

SEPARATE OPINION OF JUDGE OWADA

1. I have voted in favour of the conclusions reached by the Court in the operative part (*dispositif*) of the present Judgment, as I have no disagreement with these conclusions as such. It is my view, however, that certain specific aspects of the reasoning (*ratio decidendi*) of the Judgment that have led the Court to these conclusions have not been developed with sufficient clarity in the reasoning part (*motifs*) of the Judgment. For this reason, I wish to attach this opinion of mine, with a view to elaborating my own view on these points as I see them in the reasoning of the Judgment. (It goes without saying that I do not intend to put my own words into the language of the Judgment, but wish to explain how I see certain points covered by the Judgment.)

I. THE ISSUE OF SOVEREIGNTY OVER THE DISPUTED TERRITORY

2. In my view, the question of sovereignty over the “disputed territory” constitutes the central issue of the dispute brought before the Court in 2010 by Costa Rica in relation to certain activities conducted by Nicaraguan authorities. In the present Judgment, while the Court has rightly concluded that the legal instruments relevant for determining sovereignty over the “disputed territory” should be the 1858 Treaty, the Cleveland Award of 1888 and the Alexander Award of 1897, the language of the Judgment does not seem to have been sufficiently articulate on the logical sequence that exists between these relevant legal instruments. Thus on the issue of territorial sovereignty, which should be the prerequisite for determining the concrete allegations by the Applicant of violations of sovereignty by the Respondent, the Judgment summarily concludes that “Articles II and VI [of the 1858 Treaty], taken together, provide that the right bank of a channel of the river forms the boundary on the assumption that this channel is a navigable ‘outlet of commerce’” (Judgment, paragraph 76).

3. For the purpose of our analysis of these documents, however, the Court in my view should start from the premise that what is determinative in this case is first and foremost the interpretation of the 1858 Treaty and pursue the logical sequence of the relevant legal instruments, i.e., first the 1858 Treaty, then the Cleveland Award, which was meant to give an authoritative interpretation of the 1858 Treaty, and finally the Alexander Awards, which were given under the mandate of General Alexander to demarcate the boundary and to implement the Cleveland Award, in light of their assigned roles and purposes in their contexts. In my view, thus, the central issue that determines the issue of sovereignty over the disputed territory is *not* the identification of the geographical location of “the first channel met”, used in the first Alexander Award, among the many watercourses that could have existed (or now exist) in the wetland of the disputed territory, as some of the counsel have tried to persuade the Court. In my view, however, the Court’s task is rather to apply the basic interpretative reasoning followed by General Alexander within the scope of his mandate under the Pacheco-Matus Convention of 1896, to “proceed with [the demarcation] of the border line” on the basis of the 1858 Treaty and the Award rendered in 1888 by President Cleveland, who had been entrusted with the task of deciding upon, *inter alia*, “all . . . points of doubtful interpretation which either of the parties may find in the [1858 Treaty]”, and thus of giving an authoritative interpretation of the 1858 Treaty. Under these circumstances, the task for the Court has not and cannot have been literally to follow the line described in the first Alexander Award in 1897, particularly as General Alexander already was faced with the difficulty of investigating what the Cleveland Award had established as the authoritative interpretation of the 1858 Treaty, because of the changed geography of the area over the intervening 30 years. The resolution by the Court of the question of territorial sovereignty over the disputed territory in this situation is to be based on the same legal sources (i.e., the national boundary as determined by the 1858 Treaty) and the same legal reasoning that General Alexander applied in implementing the Cleveland Award of 1888, which, even after the passage of 30 years, provided the authoritative and binding interpretation and determination of the boundary prescribed by the 1858 Treaty.

4. It is this reasoning in my view that General Alexander applied in his first Award of 30 September 1897, when considering how the natural terminus of the San Juan River (which used to be the “right-hand headland of the harbour mouth”) as determined by the 1858 Treaty could reach the San Juan River proper following what used to be the San Juan River’s right bank. Already at the time of the first Alexander Award, the only possible way to identify the navigable waterway (as contrasted to any watercourse) that connected this “natural terminus” of the San Juan River to the Lower San Juan River was to follow the edge of the Harbor Head Lagoon until it reached the San Juan River proper. If we transfer this reasoning to the present situation, the contour of the territory following from General Alexander’s underlying reasoning, rather than the actual boundary line that he demarcated on the ground at that time, would unequivocally lead one to the conclusion that the disputed territory is under Costa Rican sovereignty.

5. Incidentally, in understanding the prescriptive description of the first Alexander Award, it is useful to note that the term used by General Alexander was “the first *channel* met” (emphasis added), and not “the first *caño* met”. (The term “channel”, according to the *Oxford English Dictionary*, denotes as a geographic term “[a] (comparatively) narrow piece of water, wider than a mere ‘strait’, connecting two larger pieces, usually seas”. This would appear to be the proper definition of the term for establishing what General Alexander had in mind, assuming that the first Alexander Award was originally drafted in English.) Be that as it may, there seems to be no doubt that General Alexander came to the conclusion that this “channel” was the one to follow in determining the boundary line as defined by the 1858 Treaty and interpreted by the Cleveland Award, not because General Alexander found that it was there as the first watercourse that he came across on his journey following the water along the Harbor Head Lagoon, but because he acted on his understanding that this “first channel” represented part of the main stream of water flowing from the San Juan River proper leading to the starting point of the boundary line which was at the mouth of the River. In other words, General Alexander was trying faithfully to follow the prescription of the 1858 Treaty contained in its Article II, namely that: “The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua river, and shall run along the right bank of the said river up to point three English miles distant from Castillo Viejo . . .” (Emphasis added.)

6. The third Alexander Award is also indicative of the reasoning of General Alexander, inasmuch as it explicitly affirms that the position of the boundary line will be altered only by “changes in the banks or channels of the river . . . as may be determined by the rules of international law applicable on a case-by-case basis” (third Alexander Award, *RIAA*, Vol. XXVIII, p. 230; emphasis added), and not just by any watercourse that can serve the purpose of letting water pass from the San Juan River proper to the Harbor Head Lagoon.

7. In other words, if we translate the language and transfer the reasoning of the Alexander Awards to the present-day geographical situation of the area, there could be no question that the reasoning underlying the first Alexander Award would lead to the unequivocal outcome that the Court has reached in the present Judgment on the question of sovereignty over the disputed territory. The task of the Court is simply to apply the reasoning of General Alexander in his first Award in a geographically generic, though not geodetically specific, manner to the boundary as prescribed in the 1858 Treaty, in order to reach the conclusion on the issue of sovereignty over the disputed territory. For this purpose, the Court has only to proceed from the “natural terminus” of the Lower San Juan River determined in the 1858 Treaty as interpreted by the Cleveland Award and as subsequently implemented by the Alexander Awards. This “natural terminus” is, as was determined by General Alexander in his first Award, “the northwestern extremity of what seems to be the solid land, on the east side of the Harbor Head Lagoon” (first Alexander Award, *RIAA*, Vol. XXVIII, p. 220). Having thus identified the terminus of the boundary, the determination of sovereignty over the disputed territory flows from the boundary line that runs along the right bank

of the river. Of course, such a riverine connection between the Harbor Head Lagoon and the San Juan River itself is no longer in existence at the present time. In this situation, the only logical way to draw that boundary line connecting what was “the right-hand headland of the harbour mouth” to the San Juan River is to follow the edge of the Harbor Head Lagoon until it reaches the present-day stream of the San Juan River proper. Once this line reaches the right bank of the river, the boundary line must turn upstream as the 1858 Treaty prescribes.

8. It should be added that the Parties in the present case have also provided the Court with a number of arguments, including references to *effectivités*, and have produced a range of supporting evidentiary materials, such as maps, witness affidavits, and expert statements relating to fluvial morphology and other aspects of the geographical context of the disputed territory, all relating to the question of whether or not any navigable channels might have traversed or currently traverse the disputed territory. The Judgment has assessed the evidentiary merit of all these materials for determining the question of territorial sovereignty, but has come to the conclusion that their evidentiary value was not determinative of the question of sovereignty. My own conclusion is that the totality of such evidence amounts in fact to very little that is material or conclusive for determining the question of territorial sovereignty over the disputed territory, to the extent that the central issue that is determinative of the question is the content of the 1858 Treaty, as interpreted by the Cleveland Award and subsequently implemented by the Alexander Awards.

II. LEGAL CONSEQUENCES OF THE COURT’S FINDING RELATING TO SOVEREIGNTY OVER THE DISPUTED TERRITORY

9. In my view, what is involved in the present dispute is not, in its fundamental nature, the situation of a classical territorial dispute that is normally brought before the International Court of Justice for judicial settlement. A territorial dispute is typically presented to the Court after attempts by the Parties at an exchange of views in order to identify the existence of a difference of positions on an issue and following a process of negotiations for its peaceful settlement. In the present case, however, the territorial dispute has been caused primarily by unilateral action taken in the form of a physical incursion by one State into the territory of another State that had been primarily held for many years by the latter State. This appreciation of the nature of the dispute in the present case is apparent from the language of the Judgment itself (Judgment, paragraphs 67-69 and paragraph 229 (2)), including in addition its finding that Nicaragua breached the Court’s Order of 8 March 2011, *inter alia*, by establishing a military presence in the disputed territory (Judgment, paragraph 229 (3)). Whatever validity the claim by the Respondent over the disputed territory may have had, such a unilateral act of incursion by that State would amount to something more than an incidental violation of the territorial sovereignty of that latter State.

10. In my view, given this undisputable circumstance, it would have been appropriate for the Court to have treated the actions by Nicaragua in question as a straightforward case of the commission of an internationally wrongful act, which could arguably constitute an unlawful use of force under Article 2 (4) of the United Nations Charter. An act of this nature would generally entail an obligation to undertake remedial measures, including reparation, going beyond a mere obligation to achieve the *restitutio in integrum* of the *status quo ante*.

11. While I have concurred with the Court’s decision to consider that an incursion has taken place, but to refrain from going further into the question of what other legal consequences of this incursion should follow in light of the Court’s finding that “by excavating three *caños* and establishing a military presence on Costa Rican territory, Nicaragua has violated the territorial sovereignty of Costa Rica” (Judgment, paragraph 229 (2), see also paragraph 229 (3)), it is my view that it would have been more appropriate for the Court to have gone further by declaring that

these internationally wrongful acts by Nicaraguan authorities constituted an unlawful use of force under Article 2 (4) of the United Nations Charter.

12. The present Judgment has not pursued that course, limiting itself to the factual finding of an incursion as referred to above, without going into any further discussion on the possible legal consequences of such an incursion. A reference made to the Judgment in the *Cameroon v. Nigeria* case of 2002 in this context to justify this approach would seem to be quite inappropriate. In that earlier Judgment, the Court had concluded that

“by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court will not therefore seek to ascertain whether and to what extent Nigeria’s responsibility to Cameroon has been engaged as a result of that occupation.” (Case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 452, para. 319.)

This reference to the case of *Cameroon v. Nigeria* in my view could be quite misleading as the *Cameroon v. Nigeria* case is qualitatively different from the present case and should clearly be distinguished from the present situation, inasmuch as the former case, different from the present case, had not been caused by an action of one Party to alter the existing status quo through unilateral means. The Judgment should in my view have taken a more correct approach in its characterization of such a blatant case of incursion and its legal consequences.

III. THE NATURE OF THE REQUIREMENT TO CONDUCT AN ENVIRONMENTAL IMPACT ASSESSMENT

13. In their written and oral pleadings, both Parties invoked the existence of a legal obligation under general international law not to cause significant transboundary harm. The existence of such an obligation has been confirmed in some of the Court’s past decisions, including, in particular, its Judgment in the case concerning *Pulp Mills on the River Uruguay* (see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp. 55-56, para. 101).

14. In the process of carrying out the obligation to act in due diligence under international environmental law, the requirement of conducting an environmental impact assessment becomes a key element for determining whether certain activities may cause significant transboundary harm. This requirement comes to play a significant role in both of the joined cases in the present proceedings. The issue of environmental impact assessment has been raised by both Parties against each other respectively in each of the joint cases. In this context, they seemed to quote approvingly the *dictum* from the Court’s Judgment in the *Pulp Mills* case.

15. In its Judgment in the *Pulp Mills* case, the Court referred to the environmental impact assessment as “a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law” (*ibid.*, p. 83, para. 204).

16. This *dictum* of the Court should be placed in contrast with that of the International Tribunal for the Law of the Sea, which in its 2011 Advisory Opinion on the *Responsibilities and obligations of States with respect to activities in the Area* appears to have gone a step further by declaring that an environmental impact assessment as such is a “general obligation under

customary international law”. More specifically, it states as follows: “It should be stressed that the obligation to conduct an environmental impact assessment is *a direct obligation under the [UNCLOS] and a general obligation under customary international law.*” (*Responsibilities and obligations of States with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, para. 145; emphasis added.)

17. By comparison, the reasoning of this Court in its Judgment in the *Pulp Mills* case appears to take a more nuanced approach to this requirement, when it circumscribes the scope and content of such an environmental impact assessment in the following manner:

“general international law [does not] specify the scope and content of an environmental impact assessment Consequently, it is the view of the Court that *it is for each State to determine* in its domestic legislation or in the authorization process for the project, *the specific content of the environmental impact assessment required in each case*, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 205; emphasis added.)

The Court also stressed the continuous nature of the process of environmental impact assessment on a case-by-case basis, as follows:

“an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.” (*Ibid.*, pp. 83-84, para. 205.)

18. These statements of the Court in its Judgment in the *Pulp Mills* case would seem to suggest that in the *dictum* quoted in paragraph 15 above, the Court emphasized the crucial importance of this element in the context of the process of carrying out the obligation of due diligence, which is a holistic process. To summarize, conducting an environmental impact assessment is one important constituent element of the process that emanates from the international obligation of States to act in due diligence to avoid or mitigate significant transboundary harm, rather than a separate and independent obligation standing on its own under general international law. This obligation to act with due diligence in such a way that the initiation of potentially environmentally hazardous activities may be avoided constitutes an established obligation of international environmental law. In this holistic process, an environmental impact assessment plays an important and even crucial role in ensuring that the State in question is acting with due diligence under general international environmental law. It should also be noted that in the *Pulp Mills* case there was no need for the Court to establish this requirement of environmental impact assessment as a general legal obligation of international environmental law or to define its limits under customary international law, to the extent that the case hinged upon the construction of the 1975 Statute, which was a *lex specialis* applicable to that case.

19. Against this background the Court in the present Judgment can be said in my view to have maintained this balanced approach when it stated as follows:

“to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.

Determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case.

.....

If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.” (Judgment, paragraph 104.)

20. Based on this reasoning, the Court has held in the operative part of its Judgment that: “Costa Rica has violated its obligation under general international law by failing to carry out an environmental impact assessment concerning the construction of Route 1856” (Judgment, paragraph 229 (6)).

21. In sum, the environmental impact assessment, which is essentially of a technical nature, is a means to achieve the ultimate objective of preventing transboundary harm — an obligation relating to the due diligence required. In addition, an environmental impact assessment serves the purpose of enabling the public or civil society to participate in the ultimate decision-making process on activities with potentially significant environmental effects. Significant as the environmental impact assessment may be, as reflecting prevailing practice in recent years, the fact remains that the function of the environmental impact assessment is essentially one of a number of means to be employed when the circumstances of the case so require, in order to attain the ultimate legal objective that is binding upon States acting in the environmental field — an obligation to act with due diligence in order to prevent significant transboundary harm in the light of the assessed risks involved.

22. The present Judgment is in my view based on this position, as demonstrated by the passages of the Judgment quoted above. The relevant activities by States are to be reviewed in the specific circumstances of the case in light of this obligation of due diligence, through verifying whether the State has acted with due diligence, as evidenced by such elements as taking necessary measures to prevent significant transboundary harm, as it is the case here with Costa Rica in relation to its construction of the Road, or with Nicaragua in relation to the undertaking of its dredging activities. Conducting an environmental impact assessment is one important element (though not necessarily constituting an indispensable obligation as such) in the process of fulfilling the obligation of acting with due diligence to prevent significant transboundary harm in each case.

(Signed) Hisashi OWADA.
