de la Paix,

sous la présidence de M. Owada, président,

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

COMPTE RENDU

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

 Registrar Couvreur

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

M. Couvreur, greffier

The Government of Costa Rica is represented by:

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

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

as Agent;

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

as Co-Agent;

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

as Co-Agent, Counsel and Advocate;

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

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

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 Masis, 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 now open. The Court meets this afternoon to hear the second round of oral observations of the Republic of Nicaragua on the Request for the indication of provisional measures filed by the Republic of Costa Rica. I believe that the first speaker on the list is Professor McCaffrey. You have the floor.

Mr. McCaffrey:

1. Thank you, Mr. President. Mr. President, distinguished Members of the Court, good afternoon. In the brief time available today I will address several points concerning the boundary in the lower San Juan river and Nicaragua's right under the relevant instruments to dredge the river without Costa Rica's permission.

Nicaragua's sovereignty over the San Juan river

2. Mr. President, Costa Rica's presentations yesterday confirmed that this is, at its core, a dispute about sovereignty. There can be absolutely no doubt that Nicaragua has sovereignty over the San Juan river — although one might not realize this from listening to Costa Rica's counsel. I will not belabour this point or recite again the relevant instruments confirming it. The dispute is about whether Nicaragua's sovereign territory embraces the area between the "caño" she recently cleaned and the River San Juan near its mouth.

Maps show the disputed area as being in Nicaragua

3. We heard counsel for Costa Rica yesterday say that there is not a single map showing the disputed territory in Nicaragua. Unfortunately for Costa Rica, this is not the case. There are in fact a number of maps indicating that the disputed area lies in Nicaraguan territory, and one that is particularly damaging to Costa Rica's case. [McC 1 on screen] Two illustrations are shown on the screen and are in your folders together with several other maps, all showing the disputed area as being within Nicaragua. [McC 2 on screen] All of these, by the way, are taken from a Nicaraguan atlas deposited with the Court by Costa Rica. Both of these early maps are from the first part of the twentieth century. If further evidence in the form of maps were needed, it is provided by Costa Rica herself. [McC 3 on screen] Now on the screen is a 1971 map prepared by the Costa Rican Geographic Institute, in collaboration with the Inter-American Geodesic Service. It is labelled

“provisional edition”, but the fact that it was prepared by Costa Rica, the level of detail, and the obvious fact that Costa Rican cartographers would take special care about the location of the boundary between the two countries, makes this a highly probative piece of evidence. This Costa Rican map clearly shows the disputed area as being located in Nicaragua. At the very least, the map shows that not even Costa Rica is entirely clear on where the boundary is in the disputed area. [end McC 3]

The existence of the *caño*

4. Perhaps being aware of the uncertainty of the map-based evidence, Costa Rica’s counsel decided to focus on the *caño*, whose lower reaches were recently cleaned by Nicaragua. Professors Kohen and Crawford did their best yesterday to cast doubt on the very existence of the *caño* — although they proved its existence themselves, evidently unwittingly.

5. Costa Rica did not challenge General Alexander’s ruling that the beginning of the border, starting from the Caribbean, goes around Harbor Head Lagoon in a clockwise direction until reaching “the first channel met”. However, Professor Crawford claimed that Nicaragua had provided absolutely no evidence that the *caño* exists¹.

6. Mr. President, maps and satellite images shown on Tuesday, a video deposited with the Court — part of which I will show in a few minutes — and, most interestingly, many of the multitudinous maps and satellite images Costa Rica herself put on the screen yesterday, all show this *caño*, as well as others. Professor Crawford seemed to be entirely unaware of this yesterday as he projected a satellite image clearly showing the *caño*, while he intoned that it showed none. I will put that image back on the screen presently. But it is important to emphasize that we are not talking about the Panama Canal here. We are talking about a small channel whose size decreases as it moves away from Harbor Head Lagoon. Much of it is covered by forest canopy — as is true of other *caños* — making it difficult to see from satellite photographs. But it is there, and it does communicate with Harbor Head Lagoon on one end, and the San Juan river on the other. It does not have to be the Nile; it only has to be the “first channel met”, and it *is*, and has been for quite a long time, the “first channel met” that connects the lagoon and the river when following the shore

¹CR 2011/3, p. 22, paras. 4 and 6 (Crawford).

of the lagoon in a clockwise direction. Let us take a look at two satellite images to demonstrate this.

7. [McC 4 on screen] The first image is Costa Rica's — if it will come up, the satellite must be behind the clouds today! This might be dubbed the "Trojan Horse image" because it carries with it the seeds of destruction of Costa Rica's case. The first slide now on the screen is the 1997 image Costa Rica showed yesterday. The *caño*, including its extension down to the slight bend in the river, is clearly visible — and my colleague is showing this with the cursor now. In the second slide we have superimposed a highlighting of the *caño* for the Court's convenience. We will show it again without the highlighting — you have to look carefully, but it is there — and then with the highlighting. [end McC 4]

8. [McC 5 on screen] The second image is Nicaragua's 2007 satellite photo, also shown by Costa Rica yesterday to prove that there is no *caño*. In fact, the *caño* appears clearly in this photograph, as well — as my colleague is indicating now with the cursor. The image even shows an ephemeral lake astride the path of the *caño*, demonstrating just how wet this region can be — so long as it is nourished by the water of the San Juan river. It is hardly Alexander's "flat and sandy delta"². Again, the second version of this image superimposes highlighting over the *caño* for ease of reference. We will show it again without the highlighting; and with the highlighting. [end of McC 5]

9. If further evidence is necessary of the existence of the entirely natural *caño* recently cleaned by Nicaragua, please allow me, Mr. President, to project on the screen several sets of images: [McC 6, 7 and 8] First, you will see some of the pictures taken during one of two visits to the *caño* by Maria Vivas Soto, an environmental engineer with Nicaragua's Environment Ministry, MARENA; the visit being for the purpose of inspecting the *caño* in connection with the Environmental Impact Study described by my friend and colleague, Mr. Reichler, during the first round³. [end McC 6, 7 and 8]

²E. P. Alexander, First Award of the Engineer-Umpire, under the Convention between Costa Rica and Nicaragua of 8 Apr. 1896 for the Demarcation of the Boundary between the Two Republics, Decision of 30 Sep. 1897, United Nations, *Reports of International Arbitral Awards* (RIAA), Vol. 28, p. 224.

³Docs. of Nicaragua. Doc. 14.

10. We will next project extracts from a video, from which I showed some screen-captures on Tuesday. These images of the *caño* demonstrate that it is hardly an “artificial canal” constructed by Nicaragua, as Costa Rica has repeatedly characterized it, and also that major stretches of it are navigable by small boats even with no cleaning.

11. Finally, Mr. President, I will project passages from Ms Vivas Soto’s statements concerning her two visits to the *caño*⁴, which I will also read out: I am not sure these are even visible to the Court and I apologize for that, Mr. President.

September 2009 visit

“We traveled through the *caño* until we found a layer of sediment and dried fallen trees that prevented the passage of water and transportation toward the San Juan River side [of the *caño*], thus affecting the flow volume, the depth and the width of the *caño*. Due to this sedimentation of the section, we were forced to continue the trip on foot . . .

The need to remove the sediment to restore the flow volume of the *caño* was visible, so that it could again flow from the Lagoon to its natural mouth in the San Juan River. The need to remove the vegetation that obstructed the *caño* was also visible, to improve its navigability as part of the sustainable development of the region.”

November 2010 visit

“17. On that occasion, our entire trip through the *caño* was undertaken in a small boat, from the San Juan River to the Harbor Head Lagoon. The *caño* area near the river, which a year ago was filled with sediment, had become a section navigable by small boats. The depth at the time of my visit was between 1 to 1.20 meters.

18. While we advanced we were able to see that the workers, who were performing the *caño* clearing activities, were civilians, workers from the area, with manual equipment, such as shovels, pickaxes and buckets.

.....

I did not see any worker present on the Costa Rican bank of the *caño*, nor did I see any destruction of vegetation on the Costa Rican side indicating that it was done during the cleaning activities.

.....

During my visit I did not see any debris at all deposited on the Costa Rican bank of the *caño*.”

⁴Docs. of Nicaragua. Doc. 14.

12. Mr. President, at the very least, these images and statements leave no doubt that the *caño* is not artificial.

The “First Channel Met”

13. Mr. President, now that we know that the *caño* does indeed exist, I must return to the question of whether it could in fact be Alexander’s “first channel met” due to the kinds of changes in the river’s channels the General said could occur, despite the hand-drawn map accompanying the Acts of the Costa Rica-Nicaragua Demarcation Commission. This map may be found at tab 40 of Volume II of Costa Rica’s judges’ folder for the first round. It was especially striking in this connection that neither Professor Kohen nor Professor Crawford yesterday addressed the long quotation I inflicted on the Court on Tuesday in which General Alexander emphasized that there could be gradual or sudden changes in the river’s channels in its delta region, and that such changes would affect the location of the boundary line. I am not bold enough to read that quotation again, but the gist of it is that the boundary would change with the changes in the channels. Instead of trying to deal with this inconvenient ruling head on, Professor Kohen looked for a different quote in his zeal to show that what he called the “principle of the stability of borders” —“le principe de stabilité des frontières”⁵ — somehow applied to the San Juan delta area, despite General Alexander’s clear explanation of why it could not. Professor Kohen found such a quotation, but it was in an award of General Alexander — the Third one — dealing with an entirely different question: whether the boundary following the bank of the river proper would change depending on changes in *water levels* — not whether the boundary would change according to changes in channels in the delta. Noting that “in the rainy season, the river’s waters submerge many miles of land in some localities”⁶, effectively leaving Costa Rica with less dry territory, General Alexander made the common-sense ruling that the bank is the bank, whether or not it is temporarily submerged in floodwater. This takes absolutely nothing away from his earlier ruling

⁵CR 2011/3, p. 14 para. 21 (Kohen).

⁶E. P. Alexander, Third Award of the Engineer-Umpire, under the Convention between Costa Rica and Nicaragua of 8 Apr. 1896 for the Demarcation of the Boundary between the Two Republics, Decision of 22 Mar. 1898, *RIAA*, Vol. 28, p. 229.

about changes in the boundary in the delta region due to changes in the channels. But Professor Kohen was right about one thing: I was not born in the nineteenth century.

The absence of Costa Rican *effectivités* in the disputed area

14. Mr. President, turning briefly to the question of Costa Rica's *effectivités* in the disputed area, having used a number of affidavits of present and former Nicaraguan army and law enforcement personnel to support the proposition that they have always patrolled the disputed area, I was chagrined to hear Professor Kohen say that Costa Rica does not accept the veracity of these sworn and notarized statements⁷. It is of course for the Court to determine the authoritative value of such affidavits, upon which parties to cases before it frequently must rely. But one cannot help but observing that if denying their veracity is the best Costa Rica can do in this case, she has effectively proved— especially in view of her failure to produce any evidence of her own law enforcement activities in the area — that Nicaragua is right.

15. The only evidence of *effectivités* Costa Rica has been able to produce are a series of use permits⁸ regarding land in the disputed area, all granted, rather oddly, in 2006 — and all pertaining, Mr. President, to a wetland Costa Rica claims to be so eager to protect. But— no actual possession, no official activities. Very thin evidence of *effectivités*, especially when contrasted with Nicaragua's long and consistent record of official presence in the area. [McC 11] And, Mr. President, Costa Rica's own permits each clearly show the *caño*! This is an image of one of the permits. [end McC 11]

Nicaragua's right to dredge without Costa Rica's permission

16. Finally, Mr. President, Costa Rica's argument yesterday compels me to return to a point that I had thought was pellucidly clear and unchallengeable: that Nicaragua does not have to obtain Costa Rica's permission to dredge the San Juan river. Professor Crawford, in his parting words and without citing authority, said that “there is the same obligation of co-operation [with respect to the San Juan] that would exist if this was a regular river with a median line”⁹. He then appealed to

⁷CR 2011/3, p. 18, para. 30 (Kohen).

⁸Costa Rican judges' folder, 11 Jan. 2011, Vol. I, tabs Nos. 10 to 15.

⁹CR 2011/3, p. 35, para. 58 (Crawford).

your predecessor's Judgment in the *River Oder* case, without referring to it by name, and in particular the Permanent Court's declaration that there is "a community of interest in a navigable river"¹⁰. He said that that community of interest ought to give rise to co-operation, including provision of information and consultation, ignoring the *lex specialis* in the form of the 1858 Treaty, which makes the river part of Nicaragua's territory. Mr. President, both the *Navigational and Related Rights* case and the present one show that there is regular co-operation between the authorities of both countries in the area of the San Juan river. I referred to some of this co-operation in my intervention in the first round of these hearings. But, Mr. President, there is a limit to what Costa Rica can insist upon, and that limit is defined by the sovereignty of Nicaragua over the river and all that that entails. One of the incidents of Nicaragua's sovereignty was recognized in no uncertain terms by President Cleveland in paragraph 6 of the third article of his Award, which I read out and showed on the screen during the first round. The nub of that passage is that "Costa Rica *cannot prevent*"¹¹ Nicaragua from executing works of improvement relating to the river. It should be added that Nicaragua also has an obligation under international law to do so. It is obviously difficult for Costa Rica to accept that Nicaragua does *not* in fact have the same obligations vis-à-vis Costa Rica as if the border followed the median line of the San Juan. This difficulty persists even after a treaty, six arbitral awards, and a judgment of this Court. Finally on this point, the Court will recall that it declined to indicate provisional measures in the *Pulp Mills* case even though there was, there, an actual duty under the relevant treaty to engage in consultation and the moving party claimed it had not been observed¹². The fact that there is no such duty here should not lead to a different outcome.

17. Mr. President, Members of the Court, that concludes my presentation. Thank you once again for your kind attention. Mr. President, I would now ask that you call to the podium Mr. Paul Reichler, who will address Costa Rica's environmental claims.

¹⁰*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27.*

¹¹Award of the President of the United States in regard to the Validity of the Treaty of Limits between Costa Rica and Nicaragua of 15 July 1858, Decision of 22 Mar. 1888, *RIAA*, Vol. 28, p. 210.

¹²*Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006.*

The PRESIDENT: I now call upon Mr. Reichler to make his presentation.

Mr. REICHLER:

CONCLUDING REMARKS ON THE EVIDENCE

1. Mr. President, Members of the Court, good afternoon. Costa Rica's second round pleadings yesterday called to mind Dinah Washington's hit song from 1959: "What a difference a day makes, twenty-four little hours."¹³

2. Two days ago, Costa Rica came out aggressively and insisted on the suspension of all dredging activities on the San Juan river¹⁴. That was before they heard Nicaragua's first round response. Yesterday, 24 little hours after hearing our response, they all but abandoned their request for interim measures in regard to the dredging of the river¹⁵.

3. This is reflected in their new submissions, which were scaled way down from one day to the next. In regard to the dredging, now they seek a suspension of activities *only* in the area adjacent to the *caño*¹⁶. That is a major retreat. But it is not far enough, because there is no evidence that Costa Rica will be harmed by dredging in this area, or any other.

4. Costa Rica questions how Nicaragua could have prepared a transboundary environmental impact study without its assistance. Very easily. The dredging of a river entails three environmental impacts: on hydraulic flow, on the disposition of extracted sediments, and on the sediments released into the water column¹⁷.

5. In regard to hydraulic flow, Nicaragua's EIS calculated that the transboundary impact, on the Colorado river in Costa Rica, would be a diminution in flow of less than 5 per cent, not enough

¹³To give credit where it is due, the song was actually composed by Mexican composer María Méndez Grever in 1934. Its original title was *Cuando Vuelva A Tu Lado*.

¹⁴E.g., CR 2011/1, pp. 70-71, para. 51 (Crawford).

¹⁵CR 2011/3, p. 38, para. 17 (Ugalde Álvarez) ("En attendant la décision finale sur le fond, le Nicaragua doit suspendre son programme de dragage de fleuve San Juan *dans la zone adjacente à la zone pertinente*"; emphasis added.)

¹⁶*Ibid.*, paras. 15-17.

¹⁷See doc. No. 13, affidavit of Hilda Espinoza Urbina (hereafter "document 13: Espinoza affidavit"), paras. 14 and 20 (c-f).

to harm navigation or anything else¹⁸. Costa Rica's own study, which I discussed in the first round¹⁹ and which Costa Rica conspicuously avoided mentioning yesterday, showed that the dredging project would diminish the flow of the Colorado by less than 4.5 per cent²⁰. That is a pretty close match.

6. In regard to the deposition of extracted sediments, Nicaragua's EIS ensured that there would be no impacts on Costa Rica by requiring that all sediments be deposited in 24 designated sites on the Nicaraguan side of the river²¹. Yesterday, my friend Professor Crawford challenged this, alleging that one of the sites, Number 2, was in Costa Rica²². Reviewing the *compte rendu*, I found no citation for this statement. In any event, I am afraid Professor Crawford miscalculated. When the co-ordinates of the site are plotted correctly, they show that it is plainly in Nicaragua, as are all the rest. [PSR1]

7. In regard to sediments in the water column, the EIS showed that these would have no impact on either bank of the river, that they would not accrete but would quickly settle to the river bottom at the conclusion of the dredging activity, or wash out to sea²³. Costa Rica has not challenged this.

8. In the end, Costa Rica accepts the EIS and its findings in regard to the dredging of the river. However, Professor Crawford drew a distinction yesterday between what he called two different projects: the one described in the EIS, to which he in the end took no exception, and the one he labelled the "Pastora Plan"²⁴.

9. In fact, the actual dredging project that is being carried out is a lot smaller and less ambitious than the one described in the EIS. In the first place, as Costa Rica has acknowledged,

¹⁸Doc. No. 15, declaration of Virgilio Silva Mungía (hereafter "document 15: Silva declaration"), paras. 2-3; doc. No. 16: declaration of Lester Antonio Quintero Gómez (hereafter "document 16: Quintero declaration"), para. 7, as well as corresponding pages of Ann. 3 thereto; see also doc. 13: Espinoza affidavit, para. 20 (f).

¹⁹CR 2011/2, p. 32, para. 5 and p. 41, para. 28 (Reichler).

²⁰Área de Ingeniería Hidráulica, C.S. Diseño, ICE, "*Estudio de comportamiento de caudales en la bifurcación Río San Juan — Río Colorado*" (hereafter "Costa Rican Flow Report"), p. 5. Spanish version submitted to the Court by Costa Rica on 7 Jan. 2011; English translation provided at the back of Nicaragua's judges' folders on 11 Jan. 2011.

²¹E.g., doc. No. 16: Quintero declaration, para. 9 and Ann. 3: Excerpts from Environmental Impact Study Final Report, p. 24; see also doc. 13: Espinoza affidavit, para. 20 (c).

²²CR 2011/3, p. 32, para. 41 (Crawford).

²³See doc. No. 16: Quintero declaration, para. 9 and corresponding pages of Ann. 3 thereto; see also doc. No. 13: Espinoza affidavit, para. 20 (c).

²⁴CR 2011/3, p. 21, para. 2 (iv), p. 25, para. 15 and pp. 27-29, paras. 25-28 (Crawford).

the budget for it is only \$7.5 million²⁵. In this regard, here is what the Costa Rican Foreign Minister told the Costa Rican Parliament in his September speech to that body:

“[W]e have reviewed the costs of the dredging works in Caldera and in the Panama Canal, which has allowed us to establish an approximate cost of \$700K to \$1M per linear kilometer for the dredging of the river. Based on this, we estimate that the budget announced by Nicaragua will allow them to dredge or clean between 7 and 10 linear kilometers of the San Juan, which would represent a small segment of the river.”²⁶

The project described in the EIS was for 42 km of dredging, so the actual budget for it cuts it down significantly, at least in half²⁷.

10. In regard to the amount of sediment to be extracted, I pointed out on Tuesday that the actual project had been scaled down by more than a third from the one described in the EIS, from 1.5 million to 900,000 cubic metres²⁸. Yesterday, Professor Crawford hypothesized a dredging of more than 3 million cubic metres, based on a computation of four dredgers working full time for a year²⁹. Again, it turns out there is no citation for this statement in the *compte rendu*, but I do not question his arithmetic. I do not doubt that four dredgers with sufficient capacity working full time could perform that much work. But that is not this project, and it is not within the permit issued by the Environment Ministry, nor within the small capacity of the dredgers built in Nicaragua³⁰.

11. And speaking of dredgers, these too have been scaled down substantially from the ones contemplated in the EIS; instead of the foreign-built dredgers Nicaragua then hoped to import, it switched to much smaller, homemade dredgers because the foreign ones were too expensive and too big for the river³¹. Until now, Nicaragua has been using one local model, with a capacity of only 350 cubic metres per hour³². The ones it plans to add are even smaller: 150 and

²⁵CR 2011/3, p. 28, para. 25.

²⁶Doc. No. 19: statement by Mr. René Castro Salazar, Costa Rican Minister of Foreign Affairs and [Worship], to the Environmental Commission of Costa Rica’s Legislative Assembly, on 8 Sep. 2010 (hereafter “document 19: Castro statement”), para. 18.

²⁷See, e.g., doc. 13: Espinoza affidavit, para. 3 (“As permitted, the project includes the dredging of the last 42 kilometers of the San Juan River”).

²⁸CR 2011/2, p. 17, para. 40 (Reichler); see also doc. 16: Quintero declaration, paras. 10-11.

²⁹CR 2011/3, pp. 29-30, para. 30 (Crawford).

³⁰See doc. No. 13: Espinoza affidavit, Ann. 8.

³¹Doc. No. 16: Quintero declaration, para. 12.

³²*Ibid.*, para. 13 as well as corresponding page of Ann. 4 thereto.

75 cubic metres per hour³³. According to the Dutch dredging experts from Delft Technical University, the San Juan river dredging project “is of a very small scale compared to the large Dutch dredging contractors currently working globally with hourly productions of more than 10,000 m³/hr”³⁴. All together, the combined productivity of *all* the Nicaraguan dredgers is less than 600 cubic metres per hour³⁵.

12. Costa Rica reveals the weakness of its own argument when it bends over backwards to describe this extremely modest endeavour as the “Pastora Plan”, as if branding it with that name is alone sufficient to condemn it³⁶. In fact, Costa Rica’s whole argument against the dredging project now boils down to certain statements attributed to Mr. Pastora by the Nicaraguan press³⁷. These supposed press statements are an extremely weak foundation on which to base a claim for interim measures, even if Mr. Pastora were accurately quoted, which Nicaragua does not accept. Costa Rica ignores the fact that the scope of this project is not governed by any individual’s wishes, but by the detailed permits which were issued after comprehensive reviews by qualified regulators³⁸. Costa Rica has not proven that Nicaragua deviated from these permits; in fact, Nicaragua has not. On this point, I should add that the permit for the dredging project actually took effect in July 2009; so, contrary to what the Court was told yesterday, the commencement in October 2010 was within the 18-month starting time.

13. It is amusing that Professor Crawford has now assumed the role of Mr. Pastora’s chief character witness: “I think we should give some credibility to Mr. Pastora,” he says³⁹. “We have every reason to believe Mr. Pastora when he speaks to the press about this project. So far, everything he has announced to the press seems to come true.”⁴⁰ Is that so? What about his supposed announcement that Nicaragua would divert 100 per cent of the flow of the Colorado

³³Doc. No. 16: Quintero declaration, para. 13, Ann. 4.

³⁴Doc. No. 18: Expert Report of Professors van Rhee and de Vriend of Delft University of Technology (4 Jan. 2011) (hereafter “document 18: Report of Dutch Experts”), p. 3.

³⁵See doc. No. 16: Quintero declaration, Ann. 4.

³⁶CR 2011/3: pp. 27-29, paras. 25-29 (Crawford).

³⁷*Ibid.*

³⁸Doc. No. 13: Espinoza affidavit, paras. 12-22 and corresponding Anns. thereto.

³⁹See CR 2011/3, p. 29, para. 28 (Crawford).

⁴⁰*Ibid.*, p. 28, para. 26.

river, all 1,700 cubic metres per second of it?⁴¹ Professor Crawford may be the only one on earth who believes that this absurd statement was made by anyone, let alone Mr. Pastora. He insisted on it again yesterday⁴², even though his own client, the Foreign Minister of Costa Rica, summarily dismissed it in his speech to the Costa Rican Parliament in September⁴³. And if they really believe Mr. Pastora said this, why has Costa Rica now abandoned its opposition to the dredging project, except for a very tiny piece of it?⁴⁴

14. In the end, Costa Rica has no case against the dredging. Full stop. There is no evidence of any kind that the dredging of the river, at any location, will cause harm to Costa Rica, let alone harm that is irreparable or irreversible.

15. That brings us to the *caño*. The response here can be very simple. In its scaled down Submissions filed yesterday, Costa Rica now asks only for an Order prohibiting further construction or enlargement of a canal⁴⁵. Nicaragua has already stated that its work on the *caño* was finished in December⁴⁶. There will be no construction or enlargement⁴⁷. The Agent of Nicaragua has already made this clear⁴⁸, and will do so again this afternoon. There is no need for an Order. Costa Rica asks for an Order against the felling of more trees⁴⁹. Again, as Nicaragua has stated, the felling of trees is over and done with⁵⁰. The replanting of trees is in progress⁵¹. Again, there is no need for an Order. Finally, Costa Rica asks for an Order against the dumping of sediments⁵². Here again, there is no need for an Order. Since there will be no construction work or enlargement, there will be no extracted sediments to deposit.

⁴¹CR 2011/3, p. 29, para. 28.

⁴²*Ibid.*

⁴³Doc. No. 19: Castro statement, paras. 15-17 (the statement made by Mr. Pastora does “not constitute sufficient proof in and of [itself] that this damage will occur . . . nobody has been able to show calculations or sustain flow reductions close to 80%, as published in some media”).

⁴⁴CR 2011/3, p. 38, para. 17 (Ugalde Álvarez).

⁴⁵*Ibid.*, para. 16 (b).

⁴⁶CR 2011/2, p. 33, para. 9 and p. 44, para. 39 (Reichler); see also doc. No. 12, declaration of Roberto Araquistain Cisneros (hereafter “document 12, Cisneros declaration”), paras. 1-3; doc. 13: Espinoza affidavit, para. 31.

⁴⁷CR 2011/2, p. 33, para. 9 (Reichler).

⁴⁸CR 2011/2, p. 15, para. 33 (Argüello-Gómez).

⁴⁹CR 2011/3, p. 38, para. 16 (c) (Ugalde Álvarez).

⁵⁰CR 2011/2, p. 16, para. 35 (Argüello-Gómez); p. 46, para. 44 (Reichler).

⁵¹*Ibid.*

⁵²CR 2011/3, p. 38, para. 16 (d) (Ugalde Álvarez).

16. On Tuesday, I said that no trees were felled by Nicaragua on the Costa Rican side of the *caño*, and no extracted sediments were deposited there⁵³. My statement was not disputed yesterday. On Tuesday, I said that, despite all of Costa Rica's protestations in the first round about the flooding of the wetlands adjacent to the *caño*, Costa Rica had submitted no evidence of flooding⁵⁴. They did not dispute that statement yesterday either. Nor did they submit any evidence to back up this claim. They remained silent in the face of my direct challenge on the point. In their two rounds of pleading they showed us dozens of photos of the *caño* from every angle. Does the Court recall seeing any flooded areas? If not, it is because there were none. There is no evidence of flooding, actual or potential, at or near the *caño*. They did not even mention the word yesterday.

17. Nor did they mention the word "erosion" yesterday. This is another example of "What a difference a day makes." On Tuesday, Professor Crawford called attention to satellite photographs to support his contention that the clearing of the *caño* had caused erosion of the adjacent banks⁵⁵. But he made no mention of the photos yesterday; nor did he say a word about erosion. Apparently this argument has been jettisoned, too. It is not difficult to understand why.

18. Costa Rica obtained the satellite photos from UNOSAT, which in this regard was acting as a private contractor, retained by Costa Rica⁵⁶, rather than an organ of the United Nations — much the same way the UK Hydrographic Office hires itself out to private parties and governments. The photos depict the San Juan river, the *caño* and the Harbor Head Lagoon quite nicely⁵⁷. But the interpretation that has been given to them is very strange. First, by comparing the photos taken on 19 November and 14 December, one can see that there was more water flowing through the *caño* on the latter date. Fair enough. We agree. But then Costa Rica attributes this increased amount of water in the *caño* to erosion of the banks⁵⁸. Quite obviously, the cause of this greater volume of water, as distinguished from its existence, is not something that can be determined by a photo taken from a satellite orbiting the earth. In fact, there is a much simpler

⁵³CR 2011/2, p. 45, para. 43 (Reichler).

⁵⁴*Ibid.*, p. 50, para. 53.

⁵⁵CR 2011/1, pp. 64-65, para. 36 (Crawford).

⁵⁶*Ibid.* ("I refer to a joint UNITAR/UNOSAT Report, *done at Costa Rica's request*") (emphasis added).

⁵⁷*Ibid.*

⁵⁸See CR 2011/1, p. 65, para. 36 (Crawford).

explanation for the increased water: the clearing of the *caño* was not completed until December, well after the first photograph was taken, but before the second one⁵⁹. Of course, more water was flowing through the *caño* after it was fully cleared. That is not a sign of erosion. It is a sign that there was less resistance in the *caño* after it was cleared, so more water was able to flow through it. It is also the result of more rain, especially during the peak of the rainy season in late November and early December, when there is more water in the river generally, as is also clear from Costa Rica's photos. Significantly, Costa Rica has not produced any photos showing a widening of the *caño* since its clearing was completed. And although it is perfectly capable of doing so, as it owns the right bank of the *caño* and enjoys navigation rights in it, Costa Rica has supplied no actual measurements of the width, depth, water volume or velocity in the *caño*. Only Nicaragua has done so⁶⁰, and its measurements are unchallenged. The satellite photos submitted by Costa Rica state explicitly that their measurements have not been verified in the field⁶¹.

19. Another curious interpretation of the photos is the one read aloud by Professor Crawford in the first round: that "This high rate of erosion" — which we have seen is not erosion at all but simply the result of the completion of the *caño* clearing — "is additionally facilitated with the high velocity of water flowing in from the San Juan river"⁶². Costa Rica does not explain how it is able to determine the velocity of a flowing river from a satellite photo. I am sure this would be of great interest to the scientific community. It might even qualify someone for a Nobel Prize. But fortunately, there is accurate information, rather than rank speculation, about water velocity in this part of the San Juan, measured not from outer space but *in situ*. It is included in the EIS, which determined the water velocity in the last 6 km of the river to be only 0.569 m/s — which is almost exactly 2 km/hour — which means the water is barely moving at all⁶³. The velocity in the *caño* is

⁵⁹See, e.g., doc. No. 14, statements of Elsa María Vivas Soto (hereafter "document 14: Vivas statements"), paras. 4 and 24 (explaining that "[t]he progress of the cleaning activities in the *caño* at the time of [her] visit [from 24-26 Nov. 2010] was approximately 50%"); see also CR 2011/2, p. 33, para. 9 and p. 44, para. 39 (Reichler).

⁶⁰E.g., doc. No. 17, certification of Lester Antonio Quintero Gómez (hereafter "document 17: Quintero certification"), paras. 1-2.

⁶¹CR 2011/1, pp. 64-65, para. 36 (Crawford).

⁶²CR 2011/1, p. 65, para. 36 (Crawford).

⁶³Doc. No. 16: Quintero declaration, Ann. 3: Excerpts from Environmental Impact Study Final Report, p. 12.

even slower, at 0.397 m/s⁶⁴. So much for Costa Rica's high water velocity/erosion theory. No wonder they stopped arguing it.

20. Costa Rica suggests that the dredging activity some 400 m upstream from the entrance to the *caño* will somehow increase the water velocity in the river and the amount of water flowing into the *caño*⁶⁵. But this makes no sense. The dredging they complain about is actually on the Nicaraguan bank of the river, rather than in the river itself. And they acknowledge this⁶⁶. Cutting this channel increases neither the volume of water in the river or its velocity. Velocity depends on the gradient, or slope of the river, not its path, and Costa Rica provides no information on that at all. But that too is contained in the EIS, which says the slope in this part of the river is "quite flat and low" — in fact, it is a mere .02 per cent, which is, for all practical purposes, almost completely flat⁶⁷. That is why the water is barely moving in this section. The dredging here will not increase either the amount of water or the velocity as it approaches the *caño* 400 m downstream. It will have no effect on the *caño*.

21. Professor Crawford pointed out yesterday that a separate EIS was not prepared for the *caño* clearing, as it was for the dredging of the river⁶⁸. That is true, but beside the point. In the first place, as the evidence shows, an environmental analysis of the *caño* clearing project was submitted by EPN to the Environment Ministry, and the Ministry conducted its own review of the potential environmental impacts, including a site visit and an inspection report⁶⁹. Second, the EIS for the dredging project already included an exhaustive analysis of the impacts on sedimentation and water quality in the San Juan⁷⁰. These are the same sediments and water that flow through the *caño* to Nicaragua's Harbor Head Lagoon; no additional analysis of them was required. As explained in the documents Nicaragua submitted to the Court last week, the Environment

⁶⁴Doc. No. 17: Quintero certification, para. 2.

⁶⁵E.g., CR 2011/1, p. 32, para. 32 (Crawford) ("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 . . .").

⁶⁶*Ibid.*

⁶⁷Doc. No. 16: Quintero declaration, Ann. 3: Excerpts from Environmental Impact Study Final Report, p. 12.

⁶⁸CR 2011/3, p. 27, para. 24 (Crawford).

⁶⁹Doc. No. 13: Espinoza affidavit, paras. 22-29 and Ann. 9; see also No. doc. 14: Vivas statements, paras. 1-13 and Ann. 1.

⁷⁰Doc. No. 16: Quintero declaration, para. 8 as well as corresponding pages of Ann. 3 thereto; see also doc. No. 13: Espinoza affidavit, para. 20 (c).

Ministry's review "was carried out in conformity with the applicable legal requirements . . . which, in the case of strictly manual works of such a small scope, do not mandate the preparation of a separate Environmental Impact Study"⁷¹. Another site inspection by the Ministry near the conclusion of the project confirmed that there were no significant, irreversible or unanticipated environmental impacts⁷².

22. In any event, the issue for Costa Rica is not whether there was a separate EIS in regard to the clearing of the *caño*, but whether it has shown a likelihood of imminent and irreparable harm as a result of that activity. Nicaragua submits that Costa Rica has failed to meet this burden. In fact, Costa Rica has not shown the likelihood of any harm, let alone irreparable harm.

23. This conclusion is confirmed by the report of the Dutch experts from the Delft Technical University. Professor Crawford said yesterday that there are aspects of this report that he agrees with⁷³. That was nice. Then he said "I have not got time to deal with the inadequacies of the Delft report."⁷⁴ I think we all know what that means. I understand my friend's time is extremely valuable, especially when he is arguing in this Court, but could he not have spared a minute, 30 seconds even, to identify at least one little inadequacy of this report? If, indeed, there is one. After all, he did find the time to tell us an amusing anecdote about Admiral Horatio Nelson⁷⁵. I think it is safe to assume that if there were any deficiencies in the Delft Report, he would have told us about them.

24. In any event, the conclusions of the Delft report are fully corroborated by other evidence, including the EIS and Costa Rica's own studies. In particular, it is indisputable that the impact of the dredging project on the flow of the Colorado river will be less than 5 per cent as the Dutch experts found⁷⁶, and Costa Rica's study confirms⁷⁷. And it is indisputable that the water volume in

⁷¹Doc. No. 13: Espinoza affidavit, para. 23.

⁷²Doc. No. 14: Vivas statements, paras. 18-25.

⁷³CR 2011/3, p. 33, para. 45 (Crawford).

⁷⁴*Ibid.*, para. 46.

⁷⁵*Ibid.*, p. 30, para. 32.

⁷⁶Doc. No. 18: Report of Dutch Experts, p. 4 ("In the EIS, it was calculated that the proposed dredging project decrease the flow of the Colorado river by less than 5% . . . the EIS conclusion was correct and . . . conservatively estimated, the proposed dredging project is likely to decrease no more than 20 cubic meters per second of the flow in the Colorado River (which is of the order of 1400 – 1700 m³/s).")

⁷⁷Costa Rican Flow Report, p. 5.

the *caño* is a miniscule 2.38 m³/s — which is not enough to cause a significant environmental impact — and that the water velocity in the *caño* is less than 0.4 m/s — which is barely moving⁷⁸. These measurements, the only ones taken in the field, stand unchallenged.

25. In sum, there is not the slightest evidence that the clearing of the *caño*, which was completed last month, is likely to cause any harm to Costa Rica. There is certainly no evidence of the likelihood of irreparable harm.

26. Mr. President, Members of the Court, this completes my presentation today. I thank you again for your courtesy and kind attention, and I ask that you call Professor Pellet to the podium.

The PRESIDENT: I thank Mr. Paul Reichler for his presentation. I now call upon Professor Alain Pellet.

M. PELLET : Merci beaucoup, Monsieur le président.

LES NOUVELLES MESURES CONSERVATOIRES DEMANDÉES PAR LE COSTA RICA

1. Monsieur le président, Mesdames et Messieurs les juges, lors du premier tour de plaidoiries du Costa Rica, le professeur Crawford a posé, avec une certaine insistance, la question suivante :

«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 ?»⁷⁹ Objection Your Honour ! This is a leading question — that is «one that suggests the desired answer or assumes the existence of a disputed fact»⁸⁰ («misleading» might be more accurate...).

2. «With respect», ou plutôt, avec tout le respect qui s'impose, Monsieur le président, car il serait mal séant que je continue à plaider en anglais dans cette enceinte où opèrent de remarquables interprètes, cette question est mal posée et n'appelle pas de réponse, mais elle reflète fort bien les demandes que le Costa Rica avait formulées initialement et qui, comme la «question Crawford», relevaient de la méthode Coué ou du *wishful thinking*. Pour parler plus familièrement et reprendre

⁷⁸ Doc. No. 17: Quintero certification, paras. 1-2; see also CR 2011/2, p. 33, para. 9 and p. 45, para. 40 (Reichler).

⁷⁹ CR 2011/1, p. 53, par. 2 (à deux reprises) et p. 72, par. 54 (Crawford).

⁸⁰ Blackstone Society, Trial Advocacy Guide (<http://www.blackstone.asn.au/>).

l'expression que j'ai utilisée lors du premier tour⁸¹, c'est mettre la charrue avant les bœufs. La véritable question, ouverte et franche, qui se pose, est toute différente ; elle est de savoir si, lorsqu'un territoire est contesté entre deux Etats, l'un d'eux peut obtenir, par le biais d'une demande en indication de mesures conservatoires, que les activités menées par l'autre Etat dans la zone contestée fassent l'objet d'une condamnation par la Cour, fût-elle provisoire, avant qu'elle se prononce, plus tard, au sujet de la souveraineté sur le territoire en cause. Le Costa Rica semble s'en être finalement aperçu comme le montrent les conclusions finales lues par son agent à la fin de l'audience d'hier.

3. Lors du premier tour de plaidoiries du demandeur, le professeur Crawford avait beaucoup insisté sur sa question — qu'il avait lue pas moins de trois fois⁸². Il s'agissait en fait d'essayer de vous convaincre d'adjuger au Costa Rica ses conclusions au fond, avant même que l'affaire ait été plaidée. Ce faisant, le demandeur espérait obtenir que vous prononciez des mesures conservatoires partant du postulat (car, à ce stade, ce n'est qu'un postulat) que la «zone frontalière» dans laquelle ont pris place les activités que le demandeur reproche au Nicaragua relève de la souveraineté costa-ricienne.

4. Les mesures que le Costa Rica vous priait de décider telles qu'elles étaient exposées à la fin de sa demande en indication de mesures conservatoires étaient biaisées, au même titre que «la question Crawford», car, elles aussi, postulaient que le Nicaragua avait envahi un territoire costa-ricien, qu'il occupait et sur lequel il se livrait à des activités, en conséquence, illicites.

5. Comme je l'ai montré mardi, procéder de cette manière au stade des mesures conservatoires aurait été totalement inacceptable (je dis «aurait été» car ce n'est plus ce que le Costa Rica vous demande). Pour faire droit aux demandes de l'Etat requérant, vous eussiez dû admettre son postulat, à savoir que les activités contestées seraient menées par le Nicaragua «sur le territoire costa-ricien». Or, ceci ne peut être affirmé par le demandeur comme une vérité révélée : il lui appartient de le *démontrer*. Et il ne peut le démontrer au stade où nous en sommes, celui des mesures conservatoires ; ce sera l'un des objets de la procédure principale — celle durant laquelle

⁸¹ CR 2011/2, p. 65, par. 35 (Pellet).

⁸² Voir note 1, *supra*.

les Parties s'expliqueront sur le fond de l'affaire à la suite d'un débat contradictoire, serein et complet.

6. Nos amis de l'autre côté de la barre ont, dans un premier temps, tenté d'écarter ce préalable aussi indispensable que gênant pour eux, en plaidant l'évidence.

7. A cette fin, ils ont affirmé d'abord qu'il existerait une sorte de parallèle entre d'une part, la condition du *fumus boni juris* (qui implique que le *demandeur* de mesures conservatoires invoque des droits au moins plausibles) et, d'autre part, la prétendue obligation dans laquelle se trouverait le *défendeur* d'établir que les droits dont il se prévaut seraient vraisemblablement affectés par l'indication des mesures demandées⁸³. Cette exigence, qui ne trouve aucun appui dans la jurisprudence de la Cour, n'a pour elle que l'apparence, très trompeuse, de la logique.

8. Ce serait en effet mettre l'Etat défendeur dans une position très difficile. Une demande en indication de mesures conservatoires est une procédure *incidente* qui le prend par surprise et se déroule dans l'urgence : même si, parfois, l'urgence est relative, le défendeur doit se défendre sans vraiment savoir ce dont on l'accuse. Le demandeur a pu fourbir ses arguments et préparer ses preuves ; le défendeur, lui, ne sait ce qui lui est reproché que par une requête et une demande en indication de mesures conservatoires de quelques pages ; et il est dans une position particulièrement difficile lorsque, comme c'est le cas en l'espèce, le demandeur tente de le noyer (et la Cour avec lui !) sous une avalanche de documents fournis à la dernière minute, et je ne compte pas les quelque huit cents pages du dossier des juges dont le Costa Rica nous a affligés mardi dernier. En fait, en procédant ainsi, l'Etat demandeur poursuit toujours le même objectif : imposer à la Cour, ou tenter d'imposer à la Cour, de se prononcer sur le fond de sa requête par le biais de l'examen, nécessairement sommaire, de sa demande en indication de mesures conservatoires.

9. L'autre motif invoqué par le Costa Rica pour tenter de vous faire avaliser son postulat de base (le caractère costa-ricien de la zone sur laquelle les activités litigieuses ont pris place) a été que l'affaire qui nous réunit aujourd'hui ne serait pas un différend territorial ou frontalier⁸⁴ (votre

⁸³ CR 2011/1, p. 52, par. 51 (Kohen).

⁸⁴ CR 2011/1, p. 16, par. 4 ; p. 18, par. 7 (Ugalde Alvarez) ; p. 37, par. 4, p. 38, par. 7 (Kohen) ; p. 66, par. 38 (Crawford).

jurisprudence établit de manière très convaincante qu'il n'y a pas lieu de faire la différence dans la plupart des cas)⁸⁵.

10. Il est exact que le demandeur ne vous a pas saisis directement d'un différend de ce type. Et le titre que vous avez retenu pour notre affaire reflète bien l'objet proclamé de sa requête : il s'agit d'un litige concernant «certaines activités menées par le Nicaragua dans la région frontalière». Mais cela laisse entière la question de savoir si ces activités sont ou non licites. Et ce titre — qui, contrairement à la *leading* ou *misleading question* du professeur Crawford, est sans parti-pris — implique aussi que la licéité de ces activités ne peut être appréciée qu'en fonction de l'emplacement de la frontière. Celui-ci — cet emplacement — n'est pas l'objet du différend ; sa détermination n'en est pas moins un préalable nécessaire à sa solution — un parmi d'autres car il me semble évident que, sur le fond, vous serez appelés aussi à répondre à d'autres questions ; mais un problème préliminaire obligé. Et incontournable, il l'est aussi au stade des mesures conservatoires.

11. Le refus de cette évidence était tellement évidemment mal fondé que les conclusions finales revues par le demandeur confirment de manière éclatante que la question posée par le professeur Crawford n'était pas la bonne.

12. En effet, Monsieur le président, la Partie costa-ricienne, s'apercevant sans doute de sa bévue, s'essaie à un mouvement de contournement de dernière minute, en modifiant *in extremis* ses conclusions de façon à «gommer» l'aspect «territorial» de ses demandes. Elle ne vous prie plus d'ordonner «*the immediate and unconditional withdrawal of all Nicaraguan troops from the unlawfully invaded and occupied Costa Rican territories*»⁸⁶, elle vous demande seulement de décider que le Nicaragua ne doit plus faire stationner de troupes armées ou d'autres agents dans la zone contestée — dans laquelle elle renonce, très raisonnablement, à parler d'invasion et d'occupation. Elle ne vous demande plus la «cessation immédiate du percement d'un canal *en territoire costa-ricien*», «la cessation de l'abattage d'arbres, de l'enlèvement de végétation et des travaux d'excavation *en territoire costa-ricien*» ou «du déversement de sédiments *en territoire*

⁸⁵ *Plateau continental de la mer Egée (Grèce c. Turquie), compétence de la Cour, arrêt, C.I.J. Recueil 1978, p. 35, par. 84 ; Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986, p. 563, par. 17 ; Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994, p. 38, par. 75.*

⁸⁶ Demande en indication de mesures conservatoires, par. 19.1 ; les italiques sont de nous.

costa-ricien», ou encore «du programme de dragage en cours, mis en œuvre par [le Nicaragua] en vue d'occuper et d'inonder le *territoire costa-ricien*»⁸⁷ : elle se garde dorénavant de préjuger, dans ses demandes, l'appartenance du territoire sur lequel elle vous prie de décider — car vous *décidez* lorsque vous indiquez des mesures conservatoires — que le Nicaragua ne doit pas construire ou élargir un canal, abattre des arbres, enlever la végétation ou déverser de sédiments. Et elle définit le territoire en question de façon plus neutre comme étant «la zone comprenant l'entièreté de Isla de Portillos, c'est-à-dire, à la rive droite du fleuve San Juan et entre les rives de la lagune los Portillos (connue aussi comme Harbour Head Lagoon) et de la rivière Taura»⁸⁸.

13. De l'avis du Nicaragua, Monsieur le président, ces changements ne sont nullement «cosmétiques» : en renonçant à postuler que le territoire contesté est costa-ricien, le demandeur reconnaît du même coup qu'à la base de l'affaire qu'il a soumise à la Cour, il y a un contentieux territorial ; ceci contrairement à ses allégations insistantes de mardi⁸⁹, dont on ne trouve plus qu'un écho très assourdi dans celles d'hier, «What a difference a day makes, twenty-four hours later», un jour plus tard les lendemains déchantent⁹⁰.

14. Cet abandon a deux conséquences fondamentales.

15. En premier lieu, la «question Crawford» ne se pose plus — en admettant qu'elle se fût jamais posée : le Costa Rica a renoncé à faire, dans un même mouvement, la question et la réponse. Raisonner ainsi revenait à demander à la Cour de préjuger que la zone frontalière où les activités litigieuses du Nicaragua avaient pris place était costa-ricienne. Cette tentative du demandeur de se faire adjuger par avance ses conclusions sur le fond a fait long feu ou, comme l'eût dit un ancien président de la République française, elle a fait «pschitt»⁹¹... Et, en tout cas, dès lors que le demandeur admet enfin l'évidence, à savoir que le territoire sur lequel les activités litigieuses se sont déroulées est contesté, on ne voit plus comment la Cour pourrait ordonner au seul Nicaragua des mesures qui ne s'appliqueraient pas tout autant au Costa Rica.

⁸⁷ *Ibid.* ; les italiques sont de nous.

⁸⁸ Conclusions du Costa Rica, dans le texte français lu par l'agent du Costa Rica à l'audience le 12 janvier 2011 (CR 2011/3, p. 38, par. 16).

⁸⁹ Voir *supra*, note 84.

⁹⁰ Voir notamment CR 2011/3, p. 22, par. 7-8, «The absence of a territorial dispute» (Crawford).

⁹¹ Jacques Chirac, allocution du 21 juillet 2001 (<http://www.ina.fr/economie-et-societe/justice-et-faits-divers/video/1756263001009/interview-jacques-chirac-billets-d-avion.fr.html>).

16. Mais, à vrai dire, il faut aller plus loin, car on ne voit plus du tout ce que la Cour pourrait bien décider :

- le stationnement de troupes ? La nouvelle rédaction de cette conclusion implique que le Costa Rica a pris conscience de l'inconvénient qu'il y aurait à empêcher toute patrouille dans la zone litigieuse, ce qui reviendrait à créer une zone d'impunité pour les narcotrafiquants et autres malfaiteurs ; en revanche, l'agent du Nicaragua l'a dit⁹², et il le redira, aucune troupe ne stationne sur le territoire ainsi défini ;
- la construction ou l'élargissement d'un canal ? Il n'y a jamais eu rien de tel — comme l'a montré le professeur McCaffrey tout à l'heure ; et, je le redis⁹³, il n'est pas davantage question de ceci pour un avenir proche ; si un canal devait être percé un jour (conformément au droit que le Nicaragua tient de l'article VIII du traité de 1858 et du point 10 de la sentence Cleveland⁹⁴), ce ne serait que dans une perspective très lointaine ;
- l'abattage d'arbres et le dépôt de sédiments dans cette zone ? Comme nous l'avons dit et répété⁹⁵, le nettoyage et le débroussaillage du *caño* sont terminés et ce n'est que dans ce cadre que la question se posait.

17. Or, Monsieur le président, il n'est peut-être pas inutile de le rappeler, lorsque, durant une audience de la haute juridiction, l'agent d'une Partie fait part de l'intention de l'Etat qu'il représente de ne pas se livrer à certains actes dont il est suspecté, la Cour se fonde sur ces assurances et, lorsque celles-ci sont données à l'occasion d'une procédure en indication de mesures conservatoires, elle s'abstient d'ordonner les mesures sollicitées⁹⁶. L'ambassadeur Argüello Gómez a donné de telles assurances, et, sans être devin, je crois qu'il a l'intention de les répéter tout à l'heure. Il n'existe dès lors, de toute manière, aucun motif justifiant que la Cour

⁹² CR 2011/2, p. 13, par. 28 (Argüello Gómez).

⁹³ CR 2011/2, p. 54, par. 10 (Pellet) ; voir aussi *supra*, par. 4-9 (McCaffrey).

⁹⁴ Sentence Cleveland rendue le 22 mars 1888 à Washington au sujet de la validité du traité de limites conclu en 1858 entre le Costa Rica et le Nicaragua, *RIAA.*, vol. XXVIII, p. 210, point 6 (annexe 2 à la requête introductive d'instance, 18 octobre 2010).

⁹⁵ CR 2011/2, p. 16, par. 36 (Argüello Gómez).

⁹⁶ Voir par exemple : *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. 134, par. 83-84 ou *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009*, par. 72.

indique les mesures conservatoires demandées par le demandeur ; nous aurions bien aimé que l'agent du Costa Rica soit aussi rassurant...

18. S'agissant du dragage, les choses sont différentes. Mais avant de commenter la nouvelle rédaction de la demande costa-ricienne sur ce point, il me semble nécessaire de procéder à une petite, mais je crois utile, mise au point. Dans sa présentation d'hier, le professeur Crawford a affirmé : «Mr. President, there are two dredging projects, not one. Project one is the one described by the EIS. Project two is the project that Mr. Eden Pastora is actually carrying out.»⁹⁷ Dit ainsi, cela n'est pas exact : certes (et Paul Reichler vient de l'expliquer très clairement), il y a deux projets : l'un, qui est terminé, a consisté dans le nettoyage du *caño* ; il n'a comporté aucune opération de dragage (ce qui eût, du reste, été techniquement irréalisable). Seul le second, qui est en cours, sous la direction de M. Pastora, et s'étendra sur plusieurs années, est une opération de dragage des derniers 42 kilomètres du San Juan.

19. La nouvelle conclusion du Costa Rica concernant cette opération s'abstient d'imputer au Nicaragua de sombres desseins et contraste, par sa sobriété en tout cas, avec celle qui figurait dans la demande costa-ricienne du 18 novembre par laquelle il exigeait :

«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»⁹⁸.

Dorénavant, le Costa Rica ne demande plus à la Cour que d'ordonner au Nicaragua la suspension de «son programme de dragage du fleuve San Juan dans la zone adjacente à la zone pertinente»⁹⁹. Ceci étant, le dragage est une réalité, à la grande différence des activités que j'ai évoquées précédemment, qui soit ne sont nullement envisagées, soit sont terminées, et qui, pour celles qui sont terminées, se sont déroulées sur un territoire dont l'appartenance à l'une ou l'autre des Parties est contestée. Et le Nicaragua n'a l'intention ni d'arrêter ni de suspendre cette opération qui est menée exclusivement sur le San Juan, c'est-à-dire sur un territoire dont il n'est pas contesté qu'il

⁹⁷ CR 2011/3, p. 25, par. 15 (Crawford).

⁹⁸ Demande en indication de mesures conservatoires déposée par la République du Costa Rica, 18 novembre 2010, p. 7, par. 19, point 5.

⁹⁹ Conclusions du Costa Rica, dans le texte français lu par l'agent du Costa Rica à l'audience le 12 janvier 2011 (CR 2011/3, p. 38, par. 17).

est nicaraguayen¹⁰⁰. Elle présente au surplus une importance fondamentale pour le désenclavement économique de la région et le développement d'un tourisme écologique et durable ; et la mener seulement sur une portion du fleuve entre la bifurcation du Colorado et la ville de San Juan del Norte n'aurait aucun sens.

20. Ceci étant, Mesdames et Messieurs de la Cour, il existe plusieurs excellentes raisons pour lesquelles nous sommes convaincus que vous vous abstenrez d'ordonner la suspension du dragage demandée par le Costa Rica :

- 1) comme Paul Reichler l'a montré à nouveau, il ne peut en résulter aucun dommage tangible pour l'Etat demandeur, qu'il s'agisse de la navigabilité du Colorado ou de l'environnement de la région (qui devrait même s'en trouver plutôt amélioré) ;
- 2) en tout état de cause, parler d'urgence est une mystification : même si les renforts de dragueurs attendus par M. Pastora devenaient une réalité, il faudrait encore plusieurs années avant que la situation existant à la fin du XIX^e siècle soit rétablie (si elle peut l'être) et que des navires d'un gabarit « commercialement intéressant » puissent l'emprunter ;
- 3) il n'empêche qu'en imposant la suspension de ces travaux indispensables, dans une aire qui plus est indéterminée (qu'est-ce que c'est que « la zone adjacente à la zone pertinente » ?), l'ordonnance de la Cour espérée par le Costa Rica infligerait au Nicaragua un préjudice indiscutable — sans contrepartie positive pour le demandeur ; même M. Crawford a admis que le San Juan est affecté par un problème de sédimentation (au sujet duquel il a été jusqu'à invoquer les mânes de Nelson...) tout en s'efforçant de le minimiser¹⁰¹ ;
- 4) hier, le même avocat du Costa Rica est revenu sur le point 3.6 de la sentence Cleveland pour faire remarquer que l'autorisation qui y est donnée au Nicaragua de procéder à des travaux d'amélioration n'était pas inconditionnelle¹⁰² ; nous ne contestons pas du tout cela, Monsieur le président, mais ce n'est pas le problème ; si, mardi, j'ai mis l'accent sur cette disposition tout à fait essentielle de la sentence de 1888 en ce qui nous concerne, ce n'était pas pour revendiquer pour le Nicaragua un droit illimité de procéder à n'importe quels travaux sur le San Juan, mais

¹⁰⁰ Voir notamment CR 2011/1, p. 70, par. 49 (Crawford) ; CR 2011/3, p. 25, par. 13 (Crawford).

¹⁰¹ CR 2011/3, p. 30-31, par. 32-33.

¹⁰² CR 2011/3, p. 34-35, par. 52-56 (Crawford).

pour souligner que la sentence Cleveland envisageait expressément l'hypothèse dans laquelle de tels travaux seraient illicites et causeraient des dommages au Costa Rica — et je cite le passage pertinent :

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

De manière fort significative, mon contradicteur et grand ami — l'un, heureusement, n'empêche pas l'autre ! — a cité le début du point 3.6 mais, une nouvelle fois, pas l'extrait que je viens de lire. C'est pourtant celui-ci qui est pertinent ; d'abord parce qu'il en résulte que la sentence Cleveland envisage expressément et la possibilité de travaux d'amélioration (et nul ne conteste que c'est ce dont il s'agit) et le risque d'un dommage¹⁰³, ce qui interdit de considérer que la demande remplit la désormais très fameuse condition du *fumus boni juris* ; et, ensuite parce que cette disposition dit pour droit que, si ce risque se réalisait, la seule réparation envisageable serait l'indemnisation. Une telle décision ne pourrait évidemment être prise par la Cour que lors de l'examen du fond de l'affaire et, tout aussi évidemment, le Costa Rica ne peut prétendre arracher par le biais d'une ordonnance en indication de mesures conservatoires ce qu'il ne saurait obtenir dans votre futur arrêt.

21. Quant à la conclusion C, vous priant d'ordonner que le Nicaragua ne fasse rien qui puisse «porter préjudice aux droits du Costa Rica, ou ... aggraver ou étendre le différend porté devant la Cour», je n'ai pas grand-chose à ajouter à ce que j'avais dit mardi au sujet de la conclusion correspondante qui figurait dans la demande du 18 novembre dernier, et qui était rédigée de la même manière : une telle demande de mesure de non-aggravation n'a et ne peut avoir aucune autonomie par rapport aux autres mesures¹⁰⁴. Si, comme le Nicaragua en est convaincu, vous n'ordonnez pas ces autres mesures, vous ne déciderez pas non plus celle-là, Mesdames et Messieurs les juges — et si, par impossible, vous décidiez, malgré votre jurisprudence maintenant établie et les raisons sérieuses qui la justifient, de faire droit à cette dernière demande du Costa Rica, il n'y aurait bien sûr aucune raison que vous adressiez cette objurgation au seul Etat

¹⁰³ Voir CR 2011/3, p. 31, par. 34-35 (Crawford).

¹⁰⁴ Voir CR 2011/2, p. 56-57, par. 14 et p. 61, par. 24 (Pellet).

défendeur : l'article 41 de votre Statut vous donne mission de préserver les droits de *chacune* des Parties, pas du seul demandeur et nous savons que vous ne l'oublierez pas. Mais, encore une fois, cette demande n'est pas justifiée et l'accepter, même en indiquant la même mesure au Costa Rica et au Nicaragua, ne pourrait qu'encourager les parties à de futures affaires devant la Cour à introduire des demandes en indication de mesures conservatoires dans l'espoir d'une victoire factice dont elles pourraient se prévaloir devant leurs opinions publiques. Je ne suis pas sûr que ce soit un très bon signal.

22. Monsieur le président, au début de ma plaidoirie du premier tour j'avais indiqué qu'à mon sens l'instance imposée par le Costa Rica était superflue¹⁰⁵. Mes amis de l'autre côté de la barre ont fait mine de s'en offusquer¹⁰⁶. Et pourtant... Etait-il vraiment nécessaire de presser la Cour de se réunir et de donner la priorité à ces demandes sur toutes autres affaires (comme l'exige l'article 74 de son Règlement) ? En modifiant ses conclusions, l'Etat demandeur a ramené l'affaire à ses justes proportions : un différend territorial portant sur l'appartenance de 2 kilomètres carrés et demi de marécages peu hospitaliers, dont la détermination est le préalable nécessaire à la décision au fond que la Cour devra prendre sur l'affaire partielle dont le Costa Rica l'a saisie. Du même coup, cela fait ressortir le caractère artificiel et assez vain des mesures conservatoires qui lui sont demandées : elles sont sans objet et ne pourraient être que sans portée.

Mesdames et Messieurs les juges, je vous remercie de votre patiente attention, et je vous prie, Monsieur le président, de bien vouloir appeler l'agent de la République du Nicaragua à cette barre.

The PRESIDENT: I thank Mr. Pellet for his presentation and now I ask His Excellency Ambassador Carlos José Argüello-Gómez to make his statement.

Mr. ARGÜELLO:

1. Mr. President, Members of the Court, good afternoon. The distinguished Agent of Costa Rica began his closing statement yesterday by asserting that the Agent of Nicaragua had "manqué à la vérité", that is, that I had not told the truth when I stated in my first presentation that:

¹⁰⁵ CR 2001/2, p. 51, par. 1 (Pellet).

¹⁰⁶ CR 2011/3, p. 21, par. 1 (Crawford).

“The sequence of events that has brought the Parties again before the Court can be explained briefly. It is a repetition of what has been happening for nearly two centuries: every time Nicaragua attempts to make any substantial use of the San Juan river, Costa Rica finds a reason for dispute.”

2. I am not going to get involved in a historical debate on the reasons that have originated the disputes of Nicaragua and Costa Rica. In the judges’ folders you have a copy of an article published in the *New York Times* in 3 April 1898, that is, at the time General Alexander was in Nicaragua. The title itself is interesting, not only for the present case brought by Costa Rica, but also as an explanation of its attempt to intervene in the *Nicaragua v. Colombia* case that is also presently before the Court.

3. The headlines of the article reads, “Plan to Grab Nicaragua; Colombia said to be behind Costa Rica against the other South American; State Scheme to Control Canal” — I continue quoting what is on the screen. [CAG1] — and this is from the *New York Times* 110 years ago —

“Without attempting now to go into the intricate history of the matter, which dates back to colonial days, it may be said that while Costa Rica may have very good reason to press Nicaragua into a war *à outrance* instead of trusting to the more modern and humane method of arbitration, Nicaragua on her part feels that she must come up to the line and fight for her life.

The situation, briefly reviewed, is just this: Costa Rica has long but unsuccessfully tried to establish territorial claims that would entitle her to a material share in and control of any canal that might be devised to connect the Atlantic and Pacific through Central American territory. So long as such a canal was a mere speculative theory, however, Costa Rica saw no reason to press the claim. Colombia apparently was going to have the monopoly of the waterway, and without a canal in it the territorial question was not worth pressing.”

4. Costa Rica has attempted to portray the assertion of Nicaragua’s rights over the area of Harbor Head as a newfangled claim by Nicaragua invented by Mr. Pastora. In the previous case brought by Costa Rica, the issues before the Court did not involve questions of sovereignty but only of Costa Rica’s limited rights of navigation in the river. For this reason, Nicaragua did not go into these questions and limited itself to making certain reservations with relation to the situation at the mouth of the San Juan river. But these reservations do not leave room for doubt that Nicaragua was indicating that there was a dispute in relation to the situation at the mouth of the river.

5. Thus, Nicaragua stated in its Counter-Memorial that it reserved its rights generally on all questions of attribution of territory at the general area of the mouth of the San Juan river. Although

this reservation pointed to a specific sketch-map, it is nonetheless a very clear general reservation on territorial sovereignty at the mouth of the river¹⁰⁷.

6. Another very important reservation on questions relating to sovereignty at the mouth of the river was made at the oral hearings of that case. On that occasion, as Agent of Nicaragua, I stated:

“Other very important issues stemming from the 1858 Treaty are still in dispute between the Parties and involve, for example, the situations of the Bays of San Juan and Salinas. Since assertions have been made on these questions during the present hearings, Nicaragua leaves on record that it reserves its rights on all questions relating to these issues.”¹⁰⁸

7. In speaking of the previous case, it must be placed on record that Nicaragua denies that it has prohibited navigation on the San Juan river by Costa Rican nationals as alleged in paragraph 41 (f) of Costa Rica’s Application. Yesterday, Costa Rica’s distinguished Agent claimed that the regulations enacted by Nicaragua on navigation in the San Juan breached Costa Rica’s rights and were also contrary to the Judgment of 13 July 2009. This is not a correct statement and Nicaragua denies any violations of Costa Rica’s rights. Since this is a question for the merits, at this time Nicaragua would simply point out that what Costa Rica is attempting to do is to also reopen the previous case.

8. Mr. President, there were several references by Costa Rica that distort the issues presently before the Court. The present situation has been portrayed as similar to the situation faced by Nicaragua in the 1980s, when it had recourse to the Court requesting provisional measures in order to stop the military and paramilitary attacks it was suffering. Professor Kohen, for example, stated:

“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 mercenaires¹⁰⁹. 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.”¹¹⁰

¹⁰⁷Sketch-map 5 of the Costa Rican Memorial does not reflect the correct attribution of territory of Nicaragua and Costa Rica at the general area of the mouth of the San Juan river. Nicaragua therefore reserves her rights generally on these questions. (Counter Memorial of Nicaragua, p. 9, fn. 14.)

¹⁰⁸CR 2009/4, para. 35, 5 Mar. 2009.

¹⁰⁹*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.*

¹¹⁰CR 2011/1, para 29.

9. The reference to a case where thousands of lives were lost and many more imperilled, and with enormous destruction of the economy and infrastructure of Nicaragua, and where there was not the most remote claim of territorial sovereignty in dispute, is totally out of place.

10. Even more so is Professor Crawford's equating the present situation with the invasion of Czechoslovakia¹¹¹. The comparison of a dispute over a small uninhabited swamp with the invasion of Czechoslovakia is completely out of place and unnecessarily unmindful of the tragedy of the Czechs and Slovaks under the boots of the Nazis. Attempting to place the Court in the position of Neville Chamberlain is well . . . the Court can be the judge of that. Since it is difficult to believe that the distinguished Professor is seriously asserting this, I must presume that the comparison was made in the same vein as the comparison of a felling of a tree to the destruction of the Court.

11. Mr. President, Members of the Court, Costa Rica apparently has a fixation with Mr. Pastora. He was mentioned by Costa Rican counsel yesterday in a preliminary count at least 36 times. But it is not the first time Mr. Pastora's name comes up in Court. Twenty-five years ago Nicaragua filed a case against Costa Rica because of its collaboration with the contra forces attacking Nicaragua from Costa Rican territory. Their main support and assistance was to the contra forces organized and headed by Mr. Pastora. If the Court is interested in reviewing the record, Nicaragua's Memorial in that case mentioned Mr. Pastora 48 times. If 25 years ago Costa Rica was boosting Mr. Pastora for attacking Nicaragua, now it has accused him of criminal activities and formulated charges against him in Costa Rican courts because he is back home helping his own country to recover the treasure of its San Juan river. The unjust criminal proceedings against Mr. Pastora are just another escalation of this situation by Costa Rica.

12. Costa Rica has thrown aspersion on the declarations of Nicaraguan officials attesting that they regularly patrolled and kept peace in the area of Harbor Head. As can be seen from the map on the screen [CAG 2] and the general area, the Harbor Head area is only a few minutes away by boat and it is only common sense that they have patrolled the area and should continue to do so. As you can see on the screen, the town of San Juan del Norte, San Juan de Nicaragua and the former Greytown, are just under 3 km away from the area in dispute. So, if this is not patrolled by

¹¹¹CR 2011/1, para. 54.

Nicaragua, the area of Harbor Head would have become the modern Tortuga's Island retreat for all the criminals and drug traffickers in the Caribbean. Costa Rica, for her part, has not dared to allege that her forces patrolled or kept peace in the area. In fact they have not been in the area and their nearest post is 40 km away at the point of the formation of the delta of the San Juan river.

13. Mr. President, Members of the Court, Costa Rica's first request for provisional measures called for "the immediate and unconditional withdrawal of all Nicaraguan troops".

14. Costa Rica's new final submissions request that the Court should order that Nicaragua:

"shall not, in the area comprising the entirety of Isla Portillos, that is to say, across the right bank of the San Juan River and between the bank of the Laguna Los Portillos (also known as Harbour Head Lagoon) and the Taura River ('the relevant area'):
1. Station any of its troops or other personnel; 2. Engage in the construction or enlargement of a canal; 3. Fell trees or remove vegetation or soil; 4. Dump sediment".

15. In my first presentation I indicated that:

"There are no troops presently in the swampland. There is no permanent military post in the area. The patrol of the area is presently done as it has always been done by boat along the waters of the river which are indisputably Nicaraguan."

I can further add to this that Nicaragua has no intention of stationing troops or personnel of any type in the swampland Nicaragua identifies as the area of Harbor Head and which coincides with the area Costa Rica alludes to with other names.

16. Costa Rica's second request is for "the immediate cessation of the construction of a canal across Costa Rican territory". No canal was being constructed or is planned to be constructed in this area. What was being done — and it is now over — was the cleaning of the main channel that flows from the San Juan proper to Harbor Head.

17. Costa Rica's third request is for "the immediate cessation of the felling of trees, removal of vegetation and soil from Costa Rican territory, including its wetlands and forests". Since this request refers to the operations involved in the cleaning of the channel, the same reasoning applies, since it is over.

18. The fourth request calls for "the immediate cessation of the dumping of sediment in Costa Rican territory". In so far as this so-called dumping refers to any operations during the cleaning of the channel, these are over and finished.

19. This new request from Costa Rica for the Court to order these new provisional measures is recognition that what was stated in Nicaragua's first presentation is true; that is, that those activities are presently not going on. In this respect, this new request for reformulated provisional measures is irrelevant and should be denied by the Court. It is in fact asking the Court to order Nicaragua not to do something which it is not doing, and has told the Court it will not be doing.

20. Costa Rica's original fifth request called for:

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

21. Costa Rica's new request asks the Court to order Nicaragua to “suspend its ongoing dredging programme in the River San Juan adjacent to the relevant area”. This ambiguous request by Costa Rica cannot prosper. What part of the San Juan is adjacent to the “relevant area”? The mouth of the river? From what point? The whole area of the river from the point that the Colorado branches off the San Juan river? But more important than this ambiguity is the fact that it is not reasonable to accept that Nicaragua can dredge the river but not all of it. How can a river be dredged if part of it is plugged or corked? If the river is to be left corked at the mouth then dredging upstream is pointless, unless Costa Rica is thinking that a dam should be erected at the mouth of the river. Nicaragua accepts Costa Rica's implicit recognition that Nicaragua can continue with its dredging programme of the river, but cannot accept the limit Costa Rica requests be imposed on the dredging of part of the river. This is a question of either Nicaragua has a right to dredge or it has not that right.

22. Costa Rica's final request remains invariable in asking the Court to order “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”. As Professor Pellet explained, this request is irrelevant and should not be granted. In fact, it is a request that the Court order something so that the Party not go away empty-handed. Granting it is an invitation to States to come to invoke the Court's emergency procedures for minor grievances, real or imagined.

23. If the Court were to consider there is a need for ordering this type of measure, then it is only logical and fair that it should be applicable to both States.

24. Mr. President, Members of the Court, Nicaragua needs no encouragement to protect its unique environmental riches, including its wetlands at the mouth of the San Juan river. Although Nicaragua takes exception to the report of the RAMSAR Advisory Mission, and the manner in which it was conducted, our Minister of the Environment, Mrs. Juana Argeñal, who has been part of our delegation to the Court, is proceeding tomorrow to Geneva, to meet with the RAMSAR Secretariat and renew our invitation for an advisory mission to visit Nicaragua and lend its technical support for the protection and preservation of these wetlands.

25. Mr. President, Members of the Court, the dispute over a 2.5 sq km area at the mouth of the river is something that could easily be resolved by negotiations. In the case brought by Nicaragua against Honduras for the delimitation of the maritime boundary (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*) a significant issue was the problem of the changes of the starting-point of the boundary located at the thalweg of the mouth of the Coco river where it reached the Caribbean Sea. This point had been exactly determined by a bilateral commission of Nicaragua and Honduras in 1963. Forty years later, when the case came before the Court, this point was no longer located at the mouth of the Coco river but was located approximately 1.5 km inland. In that case, the Court, after fixing an extensive maritime boundary, determined that this small portion of the boundary should be left undetermined and should be negotiated by both Parties. The Court found

“that the parties must negotiate in good faith with a view to agreeing on the course of the delimitation line of that portion of the territorial sea located between the endpoint of the land boundary as established by the 1906 Arbitral Award and the starting-point of the single maritime boundary determined by the Court” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment, I.C.J. Reports 2007* (Vol. II), p. 763, para. 321 (4)).

26. The small area involved in that case was more extensive than the area now disputed by Costa Rica.

Mr. President, I will now place on record Nicaragua's submissions:

FINAL SUBMISSION

In accordance with Article 60 of the Rules of Court and having regard to the Request for the indication of provisional measures of the Republic of Costa Rica and its oral pleadings, the Republic of Nicaragua respectfully submits that,

For the reasons explained during these hearings and any other reasons the Court might deem appropriate, the Republic of Nicaragua asks the Court to dismiss the Request for provisional measures filed by the Republic of Costa Rica.

27. Mr. President, distinguished Members of Court, to conclude our participation in this stage of oral proceedings, I wish to express, on behalf of the Government of the Republic of Nicaragua, our thanks to you, Mr. President, and each of the distinguished Members of Court, for the attention you have kindly provided to our presentations. May I also offer our thanks to the Court's Registrar, his staff and to the interpreters and translators.

28. Finally, I would also like to thank publicly the skilful counsel and advisers and all the members of our delegation. Thank you, Mr. President.

The PRESIDENT: I thank His Excellency Ambassador Carlos José Argüello Gómez, the Agent of Nicaragua for his statement.

Now, this concludes the second round of oral observations of the Republic of Nicaragua on the Request for the indication of provisional measures filed by the Republic of Costa Rica. But before closing, three judges have asked to take the floor to ask questions to one of the Parties. They are Judge Simma, Judge Bennouna and Judge Greenwood. I am going to call upon each of the three judges in that order. First, Judge Simma, you have the floor.

Judge SIMMA: Thank you, Mr. President. I have three questions for Nicaragua:

1. Before the hearing of 11 January 2011, did Nicaragua ever make, or attempt to make, Costa Rica aware of its claim according to which the course of the boundary does not follow that documented on all existing — including Nicaraguan — maps, but “reaches the river proper by the first channel met” — that is the First Alexander Award of 1897 — this clause being interpreted as referring to the “Caño Harbour Head”?

2. Considering the physical changes in the area of the delta of the San Juan river already known at the time of the Cleveland and Alexander awards, why has Nicaragua, within the last century or so, never made an attempt to negotiate a new course of the boundary, or at least to change its maps?
3. The dredging project concerning the San Juan river relates to a shared environment. In light of this, why was the Nicaraguan Environmental Impact Study prepared from 2006 onwards and the permit of the Environment Ministry of December 2008 for the San Juan dredging project to proceed, as well as the extension of the permit to the cleaning of the “caño”, never communicated to Costa Rica?

Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Simma. Next I call upon Judge Bennouna to ask his questions.

M. le juge BENNOUNA : Je vous remercie, Monsieur le président. Monsieur le président, j'ai aussi trois questions qui s'adressent au Nicaragua. Je pense que ces questions devraient être l'occasion pour le Nicaragua dans ses réponses de clarifier et de préciser certains points qu'il a évoqués au cours de la procédure. Ces trois questions sont les suivantes :

1. Est-ce que le Nicaragua entreprend actuellement des travaux sur le canal dit «First Caño», y compris ceux relatifs à la construction et à l'élargissement de ce canal, l'abattage d'arbres, l'enlèvement de la végétation ou de la terre, et le déversement des sédiments ?
2. Est-ce que le Nicaragua maintient sur la portion du territoire dénommée l'île de Portillos des troupes armées ou d'autres agents, quels qu'ils soient ?
3. Est-ce que le Nicaragua s'engage à ne pas entreprendre de tels travaux, ni à envoyer ses troupes armées ou d'autres agents sur l'île de Portillos, jusqu'à ce que la Cour rende son jugement au fond ?

Je vous remercie, Monsieur le président.

The PRESIDENT: Thank you, Judge Bennouna. Now I ask Judge Greenwood to ask his questions.

Judge GREENWOOD: Thank you, Mr. President. Mr. President, I have two questions for Nicaragua:

1. First, at what date did Nicaragua first form the opinion that what it has described as the “First Caño” was the boundary between itself and Costa Rica in accordance with the First Alexander Award?
2. Secondly, did it notify Costa Rica of that opinion? And if so, when and by what means?

The PRESIDENT: Thank you, Judge Greenwood. Now the text of these questions of the three judges will be sent to the Parties as soon as possible. The Party to whom the questions are addressed is invited to provide its written replies to the questions before Tuesday 18 January 2011 at 6 p.m. at the latest.

In addition, Article 72 provides that any written reply by a party to a question put under Article 61, supplied by a party under Article 62 of these Rules, received by the Court after the closure of the oral proceedings shall be communicated to the other party which shall be given the opportunity of commenting upon it. Now, in accordance with this rule, the other party is given this opportunity to offer comments, and that deadline is set for Thursday 20 January 2011 at 6 p.m. at the latest.

This brings the present series of sittings to an end. It remains for me to thank the representatives of the two Parties for the assistance they have given to the Court by their oral observations in the course of these four hearings. In accordance with practice, I would ask the Agents to remain at the Court’s disposal.

The Court will render its Order on the Request for the indication of provisional measures as soon as possible. The date on which this Order will be delivered at a public sitting will be duly communicated to the Agents of the Parties.

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

The Court rose at 6.20 p.m.
