

CR 2015/3

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2015

Public sitting

held on Tuesday 14 April 2015, at 3 p.m., at the Peace Palace,

President Abraham presiding,

*in the cases concerning Certain Activities carried out by Nicaragua in the Border Area
(Costa Rica v. Nicaragua); Construction of a Road in Costa Rica
along the San Juan River (Nicaragua v. Costa Rica)*

VERBATIM RECORD

ANNÉE 2015

Audience publique

tenue le mardi 14 avril 2015, à 15 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

*dans les affaires relatives à Certaines activités menées par le Nicaragua dans la région
frontalière (Costa Rica c. Nicaragua) ; Construction d'une route au Costa Rica
le long du fleuve San Juan (Nicaragua c. Costa Rica)*

COMPTE RENDU

Present: President Abraham
 Vice-President Yusuf
 Judges Owada
 Tomka
 Bennouna
 Cançado Trindade
 Greenwood
 Xue
 Gaja
 Sebutinde
 Bhandari
 Robinson
 Gevorgian
Judges *ad hoc* Guillaume
 Dugard

 Registrar Couvreur

Présents : M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Caçado Trindade
Greenwood
Mme Xue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Gevorgian, juges
MM. Guillaume
Dugard, juges *ad hoc*

M. Couvreur, greffier

The Government of Costa Rica is represented by:

H.E. Mr. Manuel A. González Sanz, Minister for Foreign Affairs and Worship of the Republic of Costa Rica;

H.E. Mr. Edgar Ugalde Álvarez, Ambassador on Special Mission,

as Agent;

H.E. Mr. Sergio Ugalde, Ambassador of Costa Rica to the Kingdom of the Netherlands, Member of the Permanent Court of Arbitration,

as Co-Agent, Counsel and Advocate;

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

Mr. Samuel Wordsworth, Q.C., member of the English Bar, member of the Paris Bar, Essex Court Chambers,

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

Ms Kate Parlett, Solicitor admitted in Queensland, Australia, and in England and Wales,

Ms Katherine Del Mar, member of the English Bar, 4 New Square, Lincoln's Inn,

as Counsel and Advocates;

Mr. Simon Olleson, member of the English Bar, 13 Old Square Chambers,

as Counsel;

Mr. Ricardo Otarola, Adviser to the Ministry of Foreign Affairs and Worship,

Ms Shara Duncan, Adviser to the Ministry of Foreign Affairs and Worship,

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

Mr. Rafael Saenz, Minister Counsellor at the Costa Rican Embassy in the Kingdom of the Netherlands,

Ms Ana Patricia Villalobos, Official at the Ministry of Foreign Affairs and Worship,

as Assistant Counsel;

Ms Elisa Rivero, Administrative Assistant at the Ministry of Foreign Affairs and Worship,

as Assistant.

Le Gouvernement du Costa Rica est représenté par :

S. Exc. M. Manuel A. González Sanz, ministre des affaires étrangères et des cultes de la République du Costa Rica ;

S. Exc. M. Edgar Ugalde Álvarez, ambassadeur en mission spéciale,

comme agent ;

S. Exc. M. Sergio Ugalde, ambassadeur du Costa Rica auprès du Royaume des Pays-Bas, membre de la Cour permanente d'arbitrage,

comme coagent, conseil et avocat ;

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

M. Samuel Wordsworth, Q.C., membre des barreaux d'Angleterre et de Paris, Essex Court Chambers,

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

Mme Kate Parlett, solicitor (Queensland (Australie), Angleterre et pays de Galles),

Mme Katherine Del Mar, membre du barreau d'Angleterre, 4 New Square, Lincoln's Inn,

comme conseils et avocats ;

M. Simon Olleson, membre du barreau d'Angleterre, 13 Old Square Chambers,

comme conseil ;

M. Ricardo Otarola, conseiller auprès du ministère des affaires étrangères et des cultes,

Mme Shara Duncan, conseillère auprès du ministère des affaires étrangères et des cultes,

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

M. Rafael Saenz, ministre-conseiller à l'ambassade du Costa Rica au Royaume des Pays-Bas,

Mme Ana Patricia Villalobos, fonctionnaire du ministère des affaires étrangères et des cultes,

comme conseils adjoints ;

Mme Elisa Rivero, assistante administrative au ministère des affaires étrangères et des cultes,

comme assistante.

The Government of Nicaragua is represented by:

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

as Agent and Counsel;

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

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

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

Mr. Andrew B. Loewenstein, Attorney-at-Law, Foley Hoag LLP, member of the Bar of the Commonwealth of Massachusetts,

as Counsel and Advocates;

Mr. César Vega Masís, Deputy Minister for Foreign Affairs, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs,

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

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

as Counsel;

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

Ms Claudia Loza Obregon, First Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,

Mr. Benjamin Samson, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Ms Cicely O. Parseghian, Attorney-at-Law, Foley Hoag LLP, member of the Bar of the Commonwealth of Massachusetts,

Mr. Benjamin K. Guthrie, Attorney-at-Law, Foley Hoag LLP, member of the Bar of the Commonwealth of Massachusetts,

Mr. Ofilio J. Mayorga, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the Republic of Nicaragua and New York,

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 ;

M. Stephen C. McCaffrey, professeur de droit international à la McGeorge School of Law de l'Université du Pacifique à Sacramento, ancien membre et ancien président de la Commission du droit international,

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

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

M. Andrew B. Loewenstein, avocat au cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,

comme conseils et avocats ;

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

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

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

comme conseils ;

M. Edgardo Sobenes Obregon, conseiller à l'ambassade du Nicaragua au Royaume des Pays-Bas,

Mme Claudia Loza Obregon, premier secrétaire à l'ambassade du Nicaragua au Royaume des Pays-Bas,

M. Benjamin Samson, chercheur, Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest, Nanterre-La Défense,

Mme Cicely O. Parseghian, avocate au cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,

M. Benjamin K. Guthrie, avocat au cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,

M. Ofilio J. Mayorga, avocat au cabinet Foley Hoag LLP, membre des barreaux de la République du Nicaragua et de New York,

comme conseils adjoints ;

Mr. Danny K. Hagans, Principal Earth Scientist at Pacific Watershed Associates, Inc.,

Mr. Robin Cleverly, Geographical and Technical Consultant,

Ms Blanca P. Ríos Touma, Ph.D., Assistant Professor at Universidad Tecnología Indoamérica in Quito, Ecuador,

Mr. Scott P. Walls, Master of Landscape Architecture — Environmental Planning, Sole Proprietor and Fluvial Geomorphologist at Scott Walls Consulting, Ecohydrologist at cbec ecoengineering, Inc., and Chief Financial Officer and Project Manager at International Watershed Partners,

Ms Victoria Leader, Geographical and Technical Consultant,

as Scientific Advisers and Experts.

M. Danny K. Hagans, spécialiste principal des sciences de la terre de Pacific Watershed Associates, Inc.,

M. Robin Cleverly, consultant dans les domaines géographique et technique,

Mme Blanca P. Ríos Touma, Ph.D., professeur adjoint à l'Universidad Tecnología Indoamérica de Quito (Equateur),

M. Scott P. Walls, titulaire d'une maîtrise en architecture paysagère et en planification de l'environnement, propriétaire unique et géomorphologue fluvial de Scott Walls Consulting, spécialiste en écohydrologie de cbec ecoengineering, Inc., directeur financier et chef de projet pour International Watershed Partners,

Mme Victoria Leader, consultante dans les domaines géographique et technique,

comme conseillers scientifiques et experts.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. Monsieur le juge *ad hoc* Guillaume n'est pas en mesure de siéger cet après-midi pour des raisons dont j'ai été dûment informé. Je vais donner d'abord la parole à M. Wordsworth pour une demi-heure, après quoi la Cour procédera à l'audition de l'expert cité par le Nicaragua. Monsieur Wordsworth vous avez la parole.

Mr. WORDSWORTH:

Nicaragua's breaches of Costa Rica's sovereignty over Isla Portillos

A. Introduction

1. Mr. President, Members of the Court, we now shift gear to the topic of Nicaragua's breaches of international law, and I make three introductory observations.

2. First, as this is not the usual boundary dispute case, but rather an occupy-first/justify-later case, Costa Rica is seeking more than a declaration as to its sovereignty over Isla Portillos. It seeks a series of declarations and other remedies that relate in particular to Nicaragua's unlawful incursion into Isla Portillos in late 2010-early 2011, and the unlawful construction of the three *caños* in Costa Rican territory.

3. Secondly, and this also takes this case away from the norm, the key facts are not in dispute, including as to the presence of the Nicaraguan military in Isla Portillos at the relevant points of time. There are points of detail or characterization to iron out, such as whether the first *caño* was being constructed or just "cleaned" or "cleared", as Nicaragua maintains, but these make little difference when it comes to the issue of breach. It is just as much a breach of Costa Rica's territorial integrity to enter its territory, cut down dozens of 100- or 200-year-old trees and excavate 6,000 cubic metres of soil¹ by way of a so-called "cleaning" operation as it is to cut down the same trees and excavate the same soil in order to construct a new *caño*.

¹Ministry of Environment, Energy and Telecommunications of Costa Rica, Technical Report to Ramsar: "Assessment and evaluation of the environmental situation in the Humdal Caribe Noreste within the framework of the Order of the International Court of Justice", 28 Oct. 2011, Memorial of Costa Rica (MCR), Ann. 155, pp. 33 and 92; Professor Colin Thorne, "Assessment of the physical impact of works carried out by Nicaragua since October 2010 on the geomorphology, hydrology and sediment dynamics of the San Juan River and the environmental impacts on Costa Rican territory", Oct. 2011, MCR, App. 1 (2011 Thorne Report, MCR, App. 1), pp. I-59-I-60.

4. And thirdly, the central question of breach of Costa Rica's territorial integrity follows largely as a matter of course from the determination of the dispute over sovereignty. The issues dividing the Parties go more to the precise legal principles in play, and the nature and extent of breach, not whether there is a basis for a finding of any breach of international law at all.

B. Unlawful incursion into and occupation of Isla Portillos by Nicaragua

(i) The underlying facts

5. Against this general backdrop, I turn to the unlawful incursion into Isla Portillos by the Nicaraguan military in late 2010-early 2011.

6. The details are set out in Chapter 3 of Costa Rica's Memorial, and have already been outlined by Ambassador Ugalde this morning. The presence of the Nicaraguan military on Isla Portillos, and the fact of construction of the first *caño*, was confirmed by means of overflights and inspections from 20 October to 1 November 2010. In the same way, it was confirmed that the Costa Rican flag flying in the territory had been taken down and replaced by a Nicaraguan flag, and that Nicaragua had established a military camp on Isla Portillos.

7. You can see this from this photograph of 1 November 2011; Nicaraguan soldiers at the camp directing their guns at the Costa Rican civilian aircraft conducting the overflight.

8. When, on 2 November 2010, Costa Rica called for an urgent meeting of the OAS "due to the fact that armed forces of the Republic of Nicaragua are entering Costa Rican territory in the border area of the San Juan River"², it invoked Article 21 of the OAS Charter which provides that: "[t]he territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever."

9. However, at the Special Session of the OAS that took place the following day, Nicaragua's representative argued that no violation of Costa Rican territory had occurred, and that Nicaraguan military and other personnel had been engaged in anti-drug trafficking activities on Nicaraguan territory³. But this was incorrect on two counts:

²Note from the Permanent Representative of Costa Rica before the OAS to the President of the OAS Permanent Council, ref. DE-065-10, 2 Nov. 2010, MCR, Ann. 51.

³See MCR, para. 3.22.

(a) First, and most obviously, the territory was not Nicaraguan.

(b) Secondly, the Nicaraguan military presence was due to construction of the *caño*. As Nicaragua's honourable Agent later told this Court, at the first provisional measures hearing: "The presence of Nicaraguan troops in this very difficult area during the months of October and November of last year was for the purpose of protecting the workers who were cleaning the channel connecting the river proper with Harbor Head."⁴

10. In the days following the Special Session, the OAS Secretary-General visited both States and, on 9 November, presented a report making a series of recommendations, including on avoiding the presence of armed forces or security forces in the area⁵. By resolution 978 of 12 November 2010, these recommendations were endorsed by the OAS Permanent Council, by 22 votes to two, and the two Parties were invited "to initiate simultaneously and without delay" the recommendation as endorsed⁶.

11. However, the Nicaraguan military was not then withdrawn from Isla Portillos.

(ii) The January 2011 hearing: questions posed to/answers given by Nicaragua

12. I move forward to the provisional measures hearing of 11-13 January 2011, by which time Nicaragua was stating in terms that no Nicaraguan military personnel were located on Isla Portillos, and also that it had no intention of stationing troops or personnel there⁷. This position was reiterated on 18 January 2011, in response to a question from Judge Bennouna.

(a) Judge Bennouna asked: «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?»

And the response of Nicaragua:

(b) «Aucune troupe nicaraguayenne ne stationne actuellement dans la zone en question et le Nicaragua n'a pas l'intention d'y établir de poste militaire à l'avenir. Il y a eu une présence

⁴CR 2011/2, p. 14, para. 29 (Argüello).

⁵OAS Report by the Secretary-General on his visit to Costa Rica and Nicaragua, ref. CP/doc.4521/10 corr.1, 9 Nov. 2011; MCR, Ann. 144.

⁶Resolution 978 (1777/10), Permanent Council of the OAS, ref. OEA/Ser.G CP/INF/6134/10, 12 Nov. 2010; MCR, Ann. 53.

⁷CR 2011/2, p. 13, para. 28 (Argüello); and CR 2011/4, p. 37, para. 15 (Argüello).

militaire dans cette zone durant la période de six semaines durant laquelle le *caño* a été nettoyé, mais ceci aux seules fins de la protection des ouvriers procédant à cette opération.»⁸

13. So, a straightforward question on the relevant facts, and a crisp and clear answer, even if one faintly massacred by a schoolboy French accent. The difficulty, however, is that Nicaragua's response — submitted some five days after the question had been posed — was simply wrong. A flight over the area by Costa Rican police on 19 January 2011, that is the day after Judge Bennouna's question, showed the *continuing* presence of Nicaraguan troops on Isla Portillos⁹.

14. No explanation has ever been given to the Court, as to how and why this incorrect information was given on what was a critical matter on Costa Rica's pending provisional measures application. The issue was ignored in Nicaragua's Counter-Memorial, submitted in August 2012¹⁰, although Nicaragua did later have to address the matter at the provisional measures hearing of October 2013. It accepted that Costa Rica's photograph showed a Nicaraguan army camp in the disputed area on 19 January 2011, but asserted, without any accompanying evidence, that this was closed down a few days later. There was then the following reluctant admission by Nicaragua's counsel:

“Yes, Nicaragua's statement on 18 January was a bit premature. But this is not evidence that Nicaragua violated its assurances to the Court, let alone that it is a serial violator. The larger truth [a telling formulation if ever there was one] is that Nicaragua did remove all its troops promptly, as it assured the Court that it would, and that it has honoured its word to keep them out of the disputed area ever since.”¹¹

15. It is as if Nicaragua's incorrect answer to a key question can be sidestepped through reformulation, and then by dismissing the answer actually given as if it were an unimportant matter of detail. And still no explanation was given as to how, despite the ample time available to establish the correct position, incorrect information was given to the Court. And from that it can safely be inferred that there is no satisfactory explanation to give.

⁸Reply of the Republic of Nicaragua to the questions put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, ref. 18012011-01, 18 Jan. 2011; response to question 2 of Judge Bennouna; judges' folders, tab 88.

⁹See photograph showing the presence of Nicaraguan troops in Isla Los Portillos after oral hearings on provisional measures, 19 Jan. 2011, MCR, Ann. 223.

¹⁰Counter-Memorial of Nicaragua (CMN), para. 7.7.

¹¹CR 2013/25, p. 28, para. 41 (Reichler).

16. As to what happened next, at some time after 19 January 2011, Nicaraguan troops were withdrawn; but regrettably they returned, and were camped on the beach of the disputed part of Isla Portillos in February 2013¹², that is, before the construction of the two further *caños* later that year.

17. At the hearing of January 2011, Nicaragua was also asked questions about when it had formulated the current claim to sovereignty over Isla Portillos, and when that claim had first been communicated to Costa Rica. As Professor Kohen has explained, Nicaragua's answer to the question posed by Judge Simma focused on its so-called White Book of 26 November 2010 and, cutting through the obfuscation, makes clear that any communication of the current claim, however vague, post-dates the military incursion.

18. And one sees precisely the same degree of obfuscation in the answers to the questions that were put by Judge Greenwood. These are at tab 88 of your judges' folder on the seventh page, but now also on the screen:

(a) 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?”

(b) The response:

“Nicaragua has considered this question a settled matter since the time the Umpire-Engineer found that the border followed ‘the first channel met’ until reaching the River proper. That is why Nicaragua has always patrolled the area with military and police authorities — patrolling of which Costa Rican authorities have been aware but have not objected — and that is why tourists (the few able to arrive when the River is navigable) are taken for visits along these wetlands and its several channels including the ‘first *caño*’ in those areas where it was not clogged up.”¹³

So, leaving aside the curious suggestion of tourist trips up the first *caño*, we are apparently to take the answer as 1897, that is, the date of the First Alexander Award. But that could not be a correct answer, and perhaps that is why a specific date is not given. The idea that Nicaragua formed the opinion that the first *caño* was the boundary in 1897 is wholly implausible in light of what

¹²See photograph of new Nicaraguan camps in the area indicated by the Court, 5 Feb. 2013, annexed to letter from Costa Rica to the ICJ, ref. ECRPB-016-013, 15 Mar. 2013.

¹³Reply of the Republic of Nicaragua to the questions put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, ref. 18012011-01, 18 Jan. 2011; judges' folders, tab 88.

General Alexander held in his First and Second Awards, and, indeed, in light of Nicaragua's then contentions before him.

(c) If one turns then to Judge Greenwood's second question, he asked:

“Secondly, did it notify Costa Rica of that opinion? And if so, when and by what means?”

Obviously that first element of the question is expecting a “yes/no” answer.

(d) In fact, that is not what comes:

“As indicated in the answer to the previous question” — the response goes — “Nicaragua considered that there was no special need of formal notification since Nicaragua has always accepted the Alexander Award and its determination that the first *caño* met was the border. So in fact, when Nicaragua began cleaning the *caño* it considered it was cleaning its own territory and naturally did not consider any notification was necessary.”¹⁴

So it is a form of telling non-response, which comes down to a “no”, there was “no notification”.

19. So, it follows from all this that the correct factual backdrop to this element of breach is as follows.

20. First, Nicaragua occupied the Costa Rican territory at issue and only subsequently did it lay claim to the area of Isla Portillos. It then unilaterally proceeded to apply on the ground its new position with respect to the location of the boundary, instead of withdrawing its troops consistent with OAS resolution 978.

21. Secondly, as becomes clear from a closer look at Nicaragua's responses to the questions of Judges Greenwood and Simma, there had been no prior claim to Isla Portillos, whether by reference to the “first channel met” theory or otherwise¹⁵. The true history, as just outlined by Professor Kohen, is of the two States' long-standing mutual recognition of Isla Portillos as Costa Rican territory.

¹⁴Reply of the Republic of Nicaragua to the questions put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, ref. 18012011-01, 18 Jan. 2011; judges' folders, tab 88.

¹⁵Costa Rica's comments on Nicaragua's responses were submitted on 20 January 2011: see comments by Costa Rica on the Reply of the Republic of Nicaragua to the questions put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, ref. ECRPB 017-11, 20 Jan. 2011.

22. Thirdly, even if the border had been in dispute, which it was not, there could have been no basis for the military action taken. There was no attempt to negotiate, by Nicaragua, despite the obligation to settle international disputes by peaceful means as a matter of both Article 2 (3) of the United Nations Charter and Article 3 (i) of the OAS Charter, which provides that: “[c]ontroversies of an international character arising between two or more American States shall be settled by peaceful procedures”. These key principles were just ignored.

(iii) Unlawful incursion and occupation: the individual heads of breach

23. I turn then to the individual heads of breach so far as concerns the unlawful incursion and occupation.

24. First, there has self-evidently been an infringement of Costa Rica’s territorial sovereignty. As the Court recalled in the *Kosovo* Advisory Opinion, “the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4”¹⁶.

25. The principle is also enshrined in the OAS Charter, at Article 21, as invoked by Costa Rica when it brought this matter before the OAS in November 2010. Nicaragua’s actions cut right across the principle of inviolability reflected in Article 21, and likewise the rule in Article 21 that the territory of another OAS State “may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever”.

26. And, as a matter of characterization, Nicaragua’s armed incursion and presence in Isla Portillos qualifies as military occupation, as to which it will be recalled from Common Article 2 of the 1949 Geneva Conventions that there is no requirement that an occupation be met by armed resistance.

27. Secondly, Nicaragua has breached Article IX of the 1858 Treaty of Limits, which establishes that:

“Under no circumstances, and even in case that the Republic of Costa Rica and Nicaragua should unhappily find themselves in a state of war, neither of them should

¹⁶Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II), p. 437, para. 80.

be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or in the San Juan river, or in the Lake of Nicaragua.”¹⁷

28. Thus, as a matter of the long-established border régime, it was not open to Nicaragua to send its troops into and seek to assert its sovereignty over Isla Portillos. That in itself constituted an act of hostility, as did the conduct of Nicaraguan soldiers directing their guns at a Costa Rican civilian aircraft taking photographs. Indeed, Nicaragua’s acts qualify as acts of aggression, as well as of hostility, as follows from Article 3 (a) of United Nations General Assembly resolution 3314 (XXIX), which defines aggression to include:

“[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof”.

29. Thirdly, in circumstances in which Nicaragua’s approach was to engage its military first and only later devise a claim to the territory in question, its acts are correctly regarded as amounting to the use or threat of use of force against the territorial integrity of Costa Rica, contrary to Article 2 (4) of the United Nations Charter, as well as Article 22 of the OAS Charter. Further, pursuant to Principle 1 of the Friendly Relations Declaration, which in this respect must be taken as representing customary international law:

“Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.”

30. Nicaragua has acted as if it were somehow immune so far as concerns this important duty.

C. Construction of the *caños* in 2010 and 2013

(i) The underlying facts

31. I move, now, to the breaches arising from Nicaragua’s construction of the three *caños* on Isla Portillos, as to which the basic facts are no longer in dispute.

32. Starting with the construction of the first *caño* in late 2010, Nicaragua admits that it carried out the relevant works, although it says it was merely cleaning the *caño*¹⁸. That is an

¹⁷Treaty of Limits between Costa Rica and Nicaragua (Cañas-Jerez), San José, 15 Apr. 1858, MCR, Ann. 1, Art. IX, judges’ folders, tab 36.

¹⁸CMN, para. 2.69.

inventive and inaccurate use of language as Nicaragua was in fact excavating the *caño* with a view to establishing a new outlet to the sea. And, in any event, Nicaragua accepts that this so-called cleaning involved large-scale excavation and the removal of 180 trees and also undergrowth¹⁹, over an area of approximately 7 hectares, as Ambassador Ugalde explained this morning²⁰. It involved removal of around 6,000 cubic metres of soil²¹. Nicaragua does say that this was not primary forest, and that the land in question had been used for agricultural purposes. But that could not be a defence, and nor does it anyway portray an accurate picture, as is evident not least from the photographic evidence, which shows that an area of long-established forest was indeed cut down. And, you will recall also, the photos at tabs 5 and 8 of the judges' folder that Ambassador Ugalde showed you this morning.

33. As to the second and third *caños*— and you will see the satellite image of 5 September 2013 is now up on your screens— these show how these two further *caños*, in particular, the larger eastern *caño* to the right of the screen, had been constructed in the disputed territory by early September 2013, on what was previously untouched wetland²², causing obvious harm to the environment. And you will see, just at the end of the *caño*, on the beach, you can see the Nicaraguan military camp.

34. Photographs taken by Costa Rica on 18 September 2013 show the larger of the two new *caños*, constructed in a straight line to the Caribbean Sea, with a width varying between 20 to 30 m, and measuring nearly 300 m. On the banks of this new *caño*, you can see that vegetation has been recently removed. At the top right of the photograph, on the beach just beyond the vegetation, again you see the Nicaraguan military camp, including a rudimentary observation tower. And the Court will recall how Nicaragua continued to work on the *caño*, without letting this be known to

¹⁹CMN, para. 2.67.

²⁰2011 Thorne Report, MCR, App. 1, p. I-36; Ministry of Environment, Energy and Telecommunications of Costa Rica, "Assessment and evaluation of the environmental situation in the Humedal Caribe Noreste within the framework of the Order of the International Court of Justice", 28 Oct. 2011, MCR, Ann. 155, pp. 43 and 49; and see G. Mathias Kondolf, "Distributary Channels of the Rio San Juan, Nicaragua and Costa Rica", July 2012, CMN, App. 1, p. 482, para. 2.9.

²¹Ministry of Environment, Energy and Telecommunications of Costa Rica, Technical Report to Ramsar: "Assessment and evaluation of the environmental situation in the Humdal Caribe Noreste within the framework of the Order of the International Court of Justice", 28 Oct. 2011, MCR, Ann. 155, pp. 33, 92; and 2011 Thorne Report, MCR, App. 1, pp. I-59-I-60.

²²Cf, earlier satellite images, where the *caños* do not appear. See, e.g., CMN, Ann. 135, 2007 Satellite Image and Ann. 136, 2010 Satellite Image. See also CMN, fig. 6.8, Jan. 2011 image, p. 330.

you or to Costa Rica, so that Costa Rica opened its provisional measures application at the October 2013 hearing with an inaccurate picture of how much excavation work had been carried out on the beach to enable the *caño* to break through into the sea.

35. The Court may also recall that Nicaragua had several inconsistent explanations for the appearance of these two new *caños*. Although Nicaragua initially tried to deny the existence of these *caños*²³, and then denied any knowledge of the works²⁴, these assertions were contradicted by its own official documents, and later by admissions from Nicaragua's Agent²⁵. It was only in October 2013, during the hearings on provisional measures, that Nicaragua ultimately accepted, (1) that these works had been carried out in the disputed territory by Mr. Pastora, a senior member of the Nicaraguan Government, and (2) that he had been assisted by a Nicaraguan Government department²⁶.

36. The correct position is that, astonishingly, Nicaragua was seeking once again to rechannel the waters of the San Juan down a freshly excavated *caño* on a short cut to the sea.

(ii) Breaches in respect of the three *caños*

37. As to Nicaragua's responsibility for the damage to Costa Rica's environment, this follows from the obligation to respect another State's territorial sovereignty, which of course prohibits State A from coming onto the territory of State B and carrying out works there which destroy property or the natural environment, or seek to refashion geography. All such acts are inherently unlawful absent permission or some equivalent defence. Nicaragua has no such defence, and is responsible to Costa Rica in respect of these acts. And, so far as concerns the damage to Costa Rica's environment, there is no threshold to meet, such as significant harm, as there would be in the more usual situation of alleged transboundary impacts.

²³Diplomatic Note sent by Samuel Santos López, Minister of Foreign Affairs, Nicaragua, to Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, 18 Sep. 2013, ref. MRE/DM/521/09/13, att. PM-5 to Costa Rica's New Request for Provisional Measures.

²⁴See letter from Nicaragua to the ICJ, ref. HOL-EMB-193, 10 Oct. 2013, p. 2; and Letter from Nicaragua to the ICJ, ref. HOL-EMB-197, 11 Oct. 2013, reference omitted, attached to letter from the ICJ to Costa Rica, ref. 142609, 11 Oct. 2013.

²⁵CR 2013/25, p. 16, para. 35 (Argüello).

²⁶CR 2013/25, p. 11, para. 17 (Argüello); CR 2013/25, p. 21, para. 15 (Reichler); CR 2013/25, p. 22, para. 17 (Reichler); CR 2013/25, p. 24, para. 24 (Reichler); and CR 2013/25, p. 46, para. 12 (Pellet). See also *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 365, para. 45.

38. Nicaragua is also subject to obligations that arise due to the special status of Isla Portillos which, as you will recall, forms part of a protected wetland under the Ramsar Convention. Parties to the Ramsar Convention are obliged to promote the conservation of the wetlands included in Ramsar's list²⁷, and not merely the conservation of wetlands within their sovereign territory. Further, pursuant to Articles 8 (*d*) and 10 of the 1992 Convention on the Conservation of Biodiversity, Nicaragua is obliged to promote the protection of ecosystems and natural habitats in the disputed territory, and to take the necessary measures to ensure the conservation of biodiversity²⁸. Nicaragua's destructive works have breached its obligations under these two conventions.

39. Mr. President, Members of the Court, that concludes my remarks for this afternoon, and I thank you for your kind attention.

Le PRESIDENT : Merci, Monsieur Wordsworth. Vous pouvez retourner à votre place. A présent la Cour va procéder à l'audition de l'expert cité par le Costa Rica. Mais je commencerai par expliquer brièvement la procédure qui sera suivie pour l'audition des experts et qui sera identique dans les deux affaires. J'appellerai d'abord l'expert à prendre place à la barre et lui demanderai de faire la déclaration prévue à l'alinéa *b*) de l'article 64 du Règlement de la Cour. La Partie faisant comparaître l'expert l'invitera ensuite à confirmer son exposé écrit qui tiendra lieu d'interrogatoire principal. La Partie adverse aura alors la possibilité de soumettre l'expert à un contre-interrogatoire sur la teneur dudit exposé ou de ses rapports antérieurs. L'interrogatoire complémentaire qui suivra sera limité aux questions soulevées lors du contre-interrogatoire. Des questions pourront ensuite être posées à l'expert par le président au nom de la Cour ou par les juges à titre individuel. L'expert devra répondre oralement sans autre délai sauf circonstances particulières, par exemple, lorsque l'information demandée doit faire l'objet de vérifications. Conformément à la pratique de la Cour, les compte rendus seront distribués aux Parties aussitôt que possible après chaque audience. L'expert sera invité à corriger dans le texte du compte rendu toute

²⁷Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar (Iran), 2 Feb. 1971, as amended by the Paris Protocol of 3 Dec. 1982 and the Regina Amendments of 28 May 1987, MCR, Ann. 14, Art. 3 (1).

²⁸Convention for the Conservation of the Biodiversity and Protection of the Main Wild Life Sites in Central America, 5 June 1992, MCR Ann. 23, Articles 8 (*d*) and 10.

erreur éventuelle sans modifier le sens ni la teneur de son exposé et devra rendre le texte corrigé et dûment signé au greffier dans les 24 heures suivant sa réception afin de faciliter tout contrôle que la Cour pourra juger bon d'exercer sur les corrections apportées. La Cour entendra aujourd'hui M. Colin Thorne. Monsieur Thorne, vous pouvez prendre place à la barre.

Bonjour, Monsieur Thorne. Je vous invite à faire la déclaration solennelle prévue pour les experts, dont l'énoncé figure à l'alinéa *b*) de l'article 64 du Règlement de la Cour.

Mr. THORNE:

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth, and that my statement will be in accordance with my sincere belief."

Le PRESIDENT : Merci, Monsieur Thorne. J'appelle maintenant le conseil du Costa Rica, M. Wordsworth, qui va vous demander de confirmer l'exposé écrit qui se trouve devant vous. Monsieur Wordsworth, vous avez la parole.

Mr. WORDSWORTH: Good afternoon. Could I ask you to confirm whether the three documents in front of you — that is, your summary prepared for the purposes of this hearing and your two reports prepared in the context of this case — reflect your honest expert views?

Mr. THORNE: Yes, they do.

Mr. WORDSWORTH: I believe counsel for Nicaragua will now have some questions for you.

Le PRESIDENT : Merci beaucoup. Je donne maintenant la parole au conseil du Nicaragua et donc je m'adresse à M. Reichler. Monsieur Reichler, vous avez la parole pour le contre-interrogatoire.

Mr. REICHLER: Thank you very much, Mr. President. If I may, I would just like to shake the hand of the witness, we have not met yet. I would like to find out if the judges' folders have been provided now to the witness and to counsel for Costa Rica. Has that been done? It was my understanding, Mr. President, that the judges' folders for today were to be provided to the witness

and to counsel for Costa Rica upon his swearing-in, and I just want to make sure that that is taken care of. Do we have for the witness as well?

Le PRESIDENT : Oui, il faut un exemplaire pour l'expert. Merci.

Mr. REICHLER: Mr. President, Members of the Court, good afternoon. It is, as always, an honour for me to appear before you. Professor Thorne, I bid you a good day as well. I thank you for your appearance and your willingness to respond to these questions. Mr. President, I start with two preliminary remarks, if I may, that I hope will come as welcome news both to the Court and to our friends from Costa Rica. First, I will make every effort to keep this examination as brief as possible. Second, I will not be asking any questions about dredging or deposition or removal of sediments. This, however, is a promise that only applies to today. We, of course, will co-operate with the Registry to remove from our overly-inclusive judges' folder any materials unrelated to the subjects that actually are addressed in this examination.

Professor Thorne, would you please turn to tab 6 of the judges' folder? This map — which is soon to be projected on the screen — is identified by Costa Rica as having been prepared in 1988 by the National Geographic Institute, Costa Rica's official mapping agency, in collaboration with the United States Defense Mapping Agency. Do you see on the enlargement where the map depicts channels of the Rio San Juan connecting directly to Harbor Head Lagoon, which is called by Costa Rica's name for it, Laguna Los Portillos?

Mr. THORNE: Yes, I do.

Mr. REICHLER: And can you see, Professor, that those channels are depicted by solid blue lines?

Mr. THORNE: Yes, I can.

Mr. REICHLER: May I, with your permission, refer you to the legend — which also has been enlarged — and particularly the very first line of it? Would you agree that the depiction of the solid blue line is intended by the maker of this map to reflect a channel that is considered perennial?

Mr. THORNE: It is labelled “perennial” so I would assume that it is intended to be a perennial water course.

Mr. REICHLER: May I refer you to two distinct areas on the right bank of the Rio San Juan itself: one area is depicted in green, the other to the north — adjacent to Harbor Head Lagoon — is in light blue. Do you agree — and feel free to refer to the legend if you care to — that the green area is intended to indicate woodland and the light blue area is intended to indicate a wetland with nipa or yolilla trees?

Mr. THORNE: I am not seeing the yolilla trees, can you help me?

Mr. REICHLER: If I can assist you, it is under the Spanish translation. The nipa would be on the left.

Mr. THORNE: I see, in the bottom-right corner. That seems to be the legend, yes.

Mr. REICHLER: Now, may I direct your attention to the bottom of the map where a note says that the map was prepared by the United States Defense Mapping Agency based on stereo photogrammetric methods from aerial photography taken in 1961, updated with photoplanimetric methods in 1988 from aerial photography taken in 1987. It also says “map not field-checked”. You see that, of course?

Mr. THORNE: I see that.

Mr. REICHLER: Do you agree with me that the lack of a field check does not render this map unreliable in regard to its depiction of these channels?

Mr. THORNE: No, I would not agree with that.

Mr. REICHLER: Was it not sufficient to make this map reliable in regard to the existence of these channels that the United States Defense Mapping Agency prepared it based on aerial photography taken in 1961, updated with photoplanimetric methods in 1988 from aerial

photography taken in 1987, even without a field check? Would that not be sufficient? Even without a field check, to make this reliable in its depiction of these channels?

Mr. THORNE: In conducting any kind of fieldwork, the use of remote sensing is becoming almost *de rigueur* and it is a fantastic source of information. But, you cannot tell everything from 1,000 km in space — or even from an aircraft — and so I am a supporter of the concept of “ground truthing”, perhaps not everywhere, but in terms of checking some of the apparent features of an image taken by a satellite or by an aircraft, it is preferable to do some checks on the ground.

Mr. REICHLER: Thank you. If the defence mapping agency had conducted a field check, what steps would have been involved on the ground?

Mr. THORNE: It would depend somewhat on the purpose of the map and the purpose of the exercise. I do not think I should speculate in regard to this particular map — I do not know its purpose.

Mr. REICHLER: Would the map be reliable, in your opinion, if its depictions of channels connecting the river to the lagoon *had* been confirmed by a field check?

Mr. THORNE: In as much as — based on my overflight on 7 July 2011 and my inspection of the imagery, some aerial photographs, some satellite images — what I would take from my personal experience is that the canopy of the forest makes it extremely difficult to see the ground. And so, when you are looking at the trace of waterways that were not distributories after about 1850, what you are actually looking at is a gap in the canopy, rather than *a stream* channels on the ground. So where that leads me, I think, is that in terms of verifying the conditions of those particular waterway features — if that is what you are asking me about — then ground truthing would be highly advisable.

Mr. REICHLER: And would a field check also be able to confirm whether or not any of these channels, if they exist, are navigable? Could that be determined by a field check as well?

Mr. THORNE: Navigable, by what sort of vessel?

Mr. REICHLER: Well, a good question. I suppose I am supposed to answer that.

Mr. THORNE: I am sorry ...

Mr. REICHLER: But I have no objection, I think that is actually appropriate. I can define the question better. Well, navigable by certain kinds of vessels or not others. In other words, the field check would be able to determine whether the channels are navigable and, if so, by what kind of vessels. Is that correct?

Mr. THORNE: Well, if I was going to check that, I would attempt to navigate them in the vessel that was of interest. And if I was able to navigate the channel in that vessel, I would conclude that it was navigable.

Mr. REICHLER: Thank you.

Mr. THORNE: That would of course be very seasonal. The river changes its characteristics very widely between the wet season and the dry season: a channel that is navigable during the wet season may not be navigable during the dry season, as is the case for the Lower Rio San Juan itself.

Mr. REICHLER: So, to be confident in the assessment, it would be better to do the field check both during the wet and the dry season.

Mr. THORNE: Depending on the purpose of the map, yes.

Mr. REICHLER: Let me refer you to another map now. This one is at tab 8. It is also from 1988. ~~If you seem confused, that is probably because I skipped a question, and therefore an image. As I said, I am going to charge the ?? So this is from tab 8, and this is it.~~ This map is also from 1988, it was published by the National Geographic Institute of Costa Rica — which was the official mapping agency of Costa Rica. In its Memorial, at paragraph 2.50, Costa Rica says that this is an official map of Costa Rica and in fact, I do not know if you were present in the courtroom this morning, but counsel for Costa Rica displayed it and it is available at tab 32 of their judge's folder of this morning. Now, would you agree, that — particularly looking at the enlargement —

that like the United States Defense mapping agency map of the same year, *this* Costa Rican map depicts channels of the Rio San Juan connecting directly with the Harbor Head Lagoon?

Mr. THORNE: It depicts them; I do not think they are entirely accurate. But it does depict them.

Mr. REICHLER: But the map depicts them: you can challenge its accuracy, but they are there on the map.

Mr. THORNE: They are shown on the map, but they do not look quite right to me.

Mr. REICHLER: Now I would like you to turn to tab 9, please. This is a technical report that Costa Rica sent to Ramsar on 28 October 2011 and, for purposes of the record, it is Annex 155 to the Memorial. This map, of Costa Rica's report to Ramsar, describes the same area on the right bank of the river, that is shown in blue on both of the 1988 maps, the United States Defense Agency map and the Costa Rican official map we just looked at. I first would like to ask you if you agree that the area highlighted in red on the map that is in Costa Rica's report to Ramsar corresponds approximately to the area in blue on the 1988 maps.

Mr. THORNE: Not entirely.

Mr. REICHLER: Well, I agree, not entirely, but would you say that it is roughly the same area?

Mr. THORNE: No, I would say it is not entirely the same area.

Mr. REICHLER: Would you say there is some coincidence in the areas?

Mr. THORNE: Yes, mostly to the north: the initial line is pretty good, but in other places it is not the same.

Mr. REICHLER: Well, the area that is depicted in red on the map that is actually figure 1 in Costa Rica's report to Ramsar is described in the highlighted text at pages 12 and 13 of Costa Rica's report to Ramsar — which is also at tab 9 — and to help you find it, this is on the fourth and

fifth pages from the front of tab 9 and they should be marked pages 12 and 13 and, as I said, the text is highlighted. So I would to read it along with you and then ask you a question or two about that. It says (I am referring to the figure in area 1):

“The affected zone and the surrounding areas are very wet sites, with hydrophilic vegetation and hydromorphic soils, predominantly associated with Yolillal (swamp forest), which cover 226.18 ha in total . . . Towards the west, between the areas of tall grasslands and on the banks of the San Juan river, there is an area of livestock pasture extending to the east up to an area of flooded forest, which has the features of a wetland marsh system. The latter forms part of the very extensive block of flooded forest that covers the region.

It is borders the Los Portillos Lagoon in the western sector.”

Do you agree, Professor Thorne, with Costa Rica’s description of the area that borders the lagoon as an “extensive block of flooded forest”? I am just asking if you agree with that.

Mr. THORNE: If I agree that the red area is an extensive zone of flooded forest. I am sorry, I am not sure if I entirely understand your question.

Mr. REICHLER: Well, that is the question. More specifically, I am asking if you agree with the description of this area that Costa Rica provided in its report to Ramsar which we both just read together? Do you agree with Costa Rica’s description of this area as an “extensive block of flooded forest”?

Mr. THORNE: In broad strokes, yes.

Mr. REICHLER: Please turn to tab 10 and particularly, the page is numbered 12; to help you find it, it is the third page from the front of the tab. This is part of a glossary of terms from Costa Rica’s environmental diagnostic assessment of November 2013. Please read along with me the definition that Costa Rica provided of Yollilal patch/extension: a “basal, tropical ecosystem that generally grows close to the coasts and is frequently inundated and is dominated by the palm known as ‘Yolillo’”. Is that definition correct?

Mr. THORNE: I am not a tropical ecologist. I would not feel qualified to comment on that.

Mr. REICHLER: I am sorry, I am having difficulty hearing you.

Mr. THORNE: I am sorry. I am not a tropical ecologist and I would not feel that it is within my area of expertise to answer that question.

Mr. REICHLER: Fair enough.

May I refer you now to your own summary report of March 2015; that is at tab 2 and I will be referring to the second page, and specifically to paragraph 3.2 and its subparagraph (b). This is at tab 2 of the judges' folder but if you have your own summary report with you, you are free to look there as well, whichever you are more comfortable with, Professor.

Mr. THORNE: Tab 2 is my original report of October 2011.

Mr. REICHLER: I am sorry, I mean to refer to the report of March 2015: that is the one you submitted last month.

Mr. THORNE: Right, that is at tab 1 in my book. I want to be sure that I am looking at the right document.

Mr. REICHLER: You are looking at your book; that is ~~that~~ the judges' folder.

Mr. THORNE: I am sorry, too many books.

Mr. REICHLER: No you are free to look at your version. If you prefer looking at your version that is fine with me.

Mr. THORNE: No. Okay, now I am with you – too many folders!

Mr. REICHLER: Whenever you are ready, Sir. This is the second page at our tab 2, specifically paragraph 3.2 and subparagraph (b); of course you are free to look at any part of your report that suits you. Here you state: "As regards the small inlet at the southern tip of the Harbor Head Lagoon (which I understand is asserted by Nicaragua to be the lower part of the distributary of the Lower Río San Juan that was 'cleaned' in 2010 to form the first caño" and then you state your conclusion that "it was not fluvially connected to the Río San Juan except during overbank floods prior to the excavation of the first caño". Do you see what I am referring to?

Mr. THORNE: Yes, I do.

Mr. REICHLER: So, would it be correct to conclude from this that you do believe that during overbank floods there may be a connection between the Rio San Juan and the southern tip of Harbor Head Lagoon?

Mr. THORNE: During extreme events I am sure there is a connection between the Rio San Juan and all of its adjacent wetlands, including the southern end of the Harbor Head Lagoon.

Mr. REICHLER: Thank you and I ask you please to refer to tab 11. I am calling your attention to a report from a Ramsar advisory mission dated 10 December 2010, this was Costa Rica's Annex 147. I call your attention to the highlighted text at the bottom of page 120 and top of page 121. I will give you a moment to find that.

Mr. THORNE: Thank you.

Mr. REICHLER: "The Laguna los Portillos currently acquires its water supplies from the San Juan River, controlled mainly by variations in the river mouth sector, acting as a system of communicating vases and from the superficial aquifer." Do you disagree with Ramsar on this point?

Mr. THORNE: I honestly do not understand what they mean by "communicating vases".

Mr. REICHLER: Well I can understand your difficulty. This is an English translation provided by Costa Rica and we wanted to remain faithful to Costa Rica's Annex. In Spanish, the language from the original, which Costa Rica produced is "vasos comunicantes", which I would translate as "communicating vessels" or "communicating vehicles".

Mr. THORNE: As to that, I am not sure what that means. As regards the second point, the superficial aquifer, I agree entirely, there would be a subterranean, below ground connection between the river and the Harbor Head Lagoon. They *won't* go up and down in phase but there is a connection subterraneously. *During* extreme events, when the river overtops its banks, it will *fill* to

the Harbor head Lagoon. My understanding of how the first *caño* has worked is that following the period when it was conveying flow from the river to the Harbor Head Lagoon during a flood, subsequently the water *was* flowing back from the Harbor Head Lagoon into the *caño* towards the river because the gradient is not in the obvious direction *it* would be for a distributory. It was a canal *connecting* two water bodies so water flowed either direction, unlike a distributory.

Mr. REICHLER: You agree with Ramsar that there is also a superficial aquifer as well as a subterranean aquifer?

Mr. THORNE: Well yes, but do not misconstrue superficial aquifer. That means it is in the first metre or two of the ground, rather than a deep aquifer that would be tens of metres below the ground. Superficial does not mean above the surface, it means flowing through the superficial deposits.

Mr. REICHLER: Let me ask you, your opinion as a scientist. Would you agree that a good way — a good way — to confirm whether you were correct about the existence or non-existence of channels connecting the Rio San Juan to Harbor Head Lagoon or whether the 1988 maps showing the existence of a perennial connection are correct, is for a technically qualified, truly independent or group of experts, perhaps appointed by the Court, to go to the site and conduct a field check on the ground? Would that be a good way to find out once and for all whether there are channels definitively connecting the River to the Lagoon?

Mr. THORNE: I understand the question. With the qualification that I would like to restate my independence as a friend of the Court . . .

Mr. REICHLER: Sorry, I was not challenging your independence or in any way suggesting anything other. I simply mean — when I use the word “independent” — somebody without any affiliation whatsoever to any of the Parties. I accept your independence, integrity, honesty fully. Let us be clear about that.

Mr. THORNE: Thank you for that clarification. It was when you said “truly independent” as opposed to “apparently” independent . . .

Mr. REICHLER: I think I just explained what I mean. Are you happy with that explanation? I hope I have not caused offence.

Mr. THORNE: Yes, I accept that entirely. No, not at all. It is a good point to clarify.

Mr. REICHLER: Would it not be a good way to settle this?

Mr. THORNE: I was going to say, can you remind me of the question.

Mr. REICHLER: Yes, I am trying to be helpful here. You still want me to remind you?

Mr. THORNE: Yes, please, it sort of went out of my mind whilst I was thinking about the other thing.

Mr. REICHLER: Would it be a good way, from a scientist's standpoint, given what you have said about the desirability of field checks on the ground, would it be a good way to confirm or not whether your opinion about the existence of perennial *caños* or non-existence, connecting the river to the lagoon, whether that is correct or whether the perennial *caños* shown on the 1988 maps are in fact there, would it not be a very good way to confirm that one way or the other, by having an expert or a group of experts who are technically qualified, and completely independent from the Parties, do a field check in the way you have described — field check previously?

Mr. THORNE: I agree entirely, that would be an excellent way of establishing whether a channel exists at a given location or does not exist at that location. It would have to be done before there were artificial interventions in the way of cleaning, clearing or excavating channels. But if it could be done *a priori*, I agree entirely.

Mr. REICHLER: Thank you very much. I want to ask you some questions before closing. About some of the impacts of the *caño* that was cleared, or excavated or constructed, depending on whatever you did, toward the end of 2010. Now, am I correct that, by mid-summer 2011, there had been a closure of the *caño* that had been cleared by Nicaragua in late 2010 due to siltation.

Mr. THORNE: Yes, the *caño* was closed by then. I would not attribute it entirely to siltation *though*.

Mr. REICHLER: I would like to *pursue* it with you, but I am conscious of my 40-minute limitation, so I am bound to move on. But the *caño* was closed by then?

Mr. THORNE: It was closed due to a drop in water level, sand deposition in the mouth and siltation along the rest of its length.

Mr. REICHLER: The point is, it was closed by then?

Mr. THORNE: Yes. The inlet remained open, and is still open today. The inlet at the southern end of the Harbor Head Lagoon, is a backwater from the Harbor Head Lagoon, it has not silted, it has not closed. It is still there just as it has been for 230 years.

Mr. REICHLER: Now you have written that — and I am quoting you — that, as a result of the closure, “it may be concluded that the short-term impacts of the *caño* on the hydrology, hydraulics water quality and sediment dynamics of the Rio San Juan were small or negligible”. Is that still your opinion about the short-term impacts?

Mr. THORNE: Yes, it is.

Mr. REICHLER: And, you predicted in October 2011, that due to progressive siltation — I am trying to use your words — the longer term impacts of the 2010 *caño* on the Rio San Juan, will, like the short-term impacts, be small or negligible. Do you recall that?

Mr. THORNE: I recall that, and that is what I wrote.

Mr. REICHLER: And, since the *caño* has been closed since 2011, and has not been recleared, would you say that your prediction about the small or negligible long-term impacts has turned out to be accurate, at least as of today?

Mr. THORNE: My prediction is accurate. There was a caveat to it, which I might mention, which was that provided no additional efforts were made to reopen the *caño*, to maintain it, or to

enlarge it, or to undertake other similar works. In fact, other similar works were undertaken in September 2013, and therefore my prediction was not entirely correct.

Mr. REICHLER: But at least as far as *this caño* was concerned, the one that was excavated in 2010, there were no further works there to open it, or to excavate, or to tamper with it in any way? Correct?

Mr. THORNE: To the best of my knowledge, there were not.

Mr. REICHLER: Now, you have observed in your summary report that clearing that *caño*, Nicaragua felled what you have called several hectares of old-growth forest?

Mr. THORNE: That is my belief.

Mr. REICHLER: Yes, I would like you to turn quickly to tab 12. And this is a Costa Rican Government report from May 2011, which was actually provided by Costa Rica to Nicaragua on 16 March of this year, in response to Nicaragua's request. And I refer you in particular to the highlighted text at page 3 of this tab, which is the second page from the front, where it says that tree felling by Nicaragua in connection with that *caño* cleared a total of 2.4 hectares. Do you agree with that calculation, or do you have a different calculation?

Mr. THORNE: One minute.

Mr. REICHLER: This is the English translation, highlighted text at page 3, the second page from the front of tab 12. The question is whether you agree that the tree-felling by Nicaragua occurred on a total of 2.5 hectares?

Mr. THORNE: 2.48? Is that the number we are looking at?

Mr. REICHLER: Do we agree on that?

Mr. THORNE: Ooh, um!

Mr. REICHLER: Well, if you do not know, I do not mean to put words in your mouth.

Mr. THORNE: Well, if you go back to my first report, I could verify that. Do we want to do that?

Mr. REICHLER: Well, I do not think we have time. But, I will be happy to look at it with you after the examination. But, this is what is in Costa Rica's report, in any event.

Let me ask you now to look at the highlighted text, at page 14, which is the fourth page from the front, at the same tab. And I would like to read Costa Rica's statement and ask you if you agree with it.

“Despite the favourable trend observed between 1997 and 2011 (the last 14 years) the agricultural frontier has advanced significantly to make way for pastures with few trees. During this period, the agricultural frontier advanced along a strip of land approximately 2,450 metres long, with a rather constant width of 160 to 170 metres, and it may therefore be assumed that in this period in this sector approximately 52 hectares of flooded forest and yolillo swamp has been lost.”

Do you agree with this statement?

Mr. THORNE: Yes, I do.

Mr. REICHLER: And, let me then just refer you to the satellite image from January 2011, on the prior page of this report, which is now shown, just to be precise really for the Court, would you agree that the 52 hectares of lost, flooded forest, cleared for agricultural purposes are directly alongside the river in the area close to where the *caño* was cleared by Nicaragua in late 2010?

Mr. THORNE: Yes, that is correct.

Mr. REICHLER: And finally, I would like you to turn back to tab 10, page 132 — but again to help you find it, it is the fourth page from the front of the tab. And I just have two remaining questions. I believe I am very close to my 40 minutes, Mr. President, I might not have reached them yet, but I only have two questions which should not take more than a couple of minutes, with your permission.

The PRESIDENT: OK.

Mr. REICHLER: Now, this is also from Costa Rica's environmental diagnostic assessment of November 2013. According to the highlighted text, to construct Highway 1856, Costa Rica felled 68.3 hectares of altered primary forest. Do you have any reason to doubt that figure?

Mr. THORNE: I cannot verify it again, I would have to look back at my reports in the *Road* case, but it does not sound unreasonable.

Mr. REICHLER: Last question.

Le PRESIDENT : Pardon. M. Wordsworth demande la parole.

Mr. WORDSWORTH: It is just that we seem to be straying...

Le PRESIDENT : Je vous prie de vous approcher du micro, Monsieur Wordsworth.

Mr. WORDSWORTH: Thank you, Mr. President. It is just that we seemed, in that last question, to be straying into a different case. Obviously questions relating to the roads are for next week, as opposed to this week.

Mr. REICHLER: Would you care for me to respond, Mr. President?

Le PRESIDENT : M. Reichler.

Mr. REICHLER: We are merely trying to put into perspective the harm that Nicaragua is alleged to have caused Costa Rica by the felling of trees, covering 2.48 ha and we are putting it in perspective by demonstrating that Costa Rica allowed 52 ha of flooded forest in the same area to be felled just prior to the excavation of the *caño*. And then in constructing the road, it allowed 68.3 ha of altered primary forest to be felled.

Now, I have only one more question, Mr. President. And I would beg permission to ask it, and terminate the examination.

Le PRESIDENT : Monsieur Reichler, poursuivez. Vous avez encore trois minutes.

Mr. REICHLER : Thank you, Mr. President. Professor Thorne, please turn to the next page at this tab. You see the highlighted text where Costa Rica concludes that the felling of all these trees, 68.3 ha of altered primary forest has had only a “moderate impact”. And my question is: do you agree with that assessment?

Mr. THORNE: This is an environmental diagnostic assessment made by the Centre for Tropical Ecology. As I said before, I am not a tropical ecologist and I would not feel qualified to comment upon the output of the Tropical Science Centre.

Mr. REICHLER : Professor Thorne, I thank you very much. You have been most co-operative. I greatly appreciate your efforts and I thank you very much. I thank you, Mr. President and Members of the Court, and this concludes my examination of the witness.

Le PRESIDENT : Merci, Monsieur Reichler. Monsieur Thorne, restez à votre place, je me tourne vers le conseil de Costa Rica, M. Wordsworth, souhaitez-vous procéder à présent à un interrogatoire complémentaire ? Vous avez la parole.

Mr. WORDSWORTH: Mr. Thorne, thank you very much. You were shown an image of 1988 USDMA map and asked questions about this. And I think my Nicaraguan colleagues may help me put this back on the screen. In any event, it shows a Y-shaped distributary to the north-west of Harbor Head Lagoon, do you recall that?

Mr. THORNE: I do.

Mr. WORDSWORTH: Do you know whether that Y-shaped distributary is in the same location as the so-called first *caño* excavated or cleaned by Nicaragua in 2010?

Mr. THORNE: Yes, I do know that.

Mr. WORDSWORTH: And the answer is?

Mr. THORNE: And the answer is: no, it is not. It is an entirely different location.

Mr. WORDSWORTH: You were shown at tab 7 of the folder that is in front of you an aerial image — well, you were not actually taken to it, but it is in the folder — an aerial image of 1961 which, following on from what Mr. Reichler said, would appear to be the image on which the 1988 USDMA map was based. Does that aerial image help you at all in considering whether the channel as to which Mr. Reichler was asking questions, joins to the Rio San Juan?

Mr. THORNE: I am not able to tell that from this particular image. It is not a high enough quality, the tree canopy is obscuring the water course that we believe to be Y-shaped and in that location.

Mr. WORDSWORTH: Thank you very much. Leaving the maps and the images to one side, do you consider it likely, or unlikely, that this Y-shaped channel would be connected as a distributary to the Rio San Juan?

Mr. THORNE: At what time?

Mr. WORDSWORTH: At normal flow.

Mr. THORNE: Ok, but in 1988, when the map was made?

Mr. WORDSWORTH: For example, yes.

Mr. THORNE: I don't think it would be connected as recently as that. The last time I can say for sure that that system of distributaries was connected was in 1850, when it's shown very clearly to be connected. After 1850, the Rio San Juan shifted to the west and began filling in the bay in front of Greytown and those distributaries at that time were abandoned. I know of no time when they were reoccupied.

Mr. WORDSWORTH: And as a geomorphologist, is there any reason of which you are aware to expect whether that distributary would remain open or closed over time?

Mr. THORNE: I think it is likely it would become disconnected from the mainstream due to the building of natural levees. When the water comes up and spills out over the floodplain, the

velocity drops, immediately the flow spreads out, and the *coarse sediment* builds natural levees. Not like the flood-control~~led~~ levees on the Mississippi River, but naturally high ground which would tend to disconnect the tributary. However, this area receives abundant rainfall. Several metres of rainfall every year. It is possible that the former distributaries could stay open as draining the rainwater and draining water from the wetland into the Harbor Head Lagoon.

Mr. WORDSWORTH: Thank you. You were asked a question about whether an independent — by which I think it was meant a Court-appointed — expert would be useful to identify where the channels were connected to the Rio San Juan. The question for you is, would it be helpful to have photographs taken from the river as to whether certain channels were or were not connected to the Rio San Juan, which photographs could presumably be taken at any time by Nicaraguan experts from the river?

Mr. THORNE: Yes, provided those photographs were georeferenced and dated, then they would yield useful evidence. But any image, remotely sensed or otherwise, is not a complete substitute for a field inspection, in person.

Mr. WORDSWORTH: Thank you very much. No further questions from Costa Rica, in the examination.

Le PRESIDENT : Merci beaucoup. Certains juges voudraient vous poser des questions, Monsieur Thorne. Donc je vous demande de rester encore quelques instants. Je vais leur donner la parole, selon l'ordre d'ancienneté.

M. le juge Greenwood souhaiterait poser une question, et peut-être même deux, au professeur Thorne. Monsieur le juge Greenwood, vous avez la parole.

Judge GREENWOOD: Thank you very much, Mr. President. Professor Thorne, I have a couple of questions I would like to put to you. I am afraid the first is going to prove a logistic difficulty because it concerns a map that is referred to in Professor Kondolf's summary report. I don't know whether someone could give you a copy of Professor Kondolf's summary report — if

counsel for Nicaragua has it to hand? Or possibly, Mr. President, if one of the Court's staff has document CRN-NCR 2015/22, which is the compilation of reports.

Mr. THORNE: I have it here.

Judge GREENWOOD: Ah, you have it? Right, thank you. Could you have a look at page 11 of that report, please? Where there are two enlarged extracts from maps, one of them — the lower one of the two is the 1988 map which you are being asked about. I just want, for completeness sake, to ask you about the earlier map — the 1949 one. Does it appear to you that there is some form of channel running between the River San Juan and almost the southernmost tip of Harbor Head Lagoon shown on this map?

Mr. THORNE: That is the appearance, yes.

Judge GREENWOOD: Thank you. Do you think that that was an accurate depiction as of 1949?

Mr. THORNE: No, I do not think it is.

Judge GREENWOOD: Could you just briefly explain to us why?

Mr. THORNE: If everybody's eyesight is good enough, if you look at the Y-shaped distributaries that we have spent quite a lot of time talking about this morning, you will notice they stop short of the river, whereas the curved channel that comes off the river goes to the Harbor Head Lagoon. I think this is a cartographic error; I think that line was supposed to join up with the Y-shaped distributaries in the manner of the 1988 map. I also note that this is not an accurate rendition of the area in many other ways: the Taura is shown as a distributary, even though it has been dry for decades beforehand, and the spit running across the Harbor Head Lagoon is not correctly represented. The scale of this map which is 1:400,000 — this is a national map of the whole of Costa Rica — I would forgive such errors but they do preclude zooming in to quite this extent.

Judge GREENWOOD: Thank you very much. Secondly, Professor Thorne, in your first report, which is attached as an appendix to the Memorial of Costa Rica in this case — if you have that — Executive Summary, section 3; it is page 312 of the Memorial. You say there that the estimated total value for the loss of natural capital and ecological services related to destruction of the 292 trees felled in October 2010 to make way for the *caño* is estimated to have exceeded \$1.5 million — I presume that is US dollars?

Mr. THORNE: That would be my understanding.

Judge GREENWOOD: Is that your estimate?

Mr. THORNE: Sorry?

Judge GREENWOOD: You say it is estimated here, is that your estimate?

Mr. THORNE: It is not my estimate, no.

Judge GREENWOOD: Whose estimate is it?

Mr. THORNE: The estimate was made by — if we go to the references and really I should track this back — but it is an estimate made by an environmental agency in Costa Rica who have made estimates of the total value of all the resources put at risk by the works.

Judge GREENWOOD: Thank you. Are you in a position as an expert to verify that estimate? Do you think that that estimate is accurate?

Mr. THORNE: I am not an expert in the valuation of ecological goods and services, although I work with those experts quite frequently. I had no reason to doubt their numbers based on my reading of the ecological services provided by the old-growth forest and, on that basis, I accepted the estimate as reasonable. I am not expert enough to reproduce it independently.

Judge GREENWOOD: Thank you very much. Thank you, Mr. President, that completes my questions.

Le PRESIDENT: Merci. Je donne maintenant la parole à Madame la juge Xue qui souhaite aussi poser une question à l'expert.

Judge XUE: Thank you, Mr. President. Dr. Thorne, I have a question for you. In your report, if you recall, in the case concerning *Certain Activities carried out by Nicaragua in the Border Area*, you gave three scenarios for extra discharge in the lower San Juan. Could you please clarify the baseline scenario in your analysis, particularly what do you mean by the original situation and on what basis do you form this original scenario. Thank you.

Mr. THORNE: If we go to the dredging programme — can anybody help me get to the table on the three dredging scenarios? Thank you, I have just arrived there. The three scenarios are exactly that: one is intended to represent the dredging programme of Nicaragua if fully executed; the second and third are cases where we are exploring how much more dredging would have to be done — how much more the channel would have to be enlarged — to meet the targets stated for the dredging programme of ensuring year-round navigation and increasing the discharge to the wetlands supported by the Lower Rio San Juan to the extent that they would have a beneficial effect.

Judge XUE: Thank you. But, my point is, when you designed those three scenarios, the baseline is very important; it has to be comparable to the real situation in the lower San Juan. How did you design the baseline, the starting-point?

Mr. THORNE: That is an excellent question. We took the view that the dredging programme as proposed would not have the desired outcomes, because it was based on application of the 1779 Chezy² equation for steady uniform flow, which Professor van Rhee who did those calculations in his second report agreed is inappropriate because it over-predicts how much water you would transfer. We instead used the *Hydraulic Engineering Centre Research Analysis Tool*, which is a US Army Corps of Engineers gradually varied flow model and we discovered that the dredging programme as intended would have no effect; I think 20 cumecs, a tiny amount of water. We therefore started saying what would it take to actually achieve the goals and then what would it take to achieve anything measurably beneficial to the wetlands. But they are scenarios; we are not

suggesting that that is what will happen, or would happen; we were exploring the weaknesses of the van Rhee and de Vriend simple study uniform flow analysis.

Judge XUE: I see the point. Thank you, Professor. Thank you, Mr. President, that is all I would like to ask.

Le PRESIDENT: Merci beaucoup. S'il n'y a pas d'autres questions en provenance de la Cour — je crois que non — c'est ainsi que se termine l'audition de M. Thorne ... Pardon, le juge Robinson souhaite poser une question à l'expert. Monsieur le juge Robinson, vous avez la parole.

Judge ROBINSON: Thank you, Mr. President. Professor Thorne: may I take you to paragraph 5.12 of your written statement. In that paragraph you are looking at the first *caño*, and you conclude, “[f]urther, on any view, cutting of old growth forest of such an age constitutes significant damage”. Then you move on, in paragraph 6.3, to look at the impact of the second and third *caños*, and you see there that in respect of those, damage occurred from the clearing of vegetation, including the cutting of trees, removal of soil and undergrowth, and the deposition of dredged materials on the wetlands. Now, I take Mr. Wordsworth’s point on the basis of Costa Rica’s case at any rate we are not dealing with transboundary harm. The question of environmental damage still arises and I wanted to find out the significance of the difference between your formulation in paragraph 5.12 where you used the epithet “significant”, and in paragraph 6.3 where it is absent.

Mr. THORNE: The nature of the ground and the vegetation through which the first *caño* was cut, in my opinion, differed from that of the second and third *caños*, which are much further north and on land which is much younger, because it was only created by the progradation of the delta many years after the land at the root of the delta. Consequently, because it was not as old and as well established, it did not have the mature trees of great antiquity that were destroyed when the first *caño* was cut. Therefore, I would say, in my opinion, the environmental impact of the second and third *caños* was not as great as that of the first *caños*. Vegetation does recover very quickly in these areas, but to grow a tree 200 years old takes 200 years.

Judge ROBINSON: Thank you.

Le PRESIDENT : Merci. Je donne maintenant la parole au juge Owada qui souhaite également poser une question à l'expert.

Judge OWADA: Thank you, Mr. President. I have one question for Professor Thorne, on a point which has not been referred to in the cross-examination and re-examination, that is why I have been refraining from it but, talking about your paper itself, the report, I have one question on which I needed more elaboration and explanation. In paragraph 4.17 of your summary report, you state that “if Nicaragua’s dredging programme were both repeated and expanded” — this is paragraph 4.17 — to quote your precise expression you say, “if Nicaragua’s dredging programme were both repeated and expanded”. I would like to have more elaboration and more specific information about what you mean by that? What would be a repeated and expanded dredging programme that you are thinking about in this particular case, and what kind of adverse impact are you expecting? Thank you.

Mr. THORNE: Paragraph 4.17 springs really directly from 4.16. In paragraph 4.16 I came to the conclusion that the current dredging — which is focused very heavily on the beginning of the river — is having the effect of lowering the bed slope and consequently robbing the Lower Rio San Juan of some of the very small amount of sediment transport capacity it has, because its transport capacity increases as the slope increases. This is also the conclusion of Professor van Rhee. Secondly, the dredging scale described by Professors van Rhee and de Vriend which would produce the correct dredge profile, by which I mean that — which is shown in my figure 3 on page 10 — as you will see, the corrected dredge profile produces a very, very small increase in discharge to the Lower Rio San Juan, and therefore if you are going to do any good to the river environmentally, you need to do much more than that and you are going to move up those lines in the graph in figure 3. What you discovered~~ed~~, to cut straight to the end-game, is you have to make the channel a lot wider if you are going to get substantially more water down it. And so the damage I am alluding to there is that associated with the cutting of trees on the banks, with the destabilization of the banks, with the loss of bank habitats which are particularly valuable, and of

course, that is in addition to taking the bed of the river, with all of the life that lives in it, and dumping it on the floodplain which kills everything that lives there. So, that is why I was saying a non-linear increase in the damages if the programme was to be taken and made more extensive and more intensive, in the way that I feared it might.

Judge OWADA: Thank you.

Le PRESIDENT : Merci. Ainsi se termine l'audition de M. Thorne. Nous tenons à vous remercier d'avoir bien voulu comparaître devant nous. Monsieur le professeur, vous pouvez à présent quitter la barre. Merci.

Mr. THORNE: Thank you very much for your attention, Sirs and Madam. It has been a real privilege for me to talk to you and I hesitate to say that I look forward to seeing you again next week, but I will be back.

Le PRESIDENT : Merci. La Cour va marquer à présent une pause de 15 minutes. L'audience est suspendue.

L'audience est suspendue de 16 h 35 à 16 h 50.

Le PRESIDENT: Veuillez vous asseoir. M. le juge *ad hoc* Guillaume a repris sa place au sein de la Cour. Nous allons maintenant écouter la poursuite des plaidoiries du Costa Rica et je vais donner la parole à Mme Parlett. Vous avez la parole.

Ms PARLETT:

**THE APPLICABLE ENVIRONMENTAL LAW RÉGIME
FOR TRANSBOUNDARY HARM**

A. Introduction

1. Mr. President, Members of the Court, it is an honour to appear before you once again on behalf of Costa Rica. It is my task today to address you on the applicable law régime for transboundary harm, in the particular context of the legal relationship between Costa Rica and Nicaragua. There are a number of issues that divide the Parties on the applicable law. They have

consequences for Costa Rica's claims in this case, particularly those arising from Nicaragua's dredging programme for the San Juan River. They also have consequences for the *Road* case, in which Nicaragua claims Costa Rica is responsible for transboundary environmental harm. More broadly, resolving the issues that divide these two neighbouring countries on the applicable environmental law régime is essential to their relationship, going forward. Costa Rica does not wish to be compelled to commence a new case before the Court in a year's time because of some other major construction work undertaken by Nicaragua without giving due notification to Costa Rica, or consulting with it, or respecting Costa Rica's rights under international law.

2. I will first outline three relevant obligations arising under general international law: the obligation not to cause significant transboundary harm; the obligation to notify and consult about activities which carry a risk of significant transboundary harm; and the obligation to conduct a proper transboundary environmental impact assessment. I will also address two of the relevant treaties to which Costa Rica and Nicaragua are party, the 1971 Ramsar Convention; and the 1992 Central American Convention on Biodiversity. Finally, I will address Nicaragua's attempt to avoid the application of these obligations to its activities on the San Juan River.

B. Obligations arising under general international law

3. Mr. President, Members of the Court, there is broad agreement between the Parties as to the existence of three relevant general principles.

4. The first is the obligation under general international law not to cause significant transboundary harm. As you affirmed in *Pulp Mills*, “[a] State is . . . obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing *significant* damage to the environment of another State”²⁹. The same principle was reflected in the arbitral award in *Trail Smelter*, which recorded that:

“[U]nder the general principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, *when the case is of*

²⁹*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports 2010 (I), p. 56, para. 101; emphasis added.

serious consequence and the injury is established by clear and convincing evidence”³⁰.
(Emphasis added.)

5. While Nicaragua accepts the existence of this obligation in general terms³¹, and indeed it relies upon it in making its claim of significant transboundary harm in the *Road* case³², it claims that it does not apply to any works it might carry out on the San Juan River³³. I will return to its arguments in this regard shortly.

6. The second obligation is a procedural one: to notify and consult in respect of activities which carry a risk of significant transboundary harm. The obligation to notify States of any risk of significant harm to which they are exposed is reflected in the *Corfu Channel* case, where the duty to warn was said to be based on “elementary considerations of humanity”³⁴. This general obligation is manifested in a specific obligation to notify and consult where there is a risk of significant transboundary environmental harm³⁵.

7. The rationale underlying this obligation and its specific application to a river was indicated in the *Pulp Mills* case, noting the importance of “vigilance and protection . . . on account of the often irreversible character of the damage to the environment”³⁶. The obligation to consult and negotiate in good faith was also recognized by the tribunal in the *Lac Lanoux* arbitration, in stating that “[c]onsultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities”³⁷.

³⁰*Trail Smelter Arbitration (United States of America v. Canada)*, Award, 11 March 1941, UN, RIAA, Vol. III, p. 1965.

³¹See *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.28, citing *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, pp. 241-242, para. 29; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.26, citing Art. 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses and its commentary; and *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, paras. 3.31-3.32.

³²See, for example, dispute concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, RN, paras. 6.69-6.70.

³³*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.26.

³⁴*Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22.

³⁵See Report of the United Nations Conference on the Human Environment, Rio Declaration on Environment and Development, 1992, UN doc. A/CONF.151/26, Vol. I, Principle 19. See also *Lac Lanoux* (1957) 24 ILR 101, p. 119; and Report of the International Law Commission on the work of its 53rd Session, 2001, *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10*, UN doc. A/56/10, Arts. 8 (1) and 9 (1).

³⁶*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp. 76-77, para. 185, citing *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, pp. 77-78, para. 140.

³⁷*Lac Lanoux Arbitration (France v. Spain)*, 1957, 24 ILR 101, p. 199.

8. Again, Nicaragua accepts that such an obligation exists³⁸, but it argues that it does not apply to works it may carry out on the San Juan River³⁹. I will come back to this in a moment.

9. The third relevant obligation arising under general international law is the obligation to conduct a proper transboundary environmental impact assessment. As the Court noted in *Pulp Mills*, “it may now be considered a requirement under general international law to undertake an environmental impact assessment” where there is a risk of significant adverse transboundary impact⁴⁰. This same requirement is embodied in a number of instruments⁴¹, as well as in treaties to which Nicaragua is party⁴².

10. This general principle is subject to an important qualification, which is relevant to the situation underlying the dispute in the *Road* case, and that is that it applies only in respect of proposed projects that are likely to cause significant harm⁴³. Moreover, as explained by you in *Pulp Mills*, international law effects a *renvoi* to domestic law to define the specific content of any assessment that is required in a particular case⁴⁴. Consistently with this, as will be explained further next week, where, in an exceptional case, domestic law establishes that there is no requirement to carry out an assessment because of an emergency, general international law likewise recognizes this aspect of domestic law.

11. In the present case, Nicaragua expressly accepts that a State is obliged, under general international law, to conduct a transboundary environmental impact assessment for activities likely

³⁸*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.36.

³⁹*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.38.

⁴⁰*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010 (I)*, p. 83, para. 204.

⁴¹For example the Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, GA res. 34/186, 18 Dec. 1979, Principle 5; the World Charter for Nature, 28 Oct. 1982, A/Res/37/7, paras. 11 (b) and (c); Report of the UN Conference on the Human Environment, Rio Declaration on Environment and Development, 1992, UN doc. A/CONF.151/26, Vol. I, Principle 17; ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10*, UN doc. A/56/10, Art. 7; and 1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme, UNEP/WG.152/4, Ann., 1987, document adopted by UNEP Governing Council at its 14th Session, Dec 14/25, 1987.

⁴²See for example the Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 1760 UNTS 79, MCR, Ann. 24, Art. 14.

⁴³See Dispute concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Counter-Memorial of Costa Rica (CMCR), paras. 5.8-5.11.

⁴⁴*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010 (I)*, p. 83, para. 205.

to cause significant transboundary harm⁴⁵. It only argues that it has complied with this obligation⁴⁶. Ambassador Ugalde will explain shortly that this is not the case, and will demonstrate that Nicaragua's dredging programme is in breach of Nicaragua's obligations under general international law.

C. Obligations under environmental law treaties

12. These obligations under general international law are supplemented by a number of specific obligations arising under environmental law treaties to which Costa Rica and Nicaragua are party. I note also that the 1858 Treaty as interpreted by the 1888 Cleveland Award imposes obligations on Nicaragua in respect of the San Juan River. In particular, it conditions Nicaragua's ability to carry out works of improvement upon there being no resulting damage to Costa Rican territory, and upon Costa Rica's rights of navigation not being destroyed or seriously impaired⁴⁷. It also imposes on Nicaragua a specific obligation to notify and consult with Costa Rica, and to obtain Costa Rica's consent, for canal construction projects that carry a risk of occupation or flooding of Costa Rican territory, or serious impairment of Costa Rica's rights of navigation⁴⁸.

13. Concerning other relevant treaties, I will address you briefly on two of these: the 1971 Ramsar Convention; and the 1992 Biodiversity Convention .

14. Both Costa Rica and Nicaragua are party to the Ramsar Convention⁴⁹, which protects areas designated as wetlands of international importance. As Mr. Brenes explained to you this morning, the area surrounding the San Juan River, and in particular the areas where Nicaragua has constructed the three artificial *caños* and dredged the river, are protected under the Ramsar Convention.

⁴⁵*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.47.

⁴⁶*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.48.

⁴⁷Award of the Arbitrator, the President of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica, Cleveland Award, 22 Mar. 1888, MCR, Ann. 7, para. 3 (6).

⁴⁸Costa Rica-Nicaragua Treaty of Limits, Cañas-Jerez, San José, 15 Apr. 1858, MCR, Ann. 1, Art. VIII; Award of the Arbitrator, the President of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica, Cleveland Award, 22 Mar. 1888, MCR, Ann. 7, paras. (3) 10 and (3) 11.

⁴⁹Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar (Iran), 2 Feb. 1971, as amended by the Paris Protocol of 3 Dec. 1982 and the Regina Amendments of 28 May 1987, MCR, Ann. 14.

15. While Nicaragua first argued in this case that the Ramsar Convention takes a “soft approach”⁵⁰, in the *Road* case it changed its position, accepting that the Ramsar Convention imposes an obligation to promote the conservation of the listed wetlands⁵¹, and that this obligation covers wetlands in Costa Rican territory⁵². The Ramsar Convention also imposes obligations of consultation and co-ordination, and an obligation to notify the Ramsar Secretariat in respect of anticipated changes to the ecological character of protected wetlands⁵³. These specific obligations of consultation, conservation, co-ordination and notification supplement Nicaragua’s obligations under general international law, to which I have already referred.

16. In addition to the Ramsar Convention, Nicaragua is obliged to protect and preserve the disputed territory and the San Juan River under the 1992 Convention for the Conservation of Biodiversity and Protection of Wildlife Areas in Central America⁵⁴. As Nicaragua accepts⁵⁵, the objective of this Convention is to conserve to the maximum possible extent the biological diversity of the region⁵⁶. Under the 1992 Convention areas of priority for conservation are listed, and these include the area defined under the so-called “SI-A-PAZ Agreement”, a 1990 bilateral agreement on Protected Border Areas⁵⁷. The area defined under the SI-A-PAZ Agreement includes the tropical rainforest located along Central America’s Caribbean coast, which is declared to be “the highest priority conservation project in both countries”⁵⁸. In respect of these areas, contracting States

⁵⁰*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 5.140.

⁵¹Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar (Iran), 2 Feb. 1971, as amended by the Paris Protocol of 3 Dec. 1982 and the Regina Amendments of 28 May 1987, MCR, Ann. 14, especially Arts. 2-4.

⁵²Dispute concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, MN, para. 5.75.

⁵³Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar (Iran), 2 Feb. 1971, as amended by the Paris Protocol of 3 Dec. 1982 and the Regina Amendments of 28 May 1987, MCR, Ann. 14, Arts. 3 (2), 5 and 8 (2) (c).

⁵⁴Convention for the Conservation of the Biodiversity and Protection of the Main Wild Life Sites in Central America, 5 June 1992, MCR, Ann. 23, in particular Arts. 8 (d) and 10.

⁵⁵Dispute concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, MN, para. 5.93.

⁵⁶Convention for the Conservation of the Biodiversity and Protection of the Main Wild Life Sites in Central America, 5 June 1992, MCR, Ann. 23, Art. 1.

⁵⁷Convention for the Conservation of the Biodiversity and Protection of the Main Wild Life Sites in Central America, 5 June 1992, MCR, Ann. 23, Art. 18; Agreement over the Border Protected Areas between Costa Rica and Nicaragua (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), 15 Dec. 1990, MCR, Ann. 22.

⁵⁸Agreement over the Border Protected Areas between Costa Rica and Nicaragua (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), 15 Dec. 1990, MCR, Ann. 22, Art. 1.

commit to the conservation of biodiversity, and to co-ordinate in border and regional actions⁵⁹. Again here, Nicaragua's specific obligations of conservation and co-ordination supplement its obligations under general international law.

D. International environmental law obligations apply to the San Juan River

17. While Nicaragua accepts that these obligations relating to environmental protection arise under general international law and under international treaties, it contends that most of them do not apply to its activities on the San Juan River. In particular, Nicaragua argues that the obligation not to cause significant transboundary harm, the obligation to notify and consult in respect of activities that carry a risk of such harm, and its obligations under environmental treaties are displaced because the 1858 Treaty, as interpreted by the Cleveland Award, constitutes *lex specialis*⁶⁰.

18. In support of this argument, Nicaragua invokes your 2009 Judgment in *Navigational Rights*. There you held that you did not need to consider rights of navigation arising under general international law because “[t]he 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan River that is in dispute *in respect of navigation*”⁶¹. Nicaragua seeks to extend this finding to displace all other obligations relating to the environment⁶². But to do this Nicaragua must show, as you explained in *Navigational Rights*, either that the provisions of the 1858 Treaty as interpreted by the Cleveland Award have the effect of excluding these other obligations⁶³, or that the 1858 Treaty was “intended to define completely the régime applicable”⁶⁴ to the environment. This is clearly not the case. The 1858 Treaty and the Cleveland Award do not exclude rules relating to environmental law that are otherwise applicable; neither does the

⁵⁹Convention for the Conservation of the Biodiversity and Protection of the Main Wild Life Sites in Central America, 5 June 1992, MCR, Ann. 23, Art. 10.

⁶⁰*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, paras. 3.33, 3.38-3.39, 3.47 and 3.51-3.52. See also paras. 4.36 and 5.173.

⁶¹*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, p. 233, para. 36; emphasis added.

⁶²*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.25.

⁶³*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, p. 233, para. 35.

⁶⁴*Ibid.*

1858 Treaty define completely the applicable environmental law régime. Of course it is open to States to enter into treaties which impose upon them more stringent environmental obligations than those applying under general international law — and as I will explain in a moment, this is the case in respect of any anticipated canal construction on the San Juan — but the application of a more stringent obligation for one particular activity does not exclude the application of general international law, or other treaties, in respect of other activities. And in any event, Nicaragua's rights and obligations under the 1858 Treaty and the Cleveland Award are in no way incompatible with its obligations relating to environmental protection under general and conventional international law — in fact, they are entirely consistent with it.

19. This is apparent from a cursory review of the provisions of the 1858 Treaty and the Cleveland Award invoked by Nicaragua. In respect of the obligation not to cause significant harm to Costa Rican territory, Nicaragua asserts that “the modalities of application” of this principle are limited by paragraph 3 (6) of the Cleveland Award, which concerns the circumstances in which Nicaragua may carry out works on the river to maintain or improve navigation⁶⁵. You now see paragraph 3 (6) on your screens. It states:

“The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rican territory, or in the destruction or serious impairment of the navigation of the said River or in any of its branches at any point where Costa Rica is entitled to navigate the same.”⁶⁶ (Emphasis in original.)

20. As Ambassador Ugalde will explain in short order, the dredging works which Nicaragua is carrying out on the San Juan are not consistent with this obligation. For present purposes, it is apparent that paragraph 3 (6) of the Cleveland Award does not give Nicaragua licence to carry out any works on the river that cause significant transboundary harm to Costa Rica, nor can it be considered to be inconsistent with an obligation under general international law or treaty not to cause such harm.

21. Similarly, the 1858 Treaty does not relieve Nicaragua of its obligation to notify and consult Costa Rica in respect of works on the San Juan that carry a risk of significant

⁶⁵*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.33.

⁶⁶Award of the Arbitrator, the President of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica (Cleveland Award), 22 March 1888, MCR, Ann. 7, para. 3 (6).

transboundary harm. Nicaragua argues that Article VIII of the 1858 Treaty imposes a limited duty to consult Costa Rica if it envisages to “make new grants for canal purposes involving the San Juan River”⁶⁷, and Nicaragua says that other no other limitations apply to works it might carry out on the San Juan.

22. Article VIII of the 1858 Treaty, which you now see on your screens, and which you will find at tab 36 of your folders, imposes specific obligations on Nicaragua if it proposes to construct a canal on the San Juan River⁶⁸. Indeed, as Cleveland confirmed, if the proposed canal will cause injury to Costa Rica’s rights, Costa Rica’s “consent is necessary” for the project to proceed⁶⁹. But although Article VIII as interpreted by Cleveland imposes obligations to notify, consult and obtain consent in respect of canal projects, no provisions of the 1858 Treaty or the Cleveland Award displace the obligation arising under international law to notify and consult in respect of *any* project which carries a risk of significant environmental harm. Indeed, an obligation to notify and consult in respect of any such projects is consistent with Nicaragua’s more stringent obligations for canal projects.

23. In respect of the obligation to notify and consult, Nicaragua also invokes your 2009 Judgment. In that Judgment, you considered whether Nicaragua was obliged to notify or consult Costa Rica concerning measures “to regulate navigation on the river”⁷⁰. You held that the 1858 Treaty did not impose an express general obligation to notify about measures taken with respect to navigation⁷¹, although you did hold that Nicaragua was obliged to do so, on the basis of other instruments⁷². Yet Nicaragua claims that the absence of an express obligation in the 1858 Treaty means that Nicaragua is not obliged to notify and consult in respect of any works of dredging on the river that carry a risk of significant transboundary harm. That argument is entirely

⁶⁷*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.38.

⁶⁸Costa Rica-Nicaragua Treaty of Limits, Cañas-Jerez, San José, 15 Apr. 1858, MCR, Ann. 1, Art. VIII.

⁶⁹Award of the Arbitrator, the President of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica, Cleveland Award, 22 Mar. 1888, MCR, Ann. 7, para. (3) 11.

⁷⁰*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, pp. 250-251, para. 91, referred to in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, para. 3.40.

⁷¹*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, p. 251, para. 93.

⁷²*Ibid.*, p. 252, para. 97.

contrary to your finding in the 2009 Judgment that Nicaragua *was* obliged to notify Costa Rica about measures regulating navigation on the river⁷³. In the same way, Nicaragua remains obliged, under general international law and under international treaties, to notify and consult Costa Rica in respect of any works on the San Juan River that carry a risk of significant transboundary harm.

24. Nicaragua's position that its obligations under international environmental law are displaced by the 1858 Treaty and the 1888 Award also runs counter to fundamental principles of treaty interpretation. Nicaragua's rights and obligations under the 1858 Treaty must be interpreted in the light of any relevant rules of international law binding on the Parties, including rules of international environmental law. That principle derives from the customary rule of interpretation embodied in Article 31 (3) (c) of the Vienna Convention on the Law of Treaties and it is supported by a number of international decisions specifically addressing environmental obligations, including the decision of this Court in *Gabčíkovo-Nagymaros*⁷⁴, and the decisions in the *Iron Rhine*⁷⁵ and *Kishenganga*⁷⁶ arbitrations. You see on the screens, and at tab 98 of your folders, an extract from the Partial Award in *Kishenganga* summarizing the position and confirming that nineteenth century treaties must be interpreted in the light of principles for the protection of the environment in force today.

25. Precisely the same considerations apply to interpretation of the 1858 Treaty and the Cleveland Award. The fact that these instruments of the nineteenth century did not impose environmental obligations identical to those applying under modern international law is hardly surprising, and it certainly does not render modern international law standards completely inapplicable to the San Juan River.

26. In so far as obligations arising under international treaties are concerned, Nicaragua's reliance on *lex specialis* is also misplaced. Whilst the 1858 Treaty is undoubtedly special, in the very limited sense that it relates specifically to the régime of the San Juan River, that does not

⁷³*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 252, para. 97.

⁷⁴*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, pp. 77-78, para. 140.

⁷⁵*Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award, 24 May 2005, PCA Award Series, 2007, para. 59.

⁷⁶*Indus Waters Kishenganga Arbitration (Islamic Republic of Pakistan v. Republic of India)*, Partial Award, 18 Feb. 2013. Available at: http://www.pca-cpa.org/showpage.asp?pag_id=1392, para. 452.

make it *lex specialis* such that it trumps all other international obligations. The Ramsar Convention may just as easily be characterized as *lex specialis* as regards the specific obligations that it imposes in the matter of protection of wetlands, as is the 1992 Biodiversity Convention. In this context it is significant that, when it ratified these environmental conventions, Nicaragua did not attempt to qualify the obligations it was undertaking as regards the wetlands surrounding the San Juan River. The obvious explanation for that omission is that before this case Nicaragua never considered that the 1858 Treaty and the 1888 Cleveland Award would render those treaties meaningless in so far as the San Juan River is concerned.

E. Conclusion

27. Mr. President, Members of the Court, general international law imposes three relevant obligations on Nicaragua:

- (a) first, the obligation not to cause significant transboundary harm to Costa Rica;
- (b) second, the obligation to notify and consult with Costa Rica in respect of proposed activities which carry a risk of significant transboundary harm to Costa Rica; and
- (c) thirdly, the obligation to carry out a transboundary environmental impact assessment before embarking on activities which carry a risk of significant environmental harm.

28. These obligations are supplemented by Nicaragua's relevant treaty obligations, arising under the 1858 Treaty as interpreted by the Cleveland Award, and arising under environmental law treaties that apply to the disputed territory and to the San Juan River. Contrary to Nicaragua's contentions, it is obliged to respect those obligations when it carries out works on the San Juan River.

29. Mr. President, Members of the Court, I thank you for your kind attention, and I ask that you give the floor to Ambassador Sergio Ugalde.

Le PRESIDENT : Merci, Madame Parlett. Je donne à présent la parole à Son Excellence Monsieur l'ambassadeur Sergio Ugalde.

Mr. UGALDE:

NICARAGUA'S DREDGING PROGRAMME

A. Introduction

1. Mr. President, Members of the Court, I will address now Nicaragua's dredging programme.

2. Costa Rica has reiterated, both to Nicaragua⁷⁷ and to this Court⁷⁸, that it does not contest Nicaragua's entitlement to carry out works of improvement on the San Juan River which are in accordance with the Cleveland Award.

3. Rather, Costa Rica is concerned by Nicaragua's stance that it can carry out dredging and other works on the San Juan River regardless of whether those works cause harm to Costa Rica's territory and rights, including by affecting the flow of water to the Colorado River⁷⁹.

4. In my presentation, I will first address the true scope and character of Nicaragua's dredging programme. I will then show that Nicaragua's dredging programme is inconsistent with its obligations under the Cleveland Award. Finally, I will demonstrate that, in undertaking its dredging programme, Nicaragua has breached its obligations under international environmental law.

B. Nicaragua's dredging programme

5. Costa Rica's concerns as to the scope and aims of Nicaragua's dredging arise because of statements made by Nicaraguan officials, actions taken by Nicaragua on the ground, and its claims

⁷⁷See letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-37-06, 26 Jan. 2006, MCR, Ann. 41; Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE-DM-JI-262-02-06, 17 Feb. 2006, MCR, Ann. 42; Letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-187-06, 5 May 2006, MCR, Ann. 43; Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. DM-JI-511-05-06, 8 May 2006, MCR, Ann. 44; letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-637-09, 27 August 2009, MCR, Ann. 45; Note from the acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-156-10, 11 July 2010, MCR, Ann. 46; letter from the acting Minister for Foreign Affairs of Nicaragua, ref. DM-412-10, 21 Oct. 2010, MCR, Ann. 47; and Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE/DVM/AJST/660/10/10, 26 Oct. 2010, MCR, Ann. 48.

⁷⁸MCR, para. 5.57.

⁷⁹See, for example, Government of Nicaragua "The San Juan de Nicaragua River. The Truths that Costa Rica Hides", White Book, 29 Nov. 2010, CMN, Ann. 26, p. 45.

and submissions in this case. These reveal that Nicaragua's dredging is intended to refashion the geography in the region of the mouth of the San Juan, in a manner which necessarily risks significant adverse impact on the Colorado River.

6. As Costa Rica has previously noted, there are two dredging projects⁸⁰: there is the theoretical, paper project, as authorized by MARENA; and then there is the real project, which has taken place on the ground, which continues to take place, and which bears no relationship to the paper project.

7. That the true aim of the dredging programme is the refashioning of geography is clear from Nicaragua's Counter-Memorial. Nicaragua states there that the dredging project is but "the first step in restoring the navigability of the River, which was navigable by sea-faring vessels when the Treaty of Limits was signed in 1858"⁸¹, as well as the argument that, because Nicaragua is sovereign over the San Juan River "consequently, it is entitled to execute works to improve navigation on the San Juan River with a view to re-establishing the situation that existed at the time the 1858 Treaty was concluded"⁸². I note in passing that the "consequently" at the start of that sentence is an obvious *non sequitur*.

8. Nicaragua's ultimate aim is also clear from its formal submissions as set out at the end of its Counter-Memorial. In sub-paragraph (iii) of paragraph 2, Nicaragua asks the Court to declare that it is entitled "to execute works to improve navigation on the San Juan River *as it deems suitable*"⁸³, including by dredging.

9. But it does not stop there; in sub-paragraph (iv) it seeks a declaration that, and again I quote "in so doing, Nicaragua is entitled as it deems suitable to re-establish the situation that existed at the time the 1858 Treaty was concluded"⁸⁴.

10. Those submissions are not made in defence of the dredging project authorized on paper. Rather, they are an attempt to obtain endorsement from this Court for the actual operations carried out on the ground, which Nicaragua just as clearly intends to continue. It is precisely this

⁸⁰CR 2011/3, p. 25, para. 15 (Crawford).

⁸¹CMN, para. 2.59.

⁸²CMN, para. 3.20.

⁸³CMN, pp. 455-456.

⁸⁴CMN, pp. 455-456.

programme which has already involved the illegal occupation of and damage to Costa Rican territory.

11. That the actual dredging programme will involve the drastic refashioning of geography, with the strong likelihood of detriment to the Colorado River, is not just what Nicaragua claims a right to do in these proceedings. It is what Nicaragua has clearly stated from the outset it will do, and what it has done on the ground.

12. Mr. President, in 2009 Costa Rica's Foreign Minister wrote to Nicaragua's Foreign Minister concerning reports of statements made by the manager of Nicaragua's National Port Authority, Mr. Silva⁸⁵. In those reports, Mr. Silva was quoted as saying that Nicaragua intended to deviate 1,700 cubic meters per second of the flow of the Colorado River⁸⁶. Despite the obvious serious implications of these statements, Nicaragua never responded to Costa Rica's Diplomatic Note.

13. During the oral hearings for the indication of provisional measures in January 2011, Nicaragua produced a declaration in which Mr. Silva claimed that he had been misquoted⁸⁷. If that is the case, it begs the question why Nicaragua did not make this clear to Costa Rica when the matter was raised in 2009. And, notably, a similar statement attributed to Mr. Pastora⁸⁸ was never corrected. In any case, Nicaragua's White Book, issued in November 2010, stated unambiguously that: "The cleaning of the San Juan river has the objective of recovering the historical volume of the river"⁸⁹, which could only come at the expense of the flow to the Colorado River. It further recognizes, in a matter of fact manner, that "the interests of Costa Rica will be harmed of course"⁹⁰.

⁸⁵Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-637-09, 27 Aug. 2009; MCR, Ann. 45.

⁸⁶See *La Prensa* (Nicaragua), "They are going for the flow of the San Juan River", 25 Aug. 2009; MCR, Ann. 101.

⁸⁷*Certain Activities carried out by Nicaragua on the Border Area*, oral hearings on provisional measures, relevant documents submitted by Nicaragua, 4 Jan. 2010, doc. 15.

⁸⁸*La Nación* (Nicaragua), "Nicaragua will dredge the San Juan to recover earlier flow", available at: www.nacion.com/ln_ee/2009/agosto/25/pais2069754.html; Costa Rica's judges' folder for provisional measures hearing, 11 Jan. 2011, tab 78.

⁸⁹Government of Nicaragua "The San Juan de Nicaragua River. The Truths that Costa Rica Hides", White Book, 29 Nov. 2010; CMN, Ann. 26, p. 44.

⁹⁰*Ibid.*, p. 45.

14. Naturally, this reinforces Costa Rica's concerns.

15. The real dredging project is the one which Mr. Pastora has been personally carrying out since 2010. In carrying out the dredging works in October 2010, he appeared to know nothing of the paper project. We are aware of Mr. Pastora's colourful account as to how he and Commander Ortega reached the decision to dredge the San Juan⁹¹. In this context, it is worth recalling that Mr. Pastora declared in early November 2010 that his intention was to "restore the Nicaraguan border river to its historic channel to the sea"⁹². In a further interview published on 30 November 2010, Mr. Pastora attributed the decision to carry out the dredging project directly to President Ortega and stated that the excavation of the first "caño" was undertaken to conform to his own understanding of the area and the Alexander Awards⁹³. Again, these reports of Mr. Pastora's position as to the ultimate purpose of the dredging he was undertaking and overseeing have never been withdrawn, nor has Nicaragua said that they are inaccurate.

16. What I have referred to as the paper project is the one authorized by the 2008 MARENA resolution⁹⁴, as subsequently modified⁹⁵. However, that paper project bears very little relationship to what has in fact occurred.

17. The second reduction in the programme, detailed in EPN's 2011 Annual Report, foresaw extraction of slightly over 395,000 cubic metres of sediment in total, of which some 94,000 cubic metres was to be dredged in the sector immediately downstream from Delta Costa Rica⁹⁶. I emphasize that that is a total figure for that sector, not an annual one.

⁹¹*Confidencial.com* (Nicaragua), "Pastora: I interpreted the Alexander Award", 30 Nov. 2010; MCR, Ann. 117, p. 399.

⁹²*Tico Times* (Costa Rica) "Nicaragua Denies Reports of Intrusion into Costa Rica", 2 Nov. 2010; MCR, Ann. 111.

⁹³*Confidencial.com* (Nicaragua), "Pastora: I interpreted the Alexander Award", 30 Nov. 2010; MCR, Ann. 117.

⁹⁴Ministry of Environment and Natural Resources of Nicaragua (MARENA), DGCA administrative resolution ref: No. 038-2008; MCR, Ann. 160.

⁹⁵See CMN, para. 2.58, and paras. 5.174-5.176; declaration of the Technical Manager of the National Port Authority (EPN), Lester Antonio Quintero Gómez, 16 Dec. 2010; MCR, Ann. 164, paras. 10-11; "Dredging Project Technical Evaluation Analysis: Improvement of Navigation in the San Juan de Nicaragua River" (EPN 2011 Annual Report), 23 Jan. 2012; CMN, Ann. 17, pp. 5-6.

⁹⁶"Dredging Project Technical Evaluation Analysis: Improvement of Navigation in the San Juan de Nicaragua River" (EPN 2011 Annual Report), 23 Jan. 2012; CMN, Ann. 17, p. 6; "Project 262-09: Improvement of Navigation in the San Juan de Nicaragua River: Physical-Financial Progress Report Corresponding to 2014" (EPN 2014 Annual Report), 2015, p. 12; Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015.

18. But we now know that the dredging project as it has been executed on the ground has in fact been vastly more extensive than the re-revised project. The 2014 EPN Annual Report states that dredging around the bifurcation at Delta Colorado has involved the removal of over 730,000 cubic metres in the period 2011-2014⁹⁷, with over 300,000 cubic metres being dredged in 2013 alone⁹⁸. The total amount dredged for those four years is over seven times that planned for the area around the bifurcation, and close to twice the total foreseen in 2011 for the reduced project as a whole.

19. Further, the recitals of MARENA's 2008 resolution by which it authorized the project show that MARENA considered that the project was environmentally viable "*provided the proponent strictly complies in its entirety with all the environmental measures and actions stipulated in the Environmental Impact Assessment*" and other documents⁹⁹. In that connection, the resolution imposed a specific requirement that sediment should be deposited at least 50 metres from the bank and required the construction of protective barriers along the bank at sediment deposit sites¹⁰⁰. The designs to be used for construction of these barriers are those shown at page 28 of Nicaragua's Environmental Impact Study for Improving Navigation on the San Juan River¹⁰¹. These requirements were not complied with. Despite the massive dumping of sediment at one location, for example, no barriers were erected at all as you can see¹⁰².

20. Similarly, the MARENA resolution stipulated that the deposit of dredged material on the banks should be avoided in the sensitive area between the outlet of Caño Sucio and

⁹⁷"Project 262-09: Improvement of Navigation in the San Juan de Nicaragua River: Physical-Financial Progress Report Corresponding to 2014" (EPN 2014 Annual Report), 2015, p. 20; Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015.

⁹⁸"Project 262-09: Improvement of Navigation in the San Juan de Nicaragua River: Physical-Financial Progress Report Corresponding to 2014" (EPN 2014 Annual Report), 2015, p. 20; Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015.

⁹⁹Ministry of Environment and Natural Resources of Nicaragua (MARENA), DGCA administrative resolution ref. No. 038-2008; MCR, Ann. 160, Recital VIII; original emphasis.

¹⁰⁰Ministry of Environment and Natural Resources of Nicaragua (MARENA), DGCA administrative resolution ref. No. 038-2008; MCR, Ann. 160, Art. 3 (5).

¹⁰¹Ministry of Environment and Natural Resources of Nicaragua (MARENA), DGCA administrative resolution ref. No. 038-2008; MCR, Ann. 160, Art. 3 (5), and CMN, Copies of Complete Annexes, Vol. I, Ann. 7, p. 28.

¹⁰²Photograph of sediment deposit near delta, 14 Jan. 2015 (*The Road*, Rejoinder of Costa Rica (RCR), Ann. 80); judges' folder, tab 100.

Boca de Sanjuanillo¹⁰³. But this is precisely one of the areas where Nicaragua's dredging has run out of control, involving the dumping of sediment, including in Costa Rican territory¹⁰⁴. The reach between Caño Sucio and Boca de Sanjuanillo is also where the meander cut was made by Mr. Pastora in 2010¹⁰⁵.

21. As such, in light of Nicaragua's free-wheeling dredging on the ground, which bears very little relationship to the technical documents, there is every reason for Costa Rica to fear that its true aim and scope is not limited to restoring some limited measure of navigability in the Lower San Juan, and that — as Nicaragua has said — its aim is to refashion the geography of the Lower San Juan, with dramatic implications for the Colorado River.

22. And not only is this consistent with both Nicaragua's claims in these proceedings, and its statements as to what is intended, it is entirely consistent with Nicaragua's actions on the ground. It was in pursuit of this aim that Mr. Pastora cut the first *caño*, across Costa Rican territory, and carried out the meander cut, the obvious purpose of which was to increase the flow of the river through the first *caño*. It was also his aim in cutting the second and third *caños*, again across Costa Rican territory, clearly in the hope that the course of the Lower San Juan River would be diverted through the two new *caños*, becoming the principal outlet to the sea¹⁰⁶.

23. In all of this, Costa Rica's position has never been that Nicaragua is not entitled to carry out any works of improvement in accordance with the Cleveland Award. Rather, all that Costa Rica insists upon is that Nicaragua should comply with its international obligations, including by informing it of the true nature and scope of the programme, and provide a proper transboundary Environmental Impact Study (EIS) for the dredging programme which is in fact taking place. Provision of a proper transboundary EIS, which assesses the potential impacts on Costa Rica, including the potential impacts upon flows in the Colorado River, and an undertaking

¹⁰³Ministry of Environment and Natural Resources of Nicaragua (MARENA), DGCA administrative resolution ref. No. 038-2008, MCR, Ann. 160, Art. 3 (16).

¹⁰⁴Letter from the acting Minister for Foreign Affairs of Nicaragua, ref. DM-412-10, 21 Oct. 2010, MCR, Ann. 47.

¹⁰⁵Most Ecologically Vulnerable Area According to Dredging Programme EIS, MCR, Ann. 234 and tab 65 of judges' folder for provisional measures hearing, 11 Jan. 2011 (11 Dec. 2010); judges' folder, tab 101.

¹⁰⁶The Real Dredging Programme. MCR, Anns. 225 (b), 230 (d) and 234; Costa Rica's judges' folder for provisional measures hearing, 11 Jan. 2011, tab 65, 11 Dec. 2010; Costa Rica's judges' folder for provisional measures hearing, 14 Oct. 2013, tab 12, 14 Sep. 2013; judges' folder, tab 102.

from Nicaragua to abide by it, would allay Costa Rica's concerns. But Nicaragua simply refused to provide any such assessment, and further has refused to provide the data which would show that its dredging programme has not affected the Colorado River.

24. Mr. President, verification of whether there has been a change in the proportion of flow going through the Colorado and the lower San Juan is only possible through analysis of the flow data at three key locations: before the bifurcation, and in the Colorado River and the Lower Rio San Juan after the bifurcation.

25. In accordance with the 1858 Treaty of Limits, the waters of the San Juan River are Nicaraguan. As a result, Costa Rica is unable to take any action on the river, including the taking of measurements, whether of flow rates, or sediment concentrations. It follows that Costa Rica is unable on its own definitely to ascertain whether the dredging programme has resulted in a significant change in the proportion of the total flow prior to the bifurcation which goes to the Colorado River.

26. By contrast, Nicaragua is able to take such measurements. If Nicaragua wished to show that its dredging programme had not had any effect on the Colorado River greater than the 2 per cent diversion Nicaragua's experts predicted¹⁰⁷, it would have been a simple matter for it to take and produce flow measurements.

27. Costa Rica has requested the provision of information as to flow rates in the San Juan and Lower Rio San Juan on numerous occasions, and indeed has suggested that the Parties conduct a programme of joint measurements¹⁰⁸.

28. Yet, Nicaragua has not produced any meaningful flow measurements, and has refused to agree to a joint programme of monitoring¹⁰⁹. All Nicaragua has produced are two sets of

¹⁰⁷See, e.g., CR 2011/2, p. 40, para. 26 (Reichler).

¹⁰⁸See, e.g., letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-063-13, 6 Feb. 2013, *Road* case, CMCR, Ann. 46; see also letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-0639-14, 21 Oct. 2014, *Road* case, RCR, Ann. 40; see generally, *Road* case, RCR, paras. 2.28-2.33.

¹⁰⁹See e.g., letter from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE/DM-AJ/129/03/13, 5 Mar. 2013, *Road* case, CMCR, Ann. 48; letter from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE/DM-AJ/448/11/14, 3 Nov. 2013, *Road* case, RCR, Ann. 40; see generally, *Road* case, RCR, paras. 2.28-2.33.

measurements in all, one from early 2011 and one from 2012¹¹⁰. These in themselves are clearly insufficient to assess the magnitude of the impact of the dredging program.

29. Nevertheless, what is relevant is that, given Nicaragua's ongoing dredging programme, it would be surprising if only two sets of readings had been taken in total, and that no measurements of flow rates had been undertaken after May 2012, the last measurements on the record. Such measurements are relevant to this case. However, Nicaragua either decided to stop its previous programme of measurements, for undisclosed reasons, or it has chosen not to share measurements that were taken with Costa Rica or the Court.

30. Unlike Nicaragua, Costa Rica has taken measurements of the flow of the Colorado River¹¹¹. The graph on the screen¹¹², which is based on those measurements, show the annual flow rates based on flow measurements in the Colorado River between January 2011 and October 2014¹¹³. I would remind you that on the basis of data collected by Nicaragua itself, the pre-dredging annual average flow measurement of the Colorado River in 2006 was in the region of just under 1,600 cubic metres per second¹¹⁴. As you can see, between 2011 and 2014, the annual averages of flow in the Colorado River were substantially below that level, and between 2011 and 2013, the flow of the Colorado River has been reducing, year on year.

31. Even as regards 2014, although the average flow was higher than in 2013 — in large part due to high flows in June and July¹¹⁵ — in the first half of 2014 the general downward trend continued. At any rate, the average annual flow for 2014 was still significantly below pre-dredging levels, far more so than the 2 per cent assessed by Nicaragua's experts back in January 2011.

32. These figures represent average flow levels in the Colorado. On their own, they are not proof that the proportion of the total flow of the San Juan River prior to the Delta has reduced;

¹¹⁰INETER, "Summary of Measurement of liquid and suspended solids content during the years 2006, 2011, 2012", 26 June 2012, CMN, Ann. 16.

¹¹¹ICE, "Colorado River, Gauging Station 1104, Average daily flow table", 2010-2014, *Road case*, RCR, Ann. 79.

¹¹²Average Flow of the Colorado River, 2006 and 2011-2014, CMN, Ann. 8, p. 16; *Road case*, RCR, Ann. 79, judges' folder, tab 103.

¹¹³ICE, "Colorado River, Gauging Station 1104, Average daily flow table, 2010-2014", *Road case*, RCR, Ann. 79.

¹¹⁴"Project Design Study" (excerpts), Sep. 2006, CMN, Ann. 8, p. 17.

¹¹⁵ICE, "Colorado River, Gauging Station 1104, Average daily flow table", 2010-2014, *Road case*, RCR, Ann. 79.

other factors are relevant, most obviously the amount of rainfall, which affects the overall flow volumes.

33. We have the data for the Colorado. We do not have the data from the other two locations which would have permitted verification of whether there had been any reduction in flow. It was undoubtedly within Nicaragua's power to obtain data relating to the other two locations, if it does not already have it.

34. As the Court will appreciate, in the circumstances, in particular Nicaragua's refusal to provide or collect the relevant data, the significant reduction in the flow of the Colorado is a cause for grave concern on the part of Costa Rica.

35. This gives rise to an issue as to the allocation of the burden of proof, and what inferences may legitimately be drawn from the position Nicaragua has taken, in particular its failure to provide relevant and usable flow data, and its refusal to allow measurements to be taken. The Court in the *Corfu Channel* case, made clear that the:

“exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available . . . By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.”¹¹⁶

36. In so far as Costa Rica is unable itself to obtain the measurements which would constitute direct proof of the effects of Nicaragua's dredging programme on the flow of the Colorado River, precisely the same considerations apply in the present case.

37. If, as Nicaragua argues, its dredging programme has had no effects on the Colorado River, it was uniquely within its power to substantiate its argument with hard data as to the division of flows between the two branches. It has failed to do so. It is also significant that Nicaragua has rejected both Costa Rica's requests for the data, and Costa Rica's suggestion that the Parties jointly take the relevant measurements.

38. The obvious implication of fact is that the dredging programme is having a substantial impact on the flow of the Colorado River.

¹¹⁶*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 18; judges' folder, tab 104.

C. Nicaragua's dredging programme is inconsistent with its obligations under the 1858 Treaty and the Cleveland Award

39. I turn to assess Nicaragua's real dredging programme in light of its obligations under the Cleveland Award.

40. In this regard, there is a general question of principle: is Nicaragua entitled to carry out a dredging programme which involves the refashioning of the geography as it sees fit, and which thereby prejudices Costa Rica's rights and territory?

41. If the answer to that question is no, which it is, two further questions arise:

(a) has Nicaragua complied with its obligations under the 1858 Treaty and the Cleveland Award in carrying out its dredging programme to date? and

(b) is the scope of its dredging programme, involving the explicit stated intention to refashion geography and divert flow from the Colorado River, consistent with those obligations?

42. Taking first the question of general principle, the terms of the Cleveland Award are absolutely clear: Nicaragua can only carry out improvement works on the river over which it is sovereign on the condition that they do not cause damage to Costa Rica or its rights of navigation. President Cleveland ruled in 1888 that Nicaragua may carry out "works of improvement at her own expense and within her own territory provided" (and the word "provided" is in italics in the original): "*provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same"¹¹⁷.

43. The Award goes on to state

"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."¹¹⁸

44. On the ordinary meaning of the Award, the word "provided" imposes an express proviso or limitation upon Nicaragua's recognized entitlement to undertake works of improvement.

¹¹⁷Award of the Arbitrator, the President of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica (Cleveland Award), 22 Mar. 1888, MCR, Ann. 7, para. 3 (6); judges' folder, tab 105.

¹¹⁸Award of the Arbitrator, the President of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica (Cleveland Award), 22 Mar. 1888, MCR, Ann. 7, para. 3 (6); judges' folder, tab 105.

45. President Cleveland affirmed Costa Rica's right to indemnification in the event that occupation of or damage to Costa Rica's territory occurred in the course of such works. The right to indemnification he recognized, however, cannot be read as qualifying Costa Rica's sovereignty over the territory on the right bank. That territory was expressly recognized by President Cleveland to be "Costa Rica territory" and to constitute "places belonging to her". Conversely, Nicaragua's entitlement to carry out works of improvement was expressly limited: those works were to take place "within her own territory".

46. Of course, Costa Rica would be entitled to compensation in the case that unforeseeable or uncontrollable events were to occur resulting in the occupation of, or the causing of damage to Costa Rican territory. But it is stretching the words of the Award beyond the realms of plausibility to suggest that this means that Nicaragua is entitled, at will, to occupy or cause damage to Costa Rican territory in undertaking works, upon condition that it then pays compensation to Costa Rica.

47. This appeared to have been the position taken by Nicaragua during the oral hearings in January 2011¹¹⁹.

48. By contrast, in its Counter-Memorial, Nicaragua appears to have somewhat withdrawn from that position. As regards damage to Costa Rican territory, Nicaragua is somewhat reluctantly to articulate its argument. Although it denies that it had ever argued "that it had *carte blanche* to cause unlimited harm to Costa Rica so long as indemnification was provided"¹²⁰, it then did not expand as to what its position in fact is. It merely affirmed, by reference to the Cleveland Award that: "The position is much more straightforward than that, and is described so precisely in President Cleveland's response to Nicaragua's sixth question that no further explanation is needed."¹²¹ We will no doubt hear, and look forward to, a fuller explanation of Nicaragua's position later this week.

49. Whatever the arguments put forward, the position was clear in 1888 when the Cleveland Award was rendered, and the situation has not changed since. This was a point that the Court

¹¹⁹See, e.g., CR 2011/2, 11 Jan. 2011, p. 26, para. 21 (McCaffery); *ibid.*, p. 30, para. 27 (c) (McCaffery); *ibid.*, pp. 56-57, para. 14 (Pellet); *ibid.*, p. 59, para. 19 (Pellet); *ibid.*, p. 61, para. 24; CR 2011/4, 13 Jan. 2011, p. 32, para. 20 (Pellet).

¹²⁰CMN, para. 5.167.

¹²¹CMN, para. 5.167.

upheld in its Judgment of 13 July 2009 when it rejected, on the merits, Nicaragua's request for a declaration that it is entitled to dredge the San Juan River even if this would cause harm to the Colorado River, holding that the question was "settled in the decision made in the Cleveland Award"¹²².

50. However, Nicaragua now seeks a second bite at the cherry. The position it took during the provisional measures hearing, and, implicitly, despite its protestations to the contrary, the position it has maintained in the Counter-Memorial, is that it is entitled to carry out works even if they will foreseeably, and even deliberately cause damage to Costa Rican territory and the Colorado River.

51. Paragraph 3 (9) of the Cleveland Award is also relevant here. President Cleveland held:

"The Republic of Costa Rica can deny to the Republic of Nicaragua the right of deviating the waters of the River San Juan in case such deviation will result in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same."¹²³

52. As such, it is equally clear that Nicaragua is not entitled to deviate the waters of the San Juan River if this would result in the destruction or the impairment of navigation by Costa Rica of the San Juan River, or of any of its branches, including the Colorado River.

53. I turn to the second question, whether Nicaragua's conduct is consistent with these obligations.

54. Nicaragua's actual dredging programme is inconsistent with its obligations under the Cleveland Award, in the way it has been carried out to date, and also in so far as Nicaragua's intention is to refashion geography, thereby affecting the flow of water to the Colorado River.

55. First, Nicaragua's actions in Isla Portillos in constructing the first *caño* in 2010 undoubtedly breached its obligations under the Cleveland Award. The same is true as regards construction of the second and third *caños* in 2013.

56. Second, to the extent that the dredging programme has had a significant effect upon the Colorado River, or has resulted in the substantial diversion of its waters, it is likewise undoubtedly

¹²²*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, I.C.J. Reports 2009, p. 269, para. 155.

¹²³Award of the Arbitrator, the President of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica (Cleveland Award), 22 Mar. 1888, MCR, Ann. 7, para. 3 (9); judges' folder, tab 106.

inconsistent with Nicaragua's obligations under the Cleveland Award. Similarly, to the extent that the Nicaragua's dredging in the future will have a substantial effect upon the flow of water to the Colorado River, it will also violate Nicaragua's obligations.

D. Nicaragua has breached its obligations under international environmental law

57. I turn to examine Nicaragua's compliance with its obligations under international environmental law.

58. Even if the dredging project had been of the limited scope envisaged in the technical documents (which is clearly not the case), and had been carried out in strict accordance with their terms (which is equally not the case) Nicaragua would still have breached its environmental obligations. First, Nicaragua did not provide proper notification to Costa Rica, or consult with it, as to the works it was planning. Second, in any case, Nicaragua did not comply with its obligation to carry out a transboundary environmental impact study before starting dredging.

1. Nicaragua failed to give notification to Costa Rica of its planned dredging programme

59. First, not only did Nicaragua not conduct a *transboundary* Environmental Impact Study, but it did not bother to communicate to Costa Rica even the limited EIS it did carry out, or any other technical data relating to the planned dredging works. In fact, when, from 2006 onwards¹²⁴, Costa Rica requested information as to the planned works, having learned about them through news reports, Nicaragua refused to provide any details or simply did not answer¹²⁵.

60. The first time that Costa Rica was provided with the Project Design Study, the EIS and other documents which Nicaragua has relied upon, was when those documents were produced shortly before the oral hearings on provisional measures in January 2011, after dredging had commenced.

¹²⁴Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-37-06, 26 Jan. 2006, MCR, Ann. 41; Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-637-9, 27 Aug. 2009, MCR, Ann. 45; Note from the acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-156-10, 12 July 2010, MCR, Ann. 46.

¹²⁵Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE-DM-JI-262-02-06, 17 Feb. 2006, MCR, Ann. 42; Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. DM-JI-511-05-06, 8 May 2006, MCR, Ann. 44; and Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE/DVM/AJST/660/10/10, 26 Oct. 2010, MCR, Ann. 48.

61. There is here a breach of the obligations incumbent upon Nicaragua to notify and consult with Costa Rica.

2. Nicaragua did not conduct a transboundary environmental impact assessment

62. Second, I address Nicaragua's breach of its obligation to conduct a proper transboundary Environmental Impact Study.

63. The EIS on file¹²⁶ and other documentation patently do not constitute an appropriate transboundary assessment of the potential environmental harm which could be caused by the dredging programme. Accordingly, quite apart from the lack of notification and consultation, Nicaragua is also in breach of its international obligation, as recognized by the Court in *Pulp Mills*, to conduct an assessment of the potential transboundary effects of its dredging¹²⁷.

64. The assessment which was carried out for the paper dredging programme fulfils none of the criteria put forward by Nicaragua's own experts in the *Road* case for a proper transboundary EIS¹²⁸. Still less was any environmental impact study carried out in relation to the actual actions which Nicaragua has carried out.

65. That there is no consideration of the transboundary impacts of Nicaragua's activities in the EIS is evident first and foremost from its terms of reference¹²⁹. It is self-evident that if the terms of reference for the EIS do not contemplate consideration of transboundary issues, such matters will not be addressed in the EIS itself.

66. In its Counter-Memorial, Nicaragua emphasized that the terms of reference sent to EPN by MARENA in 2006 made clear that EPN had to "consider that the site where the project will be developed is recognized as a wetland of international importance" under the Ramsar Convention¹³⁰.

¹²⁶“Environmental Impact Study for Improving Navigation on the San Juan River”, excerpts, Sep. 2006, CMN, Ann. 7.

¹²⁷*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp. 82-83 para. 204.

¹²⁸Golder Associates, Inc. “The Requirements of Impact Assessment for Large-Scale Road Construction Project in Costa Rica along the San Juan River, Nicaragua”, July 2014, *Road* case, RN, Ann. 6.

¹²⁹See MARENA, “Specific Terms of Reference for the Preparation of the Environmental Impact Study for the Project ‘Dredging of the San Juan River’”, CMN, Ann. 9.

¹³⁰CMN, para. 5.24.

67. Strictly speaking that observation is correct, but it is obviously and patently incomplete. The dredging site is located along not one, but two wetlands of international importance, the Río San Juan Wildlife Reserve¹³¹ and Costa Rica's Humedal Caribe Noreste¹³² (now on your screens).

68. Nicaragua has not produced any documents providing evidence that it communicated to the Ramsar Secretariat that it was about to undertake works that would or might affect both wetlands, the extent of the impact expected, and the measures it was planning to undertake to mitigate such impacts. It appears that a visit by a Ramsar Advisory Mission did take place in March 2011¹³³. Nicaragua did not produce that report with its Counter-Memorial. We asked for it yesterday. We see no reason why Nicaragua should not be able to produce it by the end of this week.

69. Much less has Nicaragua explained why, if it had assessed the potential impact that dredging would have on the wetlands bordering the river, it did not approach Costa Rica, nor why it refused to respond to Costa Rica's multiple requests for information.

70. Second, and in any case, there is in fact no consideration of any of the potential impacts of dredging on Costa Rican territory, including in particular upon the flow of the Colorado River.

71. In all of the technical documentation produced by Nicaragua for the paper dredging programme, not one page, not even a single line was devoted to considering how a project that would have a direct impact on over 400 hectares of riverbed, one bank of which is Costa Rican territory¹³⁴, might affect Costa Rica.

72. Nicaragua asserted in its Counter-Memorial that the "*Project Design Study . . . included detailed analyses of possible environmental impacts, including whether and to what extent the dredging would cause changes in the relative flows of the San Juan and Colorado Rivers*"¹³⁵.

¹³¹Included in Ramsar website: <https://rsis.ramsar.org/ris/1138>.

¹³²Included in Ramsar website: <https://rsis.ramsar.org/ris/811>. See Ramsar Sites Along the San Juan River, Ramsar Site Information Service, available at: https://rsis.ramsar.org/RISapp/files/669/pictures/NI1138map_SP.pdf?language=en and <https://rsis.ramsar.org/RISapp/files/628/pictures/CR811map.pdf?language=en>, judges' folder, tab 107.

¹³³Screenshot of Ramsar Secretariat website, available at: http://ramsar.rgis.ch/cda/en/ramsar-documents-rams/main/ramsar/1-31-112_4000_0_judges' folder, tab 109.

¹³⁴"Environmental Impact Study for Improving Navigation on the San Juan River" (excerpts), Sep. 2006, CMN, Ann. 7, p. 30.

¹³⁵CMN, para. 5.38.

73. Nothing of that kind is included in the Project Design Study submitted by Nicaragua. In the Project Design Study, there is but a single set of flow measurements, taken at seven sites along the San Juan River¹³⁶. But, contrary to Nicaragua's assertion, those measurements are not accompanied by any analysis at all.

74. The only reference to modification in flow included in the Project Design Study was as follows: "In other words, we only require 2.01% of additional flow so that the section of the new channel may work permanently, keeping the same current characteristics of the channel or San Juan River."¹³⁷

75. That statement says nothing about potential impacts on the Colorado River, and there is no analysis accompanying it. Rather, self-evidently, it is simply an assertion regarding the additional amount of flow Nicaragua thought was *required* to maintain the navigability of the Lower San Juan River.

76. Similarly, the bare assertion in the EIS that no substantial harm would be caused to the Colorado¹³⁸, is likewise unsupported by any analysis.

77. Nicaragua has argued that, because its EIS concluded that no significant transboundary harm was likely, it had no obligation to notify, to consult or to share documents with Costa Rica¹³⁹. But as I have shown, however, in fact transboundary impacts were never properly considered.

78. It is clear that Nicaragua's intentions and actual actions on the ground go well beyond the supposedly "minor operations", which are the basis upon which the "paper" EIS was produced. As we have seen, the actual dredging in the initial sector at the start of the Lower Rio San Juan has vastly exceeded that foreseen.

79. In that regard, the evidence of Professor Thorne is that even the paper project, as authorised by MARENA, carried with it a risk of harm to the river as a whole, including the

¹³⁶"Project Design Study" (excerpts), Sep. 2006, CMN, Ann. 8, pp. 16-17.

¹³⁷"Project Design Study" (excerpts), Sep. 2006, CMN, Ann. 8, p. 18; judges' folder, tab 108.

¹³⁸"Environmental Impact Study for Improving Navigation on the San Juan River" (excerpts), Sep. 2006, CMN, Ann. 7, p. 10.

¹³⁹CMN, para. 5.112.

Colorado River, through changes in its morphology¹⁴⁰, as well as upon the Costa Rican wetlands¹⁴¹. That risk in itself is sufficient to have rendered the carrying out of a proper transboundary Environmental Impact Study necessary. And we just heard from him on what an expanded programme would do to the overall environment of the wetlands if an expanded programme was to be implemented, as appears to be the case.

80. In light of the markedly different character of the dredging programme which has in fact been conducted in the Lower Rio San Juan, a fresh Environmental Impact Study is required which assesses the potential impacts upon Costa Rica of the programme which is in fact being carried out.

81. As a consequence, Nicaragua has breached its obligations both requiring it to carry out a transboundary environmental impact study, and to notify and consult with Costa Rica in relation to its planned works.

E. Conclusions

82. Mr. President, Members of the Court, the evidence clearly indicates that Nicaragua's dredging programme has been and is being carried out with the aim of refashioning the geography of the lower San Juan to the prejudice of Costa Rica, in particular as regards the flow of the Colorado River. Further, as I have shown, in carrying out its dredging, Nicaragua has breached and is breaching its obligations both under the 1858 Treaty and the Cleveland Award, and under international environmental law.

83. Professor Kohen will address you in due course on the specific remedial consequences which Costa Rica submits are necessary as a result in the particular circumstances of this case.

84. Mr. President, that concludes Costa Rica's presentation today. Thank you very much.

Le PRESIDENT : Merci, Monsieur l'ambassadeur. Je me tourne vers le juge Greenwood qui me fait savoir qu'il souhaiterait peut-être poser une question au Costa Rica. Monsieur le juge Greenwood.

¹⁴⁰Professor Colin Thorne, *Assessment of the physical impact of works carried out by Nicaragua since October 2010 on the geomorphology, hydrology and sediment dynamics of the San Juan River and the environmental impacts on Costa Rican territory*, MCR, App. 1, pp. II-35-43.

¹⁴¹*Ibid.*, pp. II-44-51.

Judge GREENWOOD : Thank you, President. Earlier today counsel for Costa Rica referred to Geneva Convention No. 4 of 1949. Since that Convention is applicable only in case of armed conflict, is Costa Rica alleging that there is, or at some relevant time has been, an armed conflict between itself and Nicaragua?

Le PRESIDENT : Merci, Monsieur le juge Greenwood. Le Costa Rica pourra sans doute apporter quelque réponse à cette question à la fin de son premier tour de plaidoiries, c'est-à-dire demain ou bien, le cas échéant, lors du second tour de plaidoiries.

Ainsi se termine l'audience de cet après-midi. Je vous remercie. La Cour se réunira de nouveau demain de 10 heures à 11 h 30 pour entendre la fin du premier tour de plaidoiries du Costa Rica. L'audience est levée.

L'audience est levée à 18 heures.
