

CR 2015/14

**International Court  
of Justice**

**Cour internationale  
de Justice**

**THE HAGUE**

**LA HAYE**

**YEAR 2015**

*Public sitting*

*held on Tuesday 28 April 2015, at 10 a.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)*

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**VERBATIM RECORD**

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**ANNÉE 2015**

*Audience publique*

*tenue le mardi 28 avril 2015, à 10 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)*

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**COMPTE RENDU**

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

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

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Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre le second tour de plaidoiries du Costa Rica en l'affaire relative à *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*.

Je rappelle que, conformément au paragraphe 1 de l'article 60 du Règlement, les exposés oraux devront être aussi succincts que possible et en particulier que le second tour de plaidoiries a pour objet de permettre à chacune des parties de répondre aux arguments avancés oralement par l'autre partie ou aux questions posées par les membres de la Cour lors du premier tour. Le second tour ne doit donc pas constituer une répétition des présentations déjà faites par les parties, lesquelles au demeurant ne sont pas tenues d'utiliser l'intégralité du temps de parole qui leur est alloué.

Je donne maintenant la parole à M. Wordsworth.

Mr. WORDSWORTH:

**THE LEGAL BASIS OF COSTA RICA'S SOVEREIGNTY OVER ISLA PORTILLOS  
AND NICARAGUA'S BREACHES**

**A. Introduction**

1. Mr. President, Members of the Court, this morning I will be dealing with two issues:

- (a) first, Nicaragua's case on sovereignty over Isla Portillos so far as concerns its interpretation of the 1858 Treaty of Limits, the Cleveland Award and the three Alexander Awards; and
- (b) secondly, Nicaragua's defence to the claims of breach resulting from the military incursion into Isla Portillos, and the construction of the three *caños*.

2. Professor Kohen will then be responding to the cartography and other imagery that Nicaragua has relied on in its sovereignty case, while at the same time depicting and explaining our case on the precise course of the boundary in response to the questions of Judges Yusuf and Donoghue. He will also deal with the issues on remedies before my colleagues Dr. Parlett, Ambassador Ugalde and Dr. Del Mar complete Costa Rica's reply, dealing in turn with residual issues on applicable law, dredging, and navigation. The Honourable Agent will then be closing Costa Rica's case.

**B. Nicaragua's case on the 1858 Treaty, Cleveland Award  
and Alexander Awards**

3. I pick up, then, from my friend Professor Pellet's concluding salvo on interpretation, which was to take a 2011 image from Professor Thorne's report, and to add a red line to mark the boundary that was said to be in conformity with the 1858 Treaty, the Cleveland Award, and the Alexander Awards<sup>1</sup>. While there might be thought to be more than a touch of the Harry Potter here, this unlikely endpoint was reached via four principal contentions:

- (a) first, as to the 1858 Treaty, it was said that the delimitation of the boundary under Article II is distinct from the régime of navigation established under Article VI<sup>2</sup>;
- (b) secondly, as to the First Alexander Award, the determining factor is said, by Nicaragua, to be the reference to the "first channel met"<sup>3</sup>, with a particular emphasis to be placed on the distinction supposedly made by General Alexander between the "first channel met" and the "river proper"<sup>4</sup>;
- (c) thirdly, and also from the First Alexander Award, it is emphasized by Nicaragua that it is Nicaragua that has ownership of all the islands in the Río San Juan<sup>5</sup>; and
- (d) finally, it is said that General Alexander did not purport to determine the course of a fixed boundary and, moreover, referred in his Third Award to the possibility of "changes in the banks or channels [plural] of the river"<sup>6</sup>, resulting in the modification of the boundary<sup>7</sup>.

4. I will deal with each of these contentions in turn, but they all suffer from precisely the same defect. Each limb to Nicaragua's argument is dependent on looking at a term or a phrase in isolation, in a way that is inconsistent with the basic tenets of treaty interpretation and also the approach of General Alexander. Thus, while it purports to rely on the Alexander Awards, Nicaragua rejects in the most determined way what General Alexander called the "meaning of the

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<sup>1</sup>CR 2015/5, p. 29, para. 19 (Pellet); AP1-10c, p. 3 of tab 16, Nicaragua's judges' folders, 16 April 2015.

<sup>2</sup>CR 2015/5, p. 20, para. 5 (1) (Pellet).

<sup>3</sup>First Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 30 Sep. 1897; MCR Ann. 9, p. 217.

<sup>4</sup>CR 2015/5, p. 23, para. 8 (Pellet).

<sup>5</sup>CR 2015/5, p. 28, para. 18 (5) (Pellet).

<sup>6</sup>Third Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 22 Mar. 1898; MCR, Ann. 11, p. 230.

<sup>7</sup>CR 2015/5, p. 25, para. 10 (Pellet).

men who framed the treaty” which, as the Court will recall from our opening round, he described as what “we are to seek, rather than some possible meaning which can be forced upon isolated words or sentences”<sup>8</sup>.

**(1) *The 1858 Treaty***

5. Starting with the 1858 Treaty, Nicaragua is unable to explain away Article II, which says in terms that

“The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua River, and shall run along the right bank of the said river up to a point of three English miles distant from Castillo Viejo . . .”<sup>9</sup>

6. Now, even by the time of the First Alexander Award, the original Punta de Castilla had disappeared and its precise location was uncertain<sup>10</sup>. In these circumstances, the correct approach must be to fix on the other words of Article II that set out the intention of the Treaty parties, namely that the boundary was to begin “at the mouth of the San Juan de Nicaragua River” and that, from there, it was to “run along the right bank of the said river”.

7. The Court may recall that a not dissimilar situation arose in *Cameroon v. Nigeria*. In defining the course of a sector of the land boundary as following the river Kohom, paragraph 19 of the Thomson/Marchand Declaration made reference to various specific villages and districts as falling on one side or the other of the boundary<sup>11</sup>. The Court found that, in determining the course of the Kohom river and therefore of the boundary, those words “ha[d] not provided a decisive answer”, as none of relevant villages and localities were indicated on any of the maps submitted to the Court<sup>12</sup>. It accordingly discarded those words, and had recourse to other means of interpretation. To similar effect here, we say, the Court should not be focusing on the reference in Article II to “the end of Punta de Castilla” which, as it was understood by the Treaty parties, has

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<sup>8</sup>First Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 30 Sep. 1897; MCR, Ann. 9, p. 216.

<sup>9</sup>Costa Rica-Nicaragua Treaty of Limits, 15 April 1858; MCR, Ann. 1, Art. II.

<sup>10</sup>First Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 30 Sep. 1897; MCR, Ann. 9, p. 220.

<sup>11</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, I.C.J. Reports 2002, pp. 365-366, para. 97.

<sup>12</sup>*Ibid.*, p. 366, para. 101.

disappeared under the sea, but it should be focusing on the elements of description that still do exist, namely the reference to the boundary beginning at the mouth of the river<sup>13</sup>.

8. As to the 1858 Treaty parties' repeated references to the "mouth of the river", Professor Pellet responded only in the context of Article VI, saying that use of the expression there did not necessarily imply that the boundary must follow the main channel<sup>14</sup>. But this would be the expected result as a matter of the ordinary meaning of the words of Articles II and VI when read in conjunction, and this is confirmed by the reference in Article II to the boundary running along "the right bank of the river"<sup>15</sup>. It is self-evident that the drafters of the Treaty considered that the boundary followed the main channel, i.e., the right bank of the river, all the way to the river mouth.

9. As to Article VI of the Treaty, the Court will recall how this accords to Costa Rica the right of navigation to the mouth of the river. Professor Pellet contends that the issue of the boundary line under Article II is distinct from the issue of navigation under Article VI<sup>16</sup>. But, at best, that is an example of striving not to take account of the overall scheme of the Treaty, and it is not in any event correct. The wording of Article VI does cover both navigation and allocation of territory, as one sees from the express declaration in this provision that the bank of the San Juan belongs to Costa Rica<sup>17</sup>.

10. Likewise, Professor Pellet's reliance on the reference in the Cleveland Award to Punta de Castilla being at the mouth of the river does not assist<sup>18</sup>. The suggestion appeared to be that Costa Rica's right of navigation all the way to the river mouth could in fact be a right of navigation along some other channel to the Caribbean Sea, in the vicinity of the mouth of the river. But that is not credible, and anyway assumes that there is some other channel that was or is navigable for purposes of commerce. There was not then and there is not now.

11. And all the more to the point, General Alexander correctly identified the whole scheme of the 1858 Treaty as allocating to Costa Rica the right bank of the channel used for navigation,

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<sup>13</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, I.C.J. Reports 2002, p. 366, para. 101.

<sup>14</sup>CR 2015/5, p. 21, para. 5 (2) (Pellet).

<sup>15</sup>Costa Rica-Nicaragua Treaty of Limits, 15 Apr. 1858; MCR, Ann. 1, Art. II.

<sup>16</sup>CR 2015/5, p. 20, para. 5 (1) (Pellet).

<sup>17</sup>Costa Rica-Nicaragua Treaty of Limits, 15 Apr. 1858; MCR, Ann. 1, Art. VI.

<sup>18</sup>CR 2015/5, p. 21, para. 5 (2) (Pellet).

i.e., the river as an outlet for commerce<sup>19</sup>. You can see that on the screen, in the second full paragraph: “Costa Rica was to have as a boundary line the right or southeast bank of the river, considered as an outlet for commerce, from a point 3 miles below Castillo to the sea.”<sup>20</sup> The Court will recall that this is one reason why General Alexander rejected Nicaragua’s argument that the boundary followed the Taura or Colorado branches, and described the Treaty’s scheme in relevant part as, “Costa Rica was to have as a boundary line the right or southeast bank of the river, considered as an outlet for commerce”.

12. For good measure, I should also draw the Court’s attention to Article IV of the Treaty<sup>21</sup>, which establishes that the Bay of San Juan del Norte was to be a common bay. This confirms once more that the intention was that Costa Rica should have sovereignty over the right bank of the Río San Juan all the way to the sea. It would have been very odd indeed to accord to it partial sovereignty over the Bay of San Juan del Norte, but at the same time to have its territorial sovereignty over the right bank cease some way upstream from the common bay.

## **(2) The “first channel met” argument; the “Nicaraguan islands” argument**

13. I move on to the First Alexander Award and the mainstay of Nicaragua’s case on sovereignty, which is its “first channel met” argument.

14. The short point is that this argument is based on latching onto a few words of description in the First Alexander Award, and giving them an effect that they were never intended to have.

15. I have already taken you to the detail of the First Alexander Award in opening and, to avoid repetition, we simply direct you to the importance of reading the Award as a whole — it is at tab 4 of your judges’ folders — to read it as a whole, and not just to focus on the few words that Nicaragua puts before you. Professor Pellet had no response to Costa Rica’s contentions on General Alexander’s description of the general scheme of the 1858 Treaty, or on the decisive weight that Alexander placed on Costa Rica having as a boundary the right bank as an outlet for commerce to the sea. Likewise, he had no response to our point that the understanding of both

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<sup>19</sup>First Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 30 Sep. 1897; MCR, Ann. 9, p. 217; cf. CR 2015/5, p. 21, para. 5 (3) (Pellet).

<sup>20</sup>First Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 30 Sep. 1897; MCR, Ann. 9, p. 217.

<sup>21</sup>Costa Rica-Nicaragua Treaty of Limits, 15 Apr. 1858; MCR, Ann. 1, Art. IV.

Nicaragua and General Alexander, as reflected in his further Awards, was that the border line “is and always shall be the right bank of the river as it may stand at any point in time”<sup>22</sup>. That is a quote from the Third Award, but the Court will recall that Nicaragua’s submissions were to the same effect as recorded in the Second Award — it said that “the left bank of the Harbour and of the river formed the boundary”<sup>23</sup>. It follows that, despite what is now being asserted by Nicaragua, neither Nicaragua then nor General Alexander considered that an important distinction was being drawn between the “first channel met” and the “river proper”<sup>24</sup>.

16. The impact of the erosion of a good part of the former coastline is that the “first channel met” to which General Alexander referred no longer exists. But this does not impact either on the scheme of the 1858 Treaty, or the way that the scheme was understood by General Alexander. The critical point of the Award, as reflected in General Alexander’s correct interpretation of the Treaty, is that Costa Rica was to have as a boundary the right bank of the San Juan “considered as an outlet for commerce”, not that there somehow had to be a “first channel met”.

17. If Nicaragua’s argument is that the words “first channel met” are in the *dispositif*, and that the Court should not look beyond this, then that is inconsistent with the Court’s long-standing jurisprudence, which requires that General Alexander’s reasoning be regarded as a valuable aid to the true understanding of the operative part of his Award<sup>25</sup>. Further, Nicaragua wishes the Court to focus only on the *dispositif* in the First Award, and to ignore the *dispositif* in the Third Award, where General Alexander ruled “that the exact dividing line between the jurisdiction of the two countries is the right bank of the river, with the water at ordinary stage and navigable by ships and general-purpose boats”<sup>26</sup>. Self-evidently, the boundary was not to follow any non-navigable, and ephemeral at best, *caño*.

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<sup>22</sup>Third Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 22 Mar. 1898; MCR, Ann. 11, p. 228.

<sup>23</sup>Second Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 20 Dec. 1897, p. 224.

<sup>24</sup>Cf. CR 2015/5, p. 23, para. 8 (Pellet).

<sup>25</sup>See e.g. *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, *Judgment*, *I.C.J. Reports 2013*, p. 306, para. 68. See also R. Kolb, *The International Court of Justice* (2013), pp. 767-768; C. Brown, “Article 59”, in A. Zimmermann *et al.* eds., *The Statute of the International Court of Justice. A Commentary* (2nd ed., 2012), p. 1431, referring to C. De Visscher, “La chose jugée devant la Cour internationale de La Haye”, *RBDI* 1 (1965), pp. 5, 6–7.

<sup>26</sup>Third Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 22 Mar. 1898; MCR, Ann. 11, p. 230.

18. And, now that the Court has heard the evidence, it can safely find that Nicaragua's alleged "first channel met", the 2010 *caño*, was indeed constructed afresh by Nicaragua in 2010. Professor Kohen will return briefly to the map evidence that Professor Pellet relied on, such as it is, and also to Dr. Kondolf's wholly unconvincing attempt to base the prior existence of the 2010 *caño* on the aerial imagery of 1961<sup>27</sup>. That attempt can only be rejected by the Court.

19. And while Nicaragua now wishes to tempt the Court into devising a new game of "hunt the *caño*" as if this followed as a necessary result of a plain reading of the First Alexander Award, the simple point is that General Alexander was using the phrase "first channel met" as the means of describing how, by reference to the picture before him, the boundary would follow the river as "an outlet for commerce". For him, the essential feature of the boundary was solely that it follow the river "as an outlet for commerce", as to which he concluded that the boundary "must follow the remaining branch, called the Lower San Juan, through its harbour and into the sea"<sup>28</sup>; see the First Award at page 217.

20. Professor Pellet also ran the argument that there are *caños* to the north-west of Nicaragua's 2010 construction which mean that the territory is correctly to be characterized as "islands in the river" as referred to by General Alexander in his First Award, and hence they are to be regarded as Nicaraguan territory<sup>29</sup>.

21. Two points. First, if there were indeed another candidate for Nicaragua's "first channel met" theory, that is another *caño* linking the Lower San Juan with Harbor Head Lagoon, we can be sure that Nicaragua would not be making its implausible and time-wasting request for appointment of an independent expert, but it would have taken multiple photos of the hypothetical *caño*'s exit point from the Lower San Juan. Nicaragua is after all sovereign over the river. Likewise, it would not be relying on extracts from the 2014 Ramsar Report that do not say what either Nicaragua or its

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<sup>27</sup>CR 2015/6, pp. 39-42 (Kondolf).

<sup>28</sup>*First Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 30 Sep. 1897; MRC, Ann. 9, p. 217, Judge's folder, tab 4.*

<sup>29</sup>Cf. CR 2015/5, p. 28, para. 18 (5) (Pellet).



expert, Dr. Kondolf, contends for; Ramsar does *not* identify any *caño* linking the Lower San Juan with Harbor Head Lagoon<sup>30</sup>, despite what Nicaragua and Dr. Kondolf have said.

22. And, secondly, even if the *caño* — this is the “Y” shaped *caño* marked in red on Nicaragua’s slides<sup>31</sup> — if this *caño* did indeed link into the Lower San Juan, it would neither be the “outlet for commerce” that the boundary must follow, and nor would it somehow magically turn the area into a region of Nicaraguan islands; the suggestion is fanciful.

### **(3) Nicaragua’s arguments on the Second and Third Alexander Awards**

23. I turn, then, to Nicaragua’s case that General Alexander did not purport in his Second Award to determine the course of a fixed boundary, and its reliance on the reference in the Third Award to the possibility of “changes in the banks or channels [plural] of the river”<sup>32</sup>. And these two Awards are at tabs 7 and 8 of the judges’ folder.

24. General Alexander decided to demarcate the boundary line as it stood in 1897-1898. It is indeed the case that, as he explained in his Second Award, General Alexander considered that there might be wholesale changes in the channels of the Río San Juan<sup>33</sup>. But this does not assist Nicaragua. At best, it would mean that his careful measurement and demarcation of the boundary as it stood in 1897-1898 would have limited value due to actual shifts in the course of the river. But there have been no material changes since 1897. It is the sea that has eroded the coastline, not the river that has shifted materially in its course. Professor Pellet’s reference to the changes in the area that were described in the Second Rives Report of 2 March 1888 does not impact on this<sup>34</sup>. What matters is not what changes were recorded by Rives in 1888 or indeed what changes had occurred prior to 1897-1898 when General Alexander demarcated the boundary; what matters is what has happened since.

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<sup>30</sup>CR 2015/5, p. 28, para. 18 (4) (Pellet); G. Mathias Kondolf, *Certain Activities* case, Written Summary, 16 Mar. 2015, paras. 25-26; cf. Ramsar Advisory Mission Report No. 72, 18 Apr. 2011; extract, English translation, p. 47, annexed to letter from Costa Rica to the ICJ, ref. ECPRB-062-2015, 17 Apr. 2015; and CR 2015/6, pp. 45-46 (Kondolf).

<sup>31</sup>*Judge’s folder, tab 10.*

<sup>32</sup>CR 2015/5, p. 25, para. 10 (Pellet); Third Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 22 Mar. 1898; MCR, Ann. 11, p. 230.

<sup>33</sup>Second Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 20 Dec. 1897; MCR, Ann. 10, p. 224.

<sup>34</sup>CR 2015/5, pp. 26-27, paras. 14-16 (Pellet).

25. As to this, Professor Pellet had no response to the figure in Costa Rica's Memorial that superimposes the data from Proceedings X of the Alexander Minutes onto a map of the relevant area in 1899, and then onto available aerial photographs — from 1961, 1997 and 2010<sup>35</sup>. This was shown to you by Mr. Brenes in opening<sup>36</sup> (judges' folder, tab 31), and I show it again because it demonstrates that Professor Pellet is wrong to say that since 1897, the fluctuations in the course of the San Juan and the channels of its mouth have been considerable<sup>37</sup>. The course of the San Juan has changed remarkably little, and the changes to the location of the seashore do not impact on the boundary of the right bank of the river, as demarcated by General Alexander.

26. As to the reference to the channels, plural, by General Alexander, this makes no difference at all. There might indeed be more than one channel of the Río San Juan at a given point in time, as General Alexander recognized; but the intention of Alexander was undoubtedly that the boundary follow the channel navigable as an outlet for commerce, whichever that was. The reference to channels in the plural does not somehow mean that the Second and Third Alexander Awards foresaw, or still less established, the situation where the boundary would follow a *caño* that was ephemeral at very best, and in fact has never existed.

27. Indeed, that would have been quite clear had Professor Pellet referred you to the ruling immediately above the words that he highlighted in the Third Award; you see there, the ruling:

“I therefore rule that the exact dividing line between the jurisdiction of the two countries is the right bank of the river, with the water at ordinary stage and navigable by ships and general-purpose boats. At that stage, every portion of the waters of the river is under Nicaraguan jurisdiction. Every portion of the land on the right bank is under Costa Rican jurisdiction.”<sup>38</sup>

28. Alexander thus made quite clear that Costa Rica was sovereign over all of the right bank of the river, not just the right bank of the river until it meets a non-existent non-navigable channel.

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<sup>35</sup>MCR, p. 59, fig. 2.7.

<sup>36</sup>CR 2015/2, pp. 34-35, paras. 30-35 (Brenes)

<sup>37</sup>CR 2015/5, p. 26, para. 14 (Pellet).

<sup>38</sup>Third Award of the Umpire E. P. Alexander in the boundary question between Costa Rica and Nicaragua, 22 Mar. 1898; MCR, Ann. 11, p. 230.

### **C. Nicaragua's breaches of Costa Rican sovereignty and territorial integrity**

29. I turn to the breaches resulting from Nicaragua's military incursion into Costa Rican territory in 2010, including the construction of the first *caño*, and also the breaches resulting from its subsequent construction of the second and third *caños* in September 2013. Dr. Parlett will address the events in 2013 from the perspective of breach of the 2011 Order on Provisional Measures later this morning.

#### **(1) 2010 breaches**

30. As to the 2010 breaches, in opening, Costa Rica emphasized how this case is unlike the normal boundary dispute, including because the key facts are not in issue<sup>39</sup>. The presence of the Nicaraguan military in Isla Portillos is accepted. Matters of characterization and points of detail are in dispute<sup>40</sup>, but remarkably little was said by Nicaragua in its opening round by way of a substantive defence to Costa Rica's claims of breach.

31. In particular, on the central issue of breach, Nicaragua has no defence other than its claim to be sovereign over Isla Portillos. Unsurprisingly, it appears to accept that if the Court finds that the disputed territory is part of Costa Rica, then in 2010 Nicaragua violated Costa Rica's territorial sovereignty.

32. Likewise, Nicaragua did not engage with Costa Rica's claims relating to the prohibition on the use of force contained in Article 2 (4) of the United Nations Charter, and under the Organization of American States (OAS) Charter. My friend, Professor Pellet limited himself to expressing his amazement that the actions of Nicaragua should be described as an occupation<sup>41</sup>. But that professed amazement does not address the basic point, as to which Nicaragua has no answer, which is that Nicaragua sent its troops without notice into territory that it had not previously claimed, and established a military presence there that excluded Costa Rica from its own territory, including on one occasion through directing weapons at a Costa Rican civil aircraft.

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<sup>39</sup>CR 2015/3, pp. 16-17, paras. 4, 7-8 (*Ulgade Álvarez*), p. 19, para. 3 (*Ulgade*); CR 2015/3, p. 10, paras. 2-3 (*Wordsworth*).

<sup>40</sup>CR 2015/3, p. 10, para. 3 (*Wordsworth*).

<sup>41</sup>CR 2015/7, p. 49, para. 23 (*Pellet*).

33. The violations of international law resulting from Nicaragua's actions in sending its troops into Costa Rican territory — not once but twice — are serious, and cannot be batted away by expressions of incredulity. Nicaragua cannot ~~be expected~~ to be treated as if it had simply been giving concrete effect to a long-standing claim to Costa Rican territory. It was not. This was a case of occupy first, and claim later, as Professor Kohen and I explained in opening, including by reference to the answers given by Nicaragua in January 2011 to the questions of Judges Greenwood and Simma<sup>42</sup>. Nicaragua has no response to this, just as it has no response to the fact that it gave an incorrect answer to the important question by Judge Bennouna as to whether it had withdrawn its troops<sup>43</sup>.

34. And Nicaragua has given no reasoned answer why its conduct is not a breach of its fundamental obligations under the United Nations Charter, or likewise its obligations under the OAS Charter, including Article 21 which provides 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”. As to this, the Court already has our submissions, from our opening round, and our answer to the question of Judge Greenwood relating to occupation<sup>44</sup>. Nicaragua has said nothing. Perhaps Nicaragua will have more to say on Wednesday, when we will no longer have any opportunity to respond.

35. As to the damage caused by Nicaragua, Mr. Loewenstein expended great effort in trying to convince you that Nicaragua had engaged in a minor endeavour, with insignificant and time-limited impacts. He suggested that the Court needed to put Nicaragua's clearing of the first *caño* “all in perspective” and that it “inevitably” followed that it “could not have been significant”<sup>45</sup>.

36. Well, this is not serious. The Court has fully on board the point that the threshold relevant to transboundary harm has no application where State A comes on to the territory of State B and starts chopping down trees and the like. At best, practically the entirety of

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<sup>42</sup>CR 2015/3, pp. 14-15, paras. 17-21 (Wordsworth).

<sup>43</sup>CR 2015/3, pp. 12-13, paras. 12-15 (Wordsworth).

<sup>44</sup>See CR 2015/3, pp. 16-17, paras. 23-29 (Wordsworth); and CR 2015/4, pp. 44-45 (Wordsworth).

<sup>45</sup>CR 2015/7, p. 22, para. 37 (Loewenstein).

Mr. Loewenstein's presentation can be taken as directed to the compensation phase of this proceeding. His suggestions that the first *caño* was narrow and shallow<sup>46</sup>, and that it quickly closed<sup>47</sup>, are beside the point. The same applies to the emphasis he gave to the fact that the area adjacent to where Nicaragua cut down hundreds of trees had previously been cleared to make way for pasture<sup>48</sup>, or that the area of the first *caño* was but a small part of the total area of Costa Rica's protected wetland<sup>49</sup>. And likewise, his emphasis on the question of whether 180 or 292 trees were felled by Nicaragua<sup>50</sup>, his submissions as to their diameter, and their age<sup>51</sup>, and whether the undergrowth cleared was rapidly revegetated<sup>52</sup>.

37. Costa Rica's claim of breach of its sovereignty and territorial integrity cannot be approached as if this were a case being heard by a domestic small claims court. The precise minutiae of damage inflicted on Costa Rican territory by Nicaragua are irrelevant to the question now before you, which is the question of breach. It will be relevant to your assessment of compensation for that breach, and Costa Rica has requested that the Court award compensation, to be assessed at a subsequent phase. Nicaragua could have felled five trees, or 5,000. The trees could have been one year old or 300 years old. Either way, the breach is established if the territory in dispute is Costa Rican territory.

38. To similar effect, it will have taken the Court about five seconds to see through the inappropriate comparisons drawn by Nicaragua between the size of the forest area that it cleared on Costa Rica's territory to construct the first *caño*, and the size of the forest cleared by Costa Rica in constructing the Road<sup>53</sup>. It is self-evidently one thing for a State to clear trees on its own territory, as part of a project that it has decided upon in exercise of its own prerogatives of sovereignty. It is quite another thing for State A to send its military across a border and cut down trees and the like that are on the territory of State B.

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<sup>46</sup>*Ibid.*, pp. 12-13, paras. 8-10; and pp. 14-15, para. 15 (Loewenstein).

<sup>47</sup>*Ibid.*, p. 15, para. 16 (Loewenstein).

<sup>48</sup>*Ibid.*, pp. 17-18, paras. 24-27; p. 19, para. 29 (Loewenstein).

<sup>49</sup>CR 2015/7, p. 19, para. 28 (Loewenstein).

<sup>50</sup>*Ibid.*, pp. 19-20, paras. 30-31 (Loewenstein).

<sup>51</sup>*Ibid.*, pp. 20-21, paras. 32-34 (Loewenstein).

<sup>52</sup>*Ibid.*, p. 21, para. 35 (Loewenstein). See also CR 2015/6, pp. 21-22, paras. 43-44 (Reichler).

<sup>53</sup>*Ibid.*, p. 19, para. 28 and p. 22, para. 37 (Loewenstein).

**(2) 2013 Breaches**

39. I move very briefly to the 2013 breaches. In opening, Nicaragua took a similar approach to the question of its responsibility for breaches relating to the construction of the second and third *caños* in 2013. Mr. Loewenstein said that the area regenerates quickly<sup>54</sup>, and that, since Nicaragua had closed the trench on the beach and ceased dredging the eastern *caño*, there was a “low to medium” risk that it would be connected to the sea, and that any such risk had been addressed by Costa Rica’s installation of a dyke<sup>55</sup>. That is likewise irrelevant to the question of breach. For present purposes I need only note that in the few minutes it spent on the 2013 *caños* in its first round, Nicaragua did not disclaim responsibility for these works, and nor did it present any defence to its breach of Costa Rica’s territorial sovereignty.

**D. Conclusions**

40. Mr. President, Members of the Court, to pick up again on Professor Pellet’s image, the 1858 Treaty and the Alexander Awards can only leave the current boundary running along the right bank of the Lower San Juan to the River mouth, which is the navigable course of the San Juan largely as it was in 1897-1898. These awards and the 1858 Treaty do not leave the boundary up a non-existent *caño* as Professor Pellet contends for<sup>56</sup>.

41. As to the breaches that follow from the military incursions into Costa Rican territory, and the construction of the *caños* in 2010 and 2013, Nicaragua has had notably little to say. That is as would be expected, given that the basic facts are not in dispute, and the breaches follow largely as a matter of course from the fact of Costa Rica’s long-standing and uncontested sovereignty over Isla Portillos — regardless of which Nicaraguan troops took over the area to enable construction by Nicaragua of the first *caño* with a view to shifting the course of the Río San Juan and, astonishingly, it then had another go in 2013.

42. Mr. President, I thank you for your kind attention and I ask you to call Professor Kohen to the podium to continue Costa Rica’s submissions.

Le PRESIDENT : Merci, je donne la parole au professeur Kohen.

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<sup>54</sup>*Ibid.*, p. 22, para. 38 (Loewenstein).

<sup>55</sup>CR 2015/7, p. 22, para. 39 (Loewenstein).

<sup>56</sup>AP1-10c, page 3 of tab 16, Nicaragua’s judges’ folders, 16 Apr. 2015, *Judge’s folder, tab 13*.

M. KOHEN :

***Le Nicaragua est incapable d'articuler une revendication sérieuse  
de souveraineté et se prépare déjà pour la phase suivante  
de l'affaire***

1. Monsieur le président, Mesdames et Messieurs les juges, durant le premier tour des plaidoiries, le Nicaragua a confirmé — aggravé même dirais-je,— l'impression qu'il a donnée depuis le début même de cette affaire : sa revendication est aussi artificielle que le *caño* qu'il a construit en 2010. Pour cette raison, ma première partie consacrée à la revendication nicaraguayenne de souveraineté sera brève. Ensuite, je répondrai aux questions posées par le vice-président Yusuf et la juge Donoghue. En troisième lieu, brièvement également, j'aborderai la curieuse revendication nicaraguayenne à un droit de causer des dommages et d'occuper le territoire costa-ricien et enfin, quatrième, je répondrai au Nicaragua par rapport à la question des remèdes que l'agent du Costa Rica vous lira à la fin de cette audience.

**A. L'artificialité de la revendication nicaraguayenne mise à nu au premier tour**

2. Je commence donc par la revendication artificielle nicaraguayenne. Je n'aurai pas grand-chose à ajouter à ce que j'ai déjà dit dans mon exposé du 14 avril<sup>57</sup>. Mon collègue M<sup>e</sup> Wordsworth a déjà disposé de l'interprétation alambiquée faite par le Nicaragua des sentences arbitrales Alexander. Tout ce que l'autre Partie a ajouté au premier tour a été la répétition de son analyse imaginaire de la cartographie et du dossier photographique. Cependant, si la musique demeure, la partition a — une fois de plus ! — changé. Le Nicaragua semble partir maintenant «à la recherche du *caño* perdu». Son *caño* n'est plus. Plus une goutte d'eau n'y circule, ni n'y circulera. Du moment où la justification du *caño* construit en 2010 comme étant la frontière devient manifestement indéfendable, le Nicaragua semble vous dire : si notre *caño* n'est pas le «first channel met», ce n'est pas grave Mesdames et Messieurs les juges, faites le travail à notre place et allez-y vous-mêmes, ou envoyez des experts pour savoir s'il y en a un autre et l'endroit où il se trouve<sup>58</sup> !

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<sup>57</sup> CR 2015/2, p. 46-72, par. 1-76 (Kohen).

<sup>58</sup> CR 2015/5, p. 14, par. 23 (Argüello), p. 34, par. 24 et p. 41, par. 42 (Pellet) ; CR 2015/7, p. 11, par. 4 (Loewenstein).

a) **Plus la procédure avance, plus le Nicaragua se contredit**

3. Le professeur Pellet vous disait que la parole devant la Cour est libre<sup>59</sup>. Sans doute. Je me demande si le Nicaragua n'abuse tout de même pas de votre patience et de votre temps. Et puisque j'ai évoqué l'*opus magnum* de Marcel Proust, je dirais que nous ne pouvons pas dire la même chose que Françoise à Mme Octave : notre temps, contrairement au sien, est cher. En effet, Monsieur le président, est-il soutenable d'affirmer en même temps les quatre propositions que le Nicaragua a mises en avant au premier tour, à savoir :

- a) que la frontière est mobile et que, du fait que les chenaux sont instables, le premier «caño» est variable et c'est celui que l'on rencontrera chaque fois que l'on examinera la situation sur le terrain<sup>60</sup> ;
- b) que le *caño* prétendument «nettoyé» en 2010 s'est asséché, la végétation l'a recouvert, et par conséquent, il n'y a pas de dommage causé<sup>61</sup>, ou à tout le moins de dommage «sérieux»<sup>62</sup> ou «significatif»<sup>63</sup> ;
- c) que, je lis l'agent du Nicaragua : «Nicaragua's position is that the present first *caño* connecting the river proper with Harbor Head Lagoon is the *caño* that was cleaned up in the year 2010<sup>64</sup>» ; and lastly, I am quoting now M. Loewenstein :
- d) que «it cannot be determined with certainty whether channels do, in fact, connect the San Juan to Harbor Head from cartographic materials and/or remote sensing images alone. Inspection in the field is necessary»<sup>65</sup> ? Il s'agit ici de la «deuxième leçon» que le Nicaragua vous a dit tirer des exposés des experts des deux Parties.

4. Donc, je résume la position nicaraguayenne : «le caño de 2010 est le «premier chenal rencontré» lorsqu'il s'agit d'établir la frontière, mais il n'est plus le «premier chenal rencontré» parce qu'il s'est asséché, lorsqu'il s'agit d'argumenter pour éviter la réparation des dommages causés. En fait, on ne sait plus où il y a un *caño*. Allez donc en chercher peut-être un autre».

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<sup>59</sup> CR 2015/7, p. 49, par. 23 (Pellet).

<sup>60</sup> CR 2015/5, p. 13, par. 18 (Argüello).

<sup>61</sup> CR 2015/7, p. 15, par. 16, et p. 21-22, par. 36 (Loewenstein).

<sup>62</sup> CR 2015/5, p. 39, par. 35 (Pellet).

<sup>63</sup> CR 2015/7, p. 17, par. 24 (Loewenstein) ; p. 42, par. 5 (Pellet).

<sup>64</sup> CR 2015/5, p. 13, par. 18 (Argüello).

<sup>65</sup> CR 2015/7, p. 11, par. 4 (Loewenstein).



J'avoue ressentir une certaine lassitude face aux contradictions nicaraguayennes et au caractère manifestement infondé de sa revendication. Après n'avoir juré depuis cinq ans que par le «nettoyage d'un *caño*» qui constituait la frontière, après avoir dit la veille qu'au moins une dizaine de cartes et des photos montraient ce *caño*<sup>66</sup>, il vous dit le lendemain qu'au fond, ce n'est pas sûr mais qu'il y en a d'autres qui pourraient aussi être candidats au statut, et finit par inviter votre Cour à organiser une descente sur les lieux. Monsieur le président, cela doit être la première fois qu'un Etat vient à votre prétoire pour avancer une revendication territoriale tout en disant qu'au fond, il n'est pas sûr de celle-ci et que c'est à vous de la déterminer. Votre tâche n'est pas celle d'une commission d'enquête, et vous n'êtes pas non plus d'aimables compositeurs. Le respect dû à votre fonction exige que le Nicaragua vous dise avec toute la précision nécessaire ce qu'il revendique.

**b) *La cartographie officielle employée par les commissions mixtes écarte tout doute***

5. Pour ce qui est de la cartographie, le silence du Nicaragua continue de résonner dans son contre-mémoire et depuis le premier tour de ses plaidoiries quant à sa carte officielle du département du San Juan del Norte «vérifiée sur le terrain» par l'INETER<sup>67</sup>, et à toutes celles qu'il vous a lui-même présentées dans l'affaire sur les *Droits de navigation et droits connexes*, parmi tant d'autres.

6. Pour le reste, je n'ai pas besoin de m'appesantir sur chacune des cartes et photographies déployées avec une imagination débordante par mon collègue et ami Alain Pellet le 17 avril. Le contre-interrogatoire de M. Kondolf a suffi pour les balayer d'un seul coup. D'une part, l'expert nommé par le Nicaragua n'a pas été capable une seule fois d'identifier avec certitude le prétendu *caño* frontière<sup>68</sup>. Dans son rapport toutefois, il avait commencé par affirmer catégoriquement que les photographies aériennes de 1961 montraient le *caño*<sup>69</sup>, pour finir par balbutier devant vous que «[w]e see some kind of pattern, some kind of lineation that is suggestive»<sup>70</sup>. Mais franchement,

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<sup>66</sup> CR 2015/5, p. 31-32, par. 21-22 (Pellet).

<sup>67</sup> MCR, vol. V, annexe 193.

<sup>68</sup> CR 2015/6, p. 39-46.

<sup>69</sup> *Certaines activités*, CMN, vol. I, par. 6.73.

<sup>70</sup> CR 2015/6, p. 44.

Monsieur le président, ces photographies ne suggèrent rien du tout. D'autre part, il a confirmé que ce sont les cartes et images à grande échelle qui l'emportent sur les cartes à petite échelle<sup>71</sup>.

7. Quant à la carte provisionnelle de 1949 de l'ensemble du Costa Rica dont la Partie adverse fait grand cas, M. Kondolf a fini par accepter qu'elle est en contradiction avec les cartes de 1988 quant à la manière de présenter les *caños* dans la région<sup>72</sup>. Il s'agit d'une carte à l'échelle 1/400 000<sup>73</sup>. De toute façon, est-ce que cela change quelque chose à la situation ? La carte décrit la région d'Isla Portillos comme étant costa-ricienne, qu'il y ait des *caños* ou pas.

8. Mesdames et Messieurs les juges, je me contenterai ici tout simplement de remarquer que, s'il est vrai que tous ces *caños* reliant la lagune Los Portillos au San Juan ont existé à l'époque où toutes les cartes et photographies montrées par le Nicaragua ont été élaborées ou prises, alors ces *caños* étaient à toutes ces époques le «first channel met», peu importe que le véritable «first channel met» existant à l'époque d'Alexander ait ou non disparu.

9. Faisons l'exercice auquel nous invite le Nicaragua : prenons la carte de 1988 de l'American Defense Mapping Agency qu'il a abondamment utilisée<sup>74</sup>. C'est la carte de l'annexe 185 du mémoire costa-ricien. Ce sont en effet, avec les cartes de l'IGN costa-ricien et de l'INETER nicaraguayen, toutes les deux de 1988, les cartes à l'échelle convenable : 1/50 000<sup>75</sup>. Si l'on suit le Nicaragua, le «first channel met» serait celui que M. Kondolf a appelé le *caño* «Y» (de par sa forme)<sup>76</sup>. La Partie nicaraguayenne, ayant perdu son *caño* de 2010, cherche son salut dans d'autres *caños*. La question simple et incontournable qui se pose alors est la suivante : pourquoi, si toutes ces cartes montraient l'existence d'autres «first channel met» que celui d'Alexander, le Nicaragua n'a rien dit jusqu'en 2010 ? Je me permets d'avancer une réponse très simple : parce que le Nicaragua ne contestait pas la frontière à toutes les époques considérées et n'interprétait pas la sentence Alexander comme il a commencé à le faire en 2010 pour justifier son occupation d'Isla Portillos.

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<sup>71</sup> *Ibid.*, p. 41, p. 42-43, p. 47.

<sup>72</sup> *Ibid.*, p. 47-48.

<sup>73</sup> *Certaines activités*, MCR, vol. V, annexe 176.

<sup>74</sup> *Ibid.*, annexe 185.

<sup>75</sup> *Ibid.*, annexes 186 et 188.

<sup>76</sup> CR 2015/6, p. 40 (Kondolf).

10. Par ailleurs, et c'est un «par ailleurs» très important, Monsieur le président, si la thèse actuelle du Nicaragua était vraie, ou bien l'arbitre Alexander s'est trompé et a désigné un «first channel met» qui n'en était pas un, ou bien il n'existait à l'époque où Alexander a rendu sa sentence aucun *caño* entre la lagune Los Portillos et le fleuve San Juan. Vous conviendrez, Mesdames et Messieurs les juges, qu'aucune de ces deux hypothèses n'est défendable. La première, parce que, comme le professeur Pellet le rappelait<sup>77</sup>, l'arbitre, l'ayant parcourue, connaissait très bien la zone. La deuxième hypothèse est toute aussi invraisemblable compte tenu de la configuration marécageuse de la zone. Surtout si l'on tient compte de la réponse que M. Kondolf a donnée à la question du juge Robinson : la pente qui existe depuis le fleuve vers la lagune existe depuis cent cinquante ans<sup>78</sup>, et était donc aussi présente au moment où Alexander a rendu sa sentence. Difficile de croire qu'aucun «*caño*» ne reliait le fleuve à la lagune à ce moment-là. L'imagination a quand même des limites.

11. Cette carte de 1988 est aussi utile à d'autres titres. Elle sert à démontrer une fois pour toutes l'interprétation nicaraguayenne visant à transformer l'expression «first channel met» en «first *caño* met». Regardons dans le glossaire bilingue qui apparaît dans la carte la traduction vers l'anglais du terme «*caño*». Non, Mesdames et Messieurs les juges, un «*caño*» ce n'est pas un «channel», c'est un «creek, [or] stream», c'est-à-dire, un «ruisseau» en français. Alexander n'aurait jamais envisagé de faire passer la frontière par un ruisseau, sans arriver à l'embouchure du fleuve. Le chenal était véritablement situé à l'embouchure du fleuve. L'arbitre a été soucieux, comme il l'a lui-même affirmé, de respecter ce que les auteurs du traité du 15 avril 1858 avaient eu à l'esprit. Le «first channel met», Monsieur le président, n'est pas et ne peut pas être le «first creek met».

12. Ce n'est pas tout, Monsieur le président. On lit en anglais et en espagnol sur cette carte : «Users should refer corrections, additions, and comments for improving this product to : Director, Defense Mapping Agency, Hydrographic/Topographic Center» et suit l'adresse de cette agence. Cette carte a été à la disposition des instituts géographiques des deux pays. Elle a été totalement employée et suivie lorsqu'ils ont produit, respectivement la même année, et en étroite

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<sup>77</sup> CR 2015/5, p. 8, par. 23 (Pellet).

<sup>78</sup> CR 2015/6, p. 52 (Kondolf).

collaboration, leurs cartes de San Juan del Norte et de Punta Castilla que l'on connaît, à l'échelle 1/50 000<sup>79</sup>. Et bien, Monsieur le président, certains des «usagers» de cette carte sont loin d'être anodins pour notre affaire : ce sont les membres des deux instituts géographiques nationaux et de la sous-commission des limites et de la cartographie, comme nous l'avons expliqué au premier tour<sup>80</sup>.

13. Mesdames et Messieurs les juges, pendant des décennies, le Nicaragua a eu, pour reprendre la terminologie employée par votre Cour dans les affaires du *Temple de Préah Vihéar*, du *Plateau continental de la mer du Nord*, de *Certaines terres à phosphates à Nauru*, et tant d'autres, jusqu'à la fin 2010, je cite vos expressions, une «attitude uniforme et constante»<sup>81</sup>, un comportement «absolument net et constant»<sup>82</sup> duquel découle «une acceptation claire et constante»<sup>83</sup> de la situation territoriale établie par la sentence Alexander telle que nous l'interprétons, ou, si l'on veut aussi, une renonciation «de manière claire et non équivoque»<sup>84</sup> à revendiquer une interprétation autre que celle y établie.

14. J'ajouterai à cela trois brefs points : *primo*, le Nicaragua a lui-même invoqué d'autres effectivités costa-riciennes ; *secundo*, la position nicaraguayenne est contraire à sa revendication de la baie de San Juan del Norte ; *tertio*, mais non moins important, lors du premier tour de plaidoiries, le Nicaragua a accentué son rejet de ce que vous avez appelé en 1994 le «principe fondamental de la stabilité des frontières»<sup>85</sup>.

**c) *Le Nicaragua reconnaît que c'est le Costa Rica qui exerçait le contrôle sur le «territoire contesté»***

15. Monsieur le président, cohérent avec la démarcation opérée par les commissions présidées par Alexander, ce fut naturellement le Costa Rica qui a exercé des actes d'autorité publique sur le territoire qui relève de sa souveraineté. Je ne reviendrai pas sur ce que nous avons

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<sup>79</sup> *Certaines activités*, MCR, vol. V, annexes 186 et 188.

<sup>80</sup> CR 2015/ 2, p. 51-52, par. 18 (Kohen).

<sup>81</sup> *Temple de Préah Vihéar (Cambodge c. Thaïlande)*, fond, arrêt, C.I.J. Recueil 1962, p. 30.

<sup>82</sup> *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas)*, arrêt, C.I.J. Recueil 1969, p. 25, par. 28.

<sup>83</sup> *Ibid.*, p 26, par. 30.

<sup>84</sup> *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 1992, p. 247, par. 13.

<sup>85</sup> *Différend territorial (Jamahiriya arabe libyenne/Tchad)*, arrêt, C.I.J. Recueil 1994, p. 37, par. 72.

écrit et dit<sup>86</sup>. Je relève simplement que, lors du premier tour, le Nicaragua, essayant de démontrer qu'il n'a pas causé de dommage au territoire litigieux, critiquait l'attitude costa-ricienne d'extension de l'activité d'élevage et de pâturage «au site Ramsar du Costa Rica où le *caño* litigieux est situé» et même son utilisation à des fins de tourisme<sup>87</sup>. A ce stade, je ne discuterai pas de ce que le Costa Rica a fait ou autorisé sur son site de Ramsar. Je constate que le Nicaragua a ainsi reconnu le contrôle costa-ricien du territoire aujourd'hui litigieux.

**d) *La revendication nicaraguayenne est en contradiction avec sa revendication de la baie de San Juan del Norte***

16. Monsieur le président, le Nicaragua a voulu introduire par voie de demande reconventionnelle sa prétention de souveraineté exclusive sur la baie de San Juan del Norte, alors que les Parties ont clairement stipulé à l'article IV du traité de 1858 que cette baie et celle de Salinas «seront communes aux deux Républiques». Je ne vais bien entendu pas examiner la question ici. A juste titre, vous avez déclaré cette demande irrecevable<sup>88</sup>. Permettez-moi tout simplement d'ajouter brièvement une contradiction à la longue liste des contradictions nicaraguayennes. Dans notre affaire, le défendeur insiste inlassablement sur le fait que, du fait de la disparition du «first channel met» d'Alexander, il faut alors en chercher un autre. Pour justifier sa revendication de souveraineté exclusive de ce qui reste de la baie de San Juan del Norte, le contre-mémoire affirme ceci : «l'ancienne baie de San Juan del Norte située à l'ouest de la frontière entre les deux Parties a disparu, et les prétentions du Costa Rica sur cette zone n'ont donc plus lieu d'être»<sup>89</sup>. Je laisse de côté le fait que la baie de San Juan del Norte n'a pas disparu, mais je relève que, pour le Nicaragua, les conséquences des formations aquatiques qui disparaissent varient selon que cela serve ou non ses intérêts.

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<sup>86</sup> MCR, par. 4.43-4.54 ; CR 2015/2, p. 57, par. 30 (Kohen).

<sup>87</sup> CR 2015/7, p. 33, par. 30 (McCaffrey) et onglet n° 19 du dossier des juges du Nicaragua du 17 avril 2015, après-midi ; CR 2015/7, p. 17-18, par. 24 et 27 (Loewenstein).

<sup>88</sup> *Certaines activités, ordonnance du 18 avril 2013, C.I.J. Recueil 2013*, p. 215, par. 38 et 41 B).

<sup>89</sup> *Certaines activités, CMN*, par. 9.34.

e) *Le mépris du principe de stabilité des frontières sous couleur de l'existence d'une «frontière mobile»*

17. Lors du premier tour, le Nicaragua a beaucoup insisté sur le prétendu caractère «mobile» de la frontière<sup>90</sup>. Une précision s'impose. Il serait plus approprié de parler de «frontières mobiles» lorsqu'il s'agit des frontières qui suivent le chenal principal de navigation d'un fleuve ou se situent dans des glaciers. Par exemple, votre Cour a déclaré que la frontière entre la Namibie et le Botswana «suit la ligne des sondages les plus profonds dans le chenal nord du fleuve Chobe»<sup>91</sup>. Il s'agit là d'une frontière qui variera selon la ligne des sondages les plus profonds à chaque moment considéré. Tout autre est la situation ici. Il est vrai que la frontière a été fixée aux rives, car ici il s'agit de cela, une frontière fixée à la rive du San Juan et de la lagune Los Portillos. Les contours des rives peuvent varier, et ainsi le contour des territoires considérés. Mais là s'arrête la prétendue «mobilité». Il s'agit, de la part du Nicaragua, d'une confusion volontaire entre la question du changement géophysique de la frontière (la rive change), et de la mobilité juridique de la frontière (le descriptif juridiquement entériné de la frontière change).

18. Du reste, l'essence du principe de stabilité des frontières est qu'une frontière qui a été acceptée par les parties ne peut être remise en question. Comme vous l'avez fort bien résumé :

«D'une manière générale, lorsque deux pays définissent entre eux une frontière, un de leurs principaux objectifs est d'arrêter une solution stable et définitive. Cela est impossible si le tracé ainsi établi peut être remis en question à tout moment, sur la base d'une procédure constamment ouverte, et si la rectification peut en être demandée chaque fois que l'on découvre une inexactitude par rapport à une disposition du traité de base. Pareille procédure pourrait se poursuivre indéfiniment et l'on n'atteindrait jamais une solution définitive aussi longtemps qu'il resterait possible de découvrir des erreurs. La frontière, loin d'être stable, serait tout à fait précaire.»<sup>92</sup>

19. Dans le cas d'espèce, il n'y a même pas d'erreur. Tout le contraire, Monsieur le président. Il y a des cartes qui font partie de la sentence arbitrale et des travaux de la commission mixte présidée par Alexander. Il y a des décennies d'acceptation constante de cette décision, d'exercice de la souveraineté costa-ricienne et de respect nicaraguayen. A présent, le Nicaragua ne vous demande ni plus ni moins que de laisser la frontière ouverte en permanence, les Parties devant

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<sup>90</sup> CR 2015/5, p. 24-25, par. 9-11 (Pellet).

<sup>91</sup> *Ile de Kasikili/Sedudu (Botswana/Namibie)*, arrêt, C.I.J. Recueil 1999, p. 1108, par. 104 1).

<sup>92</sup> *Affaire du Temple de Préah Vihéar (Cambodge c. Thaïlande)*, fond, arrêt, C.I.J. Recueil 1962, p. 34.

la modifier chaque fois qu'un ruisseau différent deviendrait le premier à relier le fleuve à la lagune, si tant est qu'il y en aurait un. Au lieu du principe de stabilité des frontières, ce serait une sorte de «principe de précarité des frontières en permanence conflictuelles» que le Nicaragua voudrait appliquer.

### **B. Réponse à la question posée par le vice-président Yusuf**

20. Dans ce contexte, il m'appartient maintenant de répondre à la question posée par le vice-président Yusuf, et qui se lit comme suit :

«Counsel for Costa Rica suggested that part of the strip of sand constituting the Northern bank of what Costa Rica regards as the 'first channel met' might have disappeared. In that case, could Costa Rica clarify, for the Court, whether what it regards as 'the first channel met' sill joins the San Juan River today?

In any event, what is, according to Costa Rica, the exact course of the boundary line in the disputed area including the beach on the Caribbean Sea, west of Harbor Head Lagoon and until the mouth of the San Juan River?»<sup>93</sup>

21. En effet, la bande de sable que constituait la rive nord du chenal à l'embouchure du fleuve que reliait la lagune Los Portillos au fleuve San Juan proprement dit a disparu du fait de l'action de l'érosion marine. Le chenal lui-même a aussi disparu. De ce fait, la lagune Los Portillos n'est plus reliée au fleuve San Juan. L'image satellite du 14 septembre 2013, que vous avez à l'onglet n° 18 de vos dossiers et qui apparaît à l'écran<sup>94</sup>, permet de constater, d'une part, la disparition de cette bande de sable sous la mer sur toute la façade d'Isla Portillos et, d'autre part, l'absence de lien entre le fleuve et la lagune : il suffit de comparer la couleur brunâtre du San Juan en sa qualité de fleuve qui transporte une forte charge sédimentaire et la couleur verdâtre de la lagune Los Portillos.

22. Cette disparition de la bande de sable constituant la rive septentrionale du chenal reliant les deux formations aquatiques est également attestée par la carte officielle produite par le Nicaragua en 2011 à des fins de propagande de sa nouvelle position sur la frontière (la carte du

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<sup>93</sup> CR 2015/7, p. 64, par. 52 (le vice-président).

<sup>94</sup> Image satellite du 14 septembre 2013, *Certaines Activités*, demande en indication de nouvelles mesures conservatoires du Costa Rica, 23 septembre 2013, annexe PM-28, zone détaillée.

«Caño del Puerto»<sup>95</sup>, que vous voyez aussi à l'écran et qui se trouve à l'onglet n° 20 de vos dossiers.

23. Comme le Costa Rica l'a expliqué dans son mémoire<sup>96</sup> et M<sup>e</sup> Wordsworth vient de vous le rappeler, l'article 2 du traité de limites de 1858 prévoyait que, à partir de la mer des Caraïbes, la frontière partirait de l'extrémité de Punta Castilla, qui se situait alors à l'embouchure du fleuve San Juan, suivant la rive droite de ce fleuve. Le Nicaragua reconnaît maintenant que la démarcation faite par la sentence Alexander suivait le chenal oriental à l'embouchure du fleuve et que ce chenal n'existe plus<sup>97</sup>.

24. Comme nous l'avons expliqué<sup>98</sup>, la disparition du chenal reliant la lagune au fleuve n'a pas d'incidence sur la masse terrestre démarquée par la sentence Alexander, comme les Parties l'ont d'ailleurs reconnu et mise en œuvre sans contradiction jusqu'au coup de force nicaraguayen de 2010.

25. Pour répondre à la deuxième partie de la question, il convient de rappeler la façon dont votre Cour a décrit le «territoire litigieux» : «la zone humide d'environ trois kilomètres carrés comprise entre la rive droite du *caño* litigieux, la rive droite du fleuve San Juan lui-même jusqu'à son embouchure dans la mer des Caraïbes et la lagune de Harbor Head»<sup>99</sup>. La frontière entre le Costa Rica et le Nicaragua suit la rive droite du fleuve San Juan depuis son embouchure jusqu'au point situé à trois milles anglais en aval de Castillo Viejo. Le *caño* construit en 2010 par le Nicaragua ne constitue pas du tout une frontière, tout territoire se situant au nord et au sud du *caño*, y compris celui-ci, est costa-ricien. La frontière dans le «territoire litigieux» suit donc la rive droite du fleuve San Juan dès son embouchure vers le sud. Vers l'est, depuis l'embouchure du fleuve jusqu'à la lagune Los Portillos, le territoire est par conséquent costa-ricien. La frontière suit ensuite le rivage autour de la lagune Los Portillos.

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<sup>95</sup> MCR, vol. V, annexe 196.

<sup>96</sup> MCR, par. 2.17.

<sup>97</sup> CR 2015/5, p. 29, par. 20 (Pellet).

<sup>98</sup> MCR, par. 2.49.

<sup>99</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011 (I), p. 19, par. 55.*



26. La plage d'Isla Portillos est une partie intégrante de la masse terrestre d'Isla Portillos et, comme il a été expliqué lors des audiences à l'occasion de la deuxième demande en indication de mesures conservatoires en 2013 et au premier tour des plaidoiries sur le fond<sup>100</sup>, il y a quelques jours, cette plage constitue donc du territoire costa-ricien.

27. Le Nicaragua a revendiqué cette plage lors des audiences relatives à l'indication des deuxièmes mesures conservatoires pour essayer de justifier sa présence militaire, prétendant qu'elle ne faisait pas partie du «territoire litigieux»<sup>101</sup>. Votre Cour a rejeté cette position<sup>102</sup>. L'argument utilisé par le Nicaragua a consisté à affirmer que la plage d'Isla Portillos serait la bande de sable qui se trouvait au nord de la côte, séparée par le chenal. Déjà lors des audiences en 2013, le Costa Rica a démontré que tel n'était pas le cas. Vous voyez à l'écran, et vous pouvez consulter les onglets n° 21 à 25 de vos dossiers, la carte de la région et les photographies satellite décrivant les coordonnées exactes de l'emplacement du campement militaire nicaraguayen sur la plage, d'une part, et celles de la bande de sable submergée dans la mer, d'autre part.

28. Etant donné que le Nicaragua est resté silencieux sur sa position à cet égard lors du premier tour des plaidoiries, le Costa Rica se réserve le droit de commenter la réponse que le Nicaragua formulera à la présente question.

### **C. Réponse à la question posée par Mme la juge Donoghue**

29. Judge Donoghue posed the following related question to both Parties:

«Some photographs, such as the one that appears at tab 10 of today's judges' folder, depict a sandy feature lying between the Caribbean Sea and the body of water known as Harbor Head Lagoon or Laguna Los Portillos. I request that each Party describe its understanding of the current shape and configuration of this feature.

If this feature exists today, does it comprise land territory that can appertain to a State? If so, to which State does it appertain and why?»<sup>103</sup>

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<sup>100</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 22 novembre 2013, C.I.J. Recueil 2013*, p. 365, par. 46 ; CR 2015/2, p. 36, par. 38 (Brenes) ; p. 64-65, par. 51-52 (Kohen) ; CR 2015/4, p. 25, par. 9 (Parlett).

<sup>101</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 22 novembre 2013, C.I.J. Recueil 2013*, p. 363-364, par. 42.

<sup>102</sup> *Ibid.*, p. 365, par. 46.

<sup>103</sup> CR 2015/7, p. 65, par. 52 (Donoghue).

30. The answer is the following. The strip north of Laguna Los Portillos or Harbor Head Lagoon is a bank of sand. It is a feature that is subject to marine erosion and as such undergoes regular changes. The satellite photograph taken on 14 September 2013 shows this sandy strip as running from the *north*-easternmost corner of the lagoon to its north-western tip.

31. The sandbar to the seaward side of Harbor Head Lagoon was not considered to be “solid land” in the first Alexander Award<sup>104</sup>. It can only be considered as land capable of appertaining to a State in so far as it remains permanently above water at high tide and, if it does, it appertains to Nicaragua. This is because the feature to the seaward side of the lagoon is Nicaraguan as follows from the Alexander Award. This of course applies only so far as concerns the feature immediately in front of the lagoon, and does not concern the beach of Isla Portillos, which is Costa Rican territory as explained in the answer to Vice-President Yusuf. In any event, neither the lagoon nor the feature above it is the object of the present proceedings.

32. Monsieur le président, Mesdames et Messieurs les juges, pour certains, la configuration territoriale qui résulte du régime frontalier établi par le traité de 1858 et la sentence Alexander de 1897 pourrait paraître bizarre. En effet, une partie essentiellement aquatique du Nicaragua demeure enclavée en territoire costa-ricien. Il s’agit de la situation qui émerge dans la région conformément au droit international. La tentative brutale du Nicaragua de la modifier, tant physiquement qu’au niveau de la souveraineté territoriale ne peut et ne doit pas prospérer.

33. Du reste, cette situation d’enclavement n’est pas inconnue dans la pratique internationale et interne. C’est votre Cour qui a par exemple déclaré l’existence d’enclaves belges en territoire néerlandais dans l’affaire sur la *Souveraineté sur certaines parcelles frontalières*<sup>105</sup>. On trouve des enclaves de Brunéi Darussalam dans le territoire malaisien de Bornéo, ou une enclave de Timor-Leste en territoire indonésien dans l’île de Timor. Et pour parler d’une enclave qui m’est proche, et que de nombreux membres de votre Cour, Monsieur le président, tout comme mes collègues de l’autre côté de la barre, connaissent bien, je mentionnerai l’enclave genevoise de

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<sup>104</sup> MCR, annexe 9, première sentence de l’arbitre E.P. Alexander sur la question de la frontière entre le Costa Rica et le Nicaragua, rendue le 30 septembre 1897 à San Juan del Norte et réimprimée dans UNRIAA, vol. XXVIII (2007), p. 220.

<sup>105</sup> *Souveraineté sur certaines parcelles frontalières (Belgique/Pays-Bas), arrêt du 20 juin 1959, C.I.J. Recueil 1959, p. 212-213.*

Celigny dans le territoire du canton de Vaud en Suisse. La différence notable entre toutes ces enclaves et notre cas est qu'il s'agit ici d'un territoire inhabité et inhabitable, alors que dans les quatre cas que je viens de mentionner, il s'agit de territoires habités.

**D. Le prétendu droit nicaraguayen de causer des dommages au Costa Rica et d'occuper «temporairement» son territoire**

34. Monsieur le président, j'aborde maintenant ce qu'on pourrait appeler «la revendication d'un droit nicaraguayen à causer des dommages au Costa Rica». Cela doit être la première fois dans l'histoire qu'un Etat vient vous demander que vous constatiez son prétendu droit à causer un dommage à un autre et même à occuper son territoire temporairement. La première fois que cette revendication a été avancée, plus d'un siècle après la sentence Cleveland, c'était en 2011 devant votre Cour<sup>106</sup>.

35. C'est une interprétation qui défie les relations normales entre Etats, lesquelles sont fondées sur le respect mutuel. En fait, il s'agit d'une prétention qui défie les notions de base de tout système juridique, et si je puis dire, de toutes les conceptions que l'on trouve chez tous les peuples et selon lesquelles on ne saurait porter atteinte aux droits d'autrui. L'argument avancé est une interprétation de la sentence Cleveland qui constituerait la *lex specialis*, dérogeant ainsi aux règles générales en matière de dommage et de responsabilité. Mme Parlett réfutera cette vision particulière de la *lex specialis* plus tard.

36. Je me contenterai simplement ici de rappeler que lorsque l'on interprète un texte, conventionnel ou juridictionnel (j'ajouterais, à plus forte raison s'il s'agit d'une décision arbitrale ou judiciaire), il faut l'interpréter dans le sens de la conformité et non pas de la non-conformité au droit international. En effet, vous avez affirmé que «[c]'est une règle d'interprétation qu'un texte émanant d'un Gouvernement doit, en principe, être interprété comme produisant et étant destiné à produire des effets conformes et non pas contraires au droit existant»<sup>107</sup>. Ce qui s'applique aux actes d'un gouvernement s'applique à plus forte raison à une sentence arbitrale.

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<sup>106</sup> CR 2011/2, p. 26, par. 21 (McCaffrey), p. 56-57, par. 14, et p. 61, par. 24 (Pellet).

<sup>107</sup> Affaire du *Droit de passage sur territoire indien (Portugal c. Inde)*, exceptions préliminaires, arrêt, C.I.J. Recueil 1957, p. 142.

37. Même par rapport à la dérogation conventionnelle, pourtant fréquente, à la règle de l'épuisement des voies de recours internes, vous avez recommandé, Mesdames et Messieurs les juges, la plus grande prudence. Je vous cite : «la Chambre ne saurait accepter qu'on considère qu'un principe important du droit international coutumier a été tacitement écarté sans que l'intention de l'écarter soit verbalement précisée»<sup>108</sup>.

38. Monsieur le président, rien dans la sentence Cleveland ne permet d'affirmer qu'il était de son intention d'écarter la règle élémentaire de tout système juridique selon laquelle il existe une obligation de ne pas causer de dommage à autrui. L'interprétation, simple et correcte, de cette sentence est la suivante : à la différence des travaux dans les baies communes, le Costa Rica ne peut empêcher le Nicaragua d'accomplir sur son territoire des travaux d'amélioration du fleuve, à la condition cependant que le territoire costa-ricien ne soit pas occupé, inondé ou autrement endommagé. Si cela toutefois se produisait, le Nicaragua devrait alors indemniser le Costa Rica.

#### **E. Les efforts du Nicaragua pour réduire la compensation due et échapper aux autres formes de réparation et satisfaction**

39. Je passe, Monsieur le président, à la question des «remèdes». On a l'impression que le Nicaragua estime être déjà à la prochaine phase de cette affaire. Le Nicaragua semble se préoccuper davantage de minimiser le montant des dommages causés que de défendre sa position juridique. L'ensemble de l'exposé de M<sup>e</sup> Loewenstein et une bonne partie des exposés de mes collègues McCaffrey et Pellet avaient un tel but<sup>109</sup>. Mme Parlett vous parlera de la curieuse manière que le Nicaragua a d'interpréter la satisfaction par voie d'ordonnance de mesures conservatoires. M<sup>e</sup> Del Mar vous démontrera la recevabilité de notre demande d'abrogation des dispositions du décret n° 079/2009 contraires à votre arrêt de 2009.

40. Dans sa quête effrénée à minimiser les coûts, le conseil du Nicaragua nous parlait de la nature prétendument «symbolique, voire fictive» des préjudices subis. Mais la reforestation a un coût, Monsieur le président. L'organisation des inspections sur le lieu par le personnel environnemental, parfois avec du personnel du Secrétariat de Ramsar, conformément à vos

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<sup>108</sup> *Elektronika Sicula S.p.A. (ELSI) (Etats-Unis d'Amérique c. Italie)*, arrêt, C.I.J. Recueil 1989, p. 42, par. 50.

<sup>109</sup> CR 2015/7, p. 11-23, par. 6-40 (Loewenstein), p. 30, 36, par. 24, 37 (McCaffrey), p. 54, 57-60, par. 32, 39, 40 (Pellet).

ordonnances, le travail de comblement du *caño* oriental de 2013, tout ceci, entre autres, a aussi un coût, Monsieur le président. L'annulation des contrats de transports fluviaux du fait de la prohibition de la navigation, cela a également un coût, Monsieur le président. En temps opportun, c'est-à-dire dans une autre phase de l'affaire, le Costa Rica vous fournira le montant détaillé des réparations dues.

41. Quant aux efforts mis en œuvre par mon collègue Alain Pellet afin d'éviter les différentes formes de satisfaction et les garanties de non-répétition que nous avons formulées, je dirai que la propre défense nicaraguayenne de sa revendication de souveraineté formulée lors du premier tour ne l'aidera pas à convaincre votre Cour de la bonne foi alléguée. Je ne reviendrai pas sur ce que nous avons mentionné il y a une dizaine de jours. Toutes nos demandes demeurent valables.

42. Les efforts pour faire tomber toute la responsabilité des agissements nicaraguayens sur la personne d'Eden Pastora et de sa troupe ne trompent personne<sup>110</sup>. Non seulement parce que M. Pastora est un fonctionnaire du Gouvernement nicaraguayen, mais aussi et surtout parce que le Nicaragua a reconnu, que ses forces armées étaient présentes sur le territoire d'Isla Portillos au moment où les agissements de 2010-2011 et 2013 se sont produits. Il a même publicé en grande pompe ses activités militaires en Isla Portillos dans son fameux «Livre blanc» en 2010.

43. A vrai dire, Mesdames et Messieurs les juges, cette tentative infructueuse de blanchir le Gouvernement de Managua conforte plutôt le besoin du Costa Rica de demander des garanties de non-répétition. Monsieur le président, un gouvernement qui, de son propre aveu, est incapable de faire que ses agents respectent non seulement la souveraineté et l'intégrité de l'Etat voisin, mais aussi une ordonnance de votre Cour ayant force obligatoire alors que l'affaire se trouve en instance, un tel gouvernement se doit de donner des garanties de non-répétition.

44. Toujours de l'aveu du Nicaragua, son gouvernement n'est pas en mesure d'être tenu au courant de la manière dont ses agents agissent à l'égard du Costa Rica. Ni votre Cour ni le Costa Rica n'ont été informés d'une quelconque sanction imposée aux personnes responsables des agissements en cause. Une forme de garantie de non-répétition pourrait consister en une demande

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<sup>110</sup> *Ibid.*, p. 54, 57, 61, par. 33, 38, 43 (Pellet).

visant à ce que le Gouvernement nicaraguayen instruisse ses forces armées, le personnel de l'autorité nationale portuaire et M. Pastora et son équipe de dragage, par le moyen de son choix, à respecter la future décision de la Cour en ce qui concerne les droits du Costa Rica. Une autre forme de garantie de non-répétition, toujours par les moyens de son choix et conformément au droit national, serait d'imposer des sanctions au personnel responsable de tels agissements.

45. Quant à notre demande partielle relative aux frais de procédure, contrairement à ce qu'affirme notre contradicteur, certes, sans trop de conviction, ce stade de la procédure est le moment opportun pour s'y référer. C'est ce que nous faisons maintenant.

### **Conclusion**

46. Ma conclusion sera brève, Monsieur le président. Plus le temps passe et moins le Nicaragua sait comment justifier sa revendication. Au point que le défendeur ne sait plus quelle frontière il revendique et vous demande alors d'aller ou d'envoyer quelqu'un à la recherche d'un chimérique «first creek met». On pourra trouver tous les ruisseaux que l'on voudra entre le fleuve et la lagune. Des ruisseaux asséchés et des ruisseaux encore existants. Des ruisseaux pérennes et des ruisseaux non pérennes. Des ruisseaux à peine navigables (ce dont je doute, mais peu importe) ou des ruisseaux non navigables du tout. Tout cela ne changera rien ! Aucun de ces ruisseaux n'a jamais constitué, ne constitue ni ne constituera le «first channel met» de la sentence Alexander. Isla Portillos a été déclarée costa-ricienne par la sentence arbitrale du 30 septembre 1897. Effet obligatoire et final. *Res iudicata*. Fin de l'histoire. On ne peut pas rouvrir ce qui a été clos et est resté ainsi durant plus d'un siècle.

47. Il n'y a pas deux affaires semblables. Mais celle-ci se distingue de toutes les autres à plusieurs égards. L'occupation par des forces armées d'un territoire auparavant jamais revendiqué, la revendication territoriale qui suit dans le but de créer un différend frontalier, lequel, plus le temps passe, plus il change de forme ou de contenu, le non-respect grave et flagrant de vos mesures conservatoires, un différend de cette nature appelle l'emploi de tous les outils que le droit international et votre Statut mettent à votre disposition.

48. Je vous remercie de votre attention, Mesdames et Messieurs les juges, et vous prie, Monsieur le président, peut-être après la pause, de bien vouloir donner la parole à Mme Parlett.

Le PRESIDENT : Merci, Monsieur le professeur. Le moment est venu pour la Cour de se retirer pour une pause de 15 minutes. L'audience est suspendue.

*L'audience est suspendue de 11 h 25 à 11 h 40.*

Le PRESIDENT : Veuillez vous asseoir. Je donne la parole à Mme Parlett.

Ms PARLETT:

### **I. NICARAGUA'S FAILURE TO COMPLY WITH PROVISIONAL MEASURES ORDERS OF THE COURT**

1. Mr. President, Members of the Court, I will be addressing two matters this morning. I will first address Nicaragua's failure to comply with your provisional measures Orders; then I will shift gear to discuss the issues relating to the applicable environmental law régime, in so far as the Parties remain divided.

#### **A. Nicaragua's breaches of the provisional measures Orders**

2. In the first round, I explained that Nicaragua breached your 2011 Order<sup>111</sup>; and I also explained that, by doing so, Nicaragua aggravated the dispute between the Parties<sup>112</sup>.

3. Since then, Nicaragua's Honourable Agent told you that "Nicaragua deeply regrets the actions following the 2011 Order . . . that led [you] to determine . . . that a new Order was required"<sup>113</sup>. He told you "Nicaragua received and understood [your] message"<sup>114</sup>.

4. Professor Pellet asked you to leave the past in the past. He said that "if" there had been a violation of your 2011 Order, and "if" there had been prejudice to Costa Rica, material, moral, or legal, then your 2013 Order was already adequate satisfaction<sup>115</sup>. He regretted that Costa Rica insisted on "reopening a debate that your second Order . . . should have closed"<sup>116</sup>. This is not the time for reparation, he told you.

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<sup>111</sup>CR 2015/4, pp. 23-31, paras. 1-22 (Parlett).

<sup>112</sup>*Ibid.*, pp. 31-32, para. 23 (Parlett).

<sup>113</sup>CR 2015/5, p. 18, para. 42 (Argüello).

<sup>114</sup>*Ibid.*, p. 18, para. 42 (Argüello).

<sup>115</sup>CR 2015/7, pp. 41-41, para. 5 (Pellet).

<sup>116</sup>*Ibid.*, p. 45, para. 14 (Pellet).

5. When I heard Professor Pellet tell you that the time was not now, I wondered if I had been transported back in time, because when he defended Nicaragua in 2013 *against* your second Order, he told you that the time was not then either. Discussion of responsibility for any breach, he said, was “premature: these are [issues] going to the merits, which it is not for the Court to decide at this stage”<sup>117</sup>. He told you that you would have to determine that there were no circumstances precluding wrongfulness; and that the acts were attributable to Nicaragua, and you could not do that in 2013<sup>118</sup>.

6. So he said, in 2013, it was too early to address the question of breach of your 2011 Order. Now in 2015, he tells you it is too late.

7. Indeed, in your 2013 Order, you noted that your Orders on provisional measures are binding, and that “the question of compliance with provisional measures indicated in a case may be considered by the Court in the principal proceedings”<sup>119</sup>. You further noted that your Order was without prejudice to your decision on the merits<sup>120</sup>.

8. In your 2013 Order you did not award reparation to Costa Rica for Nicaragua’s breaches of your 2011 Order. You made no declaration of breach in satisfaction; you ordered no restitution; you awarded no compensation. Now is the appropriate time to do so<sup>121</sup> just as, with respect to the *LaGrand* case<sup>122</sup>, where you addressed the issue of breach of the applicable provisional measures and accorded a remedy in your Judgment on the merits. Accordingly:

(a) Costa Rica requests that you award appropriate satisfaction, including by declaring that Nicaragua breached your 2011 Order by:

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<sup>117</sup>CR 2013/27, p. 34, para. 19 (Pellet). See also CR 2013/27, p. 35, para. 22 (Pellet) (“discussion of responsibility [for breach of your 2011 Order] is premature”).

<sup>118</sup>CR 2013/27, p. 34, para. 19 (Pellet).

<sup>119</sup>*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. 368, para. 57; references omitted.

<sup>120</sup>*Ibid.*, p. 369, para. 58.

<sup>121</sup>See A. Zimmerman *et al.*, *The Statute of the International Court of Justice: A Commentary*, 2nd ed., 2012, Commentary to Article 41, p. 1068, para. 95.

<sup>122</sup>*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 516, para. 128 (5) (The Court:

“Finds that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999”).



- (i) constructing two new artificial *caños* in the disputed territory;
- (ii) by maintaining military camps on the disputed territory; and
- (iii) by sending and maintaining its nationals there, who caused damage thereon<sup>123</sup>.

The carefully chosen words of Nicaragua's Agent in his opening stops short even of an apology for Nicaragua's breach of the 2011 Order, and Costa Rica does not consider them to be appropriate satisfaction. And anyway, it is apparent that Nicaragua does not accept that there has been any breach, as was evident from the repeated refrain of "s'il y avait", uttered at the Bar in Nicaragua's first round<sup>124</sup>. Nicaragua may have expressed "regret" for anything and everything that *may* have happened, but it has not given a full and frank account of what happened, seeking to portray Mr. Pastora as if he somehow operated outside the organs of Nicaraguan governance; and it has not admitted that there was a breach.

(b) Costa Rica also requests that you award compensation for the damage caused by Nicaragua to the disputed territory<sup>125</sup>. I note here that counsel for Nicaragua told you that there was no "significant" damage to the environment<sup>126</sup>, either arising from the two new *caños* or from damage caused by the Sandinista Youth. As Mr. Wordsworth has just noted, there is no threshold of "significant" when it comes to damage caused on another States' territory. This is not incidental transboundary harm; it is direct and brazen damage caused when Nicaragua's military and its personnel came onto Costa Rica's territory and dug it up. And just because Costa Rica has been able to avoid irreparable prejudice by installing a dyke in the eastern *caño*, in spite, I might add, of the obstacles put in its way by Nicaragua, this does not mean that the damage has been undone<sup>127</sup>.

(c) As Professor Kohen has just mentioned, Costa Rica also requests that you order appropriate measures by way of a guarantee of non-repetition<sup>128</sup>, and that Nicaragua pay Costa Rica's costs of obtaining the 2013 Order.

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<sup>123</sup>CR 2015/4, pp. 23-31, paras. 1-22 (Parlett); and CR 2015/4, pp. 38-39, paras 11-13 (Kohen).

<sup>124</sup>CR 2015/7, pp. 41-41, para. 5 (Pellet).

<sup>125</sup>CR 2015/4, pp. 36-37, para. 7 (Kohen).

<sup>126</sup>CR 2015/7, pp. 41-42, para. 5 (Pellet).

<sup>127</sup>Cf. CR 2015/7, p. 22, para. 39 (Loewenstein).

<sup>128</sup>CR 2015/4, pp. 39-40, paras. 17-20 (Kohen).

9. Costa Rica's entitlement to reparation for these breaches of your binding 2011 Order cannot be swept away by the fact that Nicaragua has not dredged any more *caños* since 2013<sup>129</sup>; by the fact that it filled in the trench on the beach with 100 truckloads of sand<sup>130</sup> and took some photographs of it<sup>131</sup>; or by the fact that it finally stopped sending and maintaining large groups of Nicaraguan nationals on the disputed territory to carry out works there under Nicaragua's instruction<sup>132</sup>. Nicaragua's alleged compliance with your second Order does not undo the harm it did by breach of your first Order.

10. I note finally that Nicaragua's posture in its first round with respect to your 2013 Order is to be contrasted with its posture before you when it fought vigorously against the imposition of that Order. As Professor Kohen explained in Costa Rica's first round, Nicaragua said that the measures were unnecessary because it was already complying with them, and yet it rejected Costa Rica's very reasonable proposal of a consent order being made to that effect<sup>133</sup>. At the same time, it was content to leave you with an out-of-date picture of the real situation, of precisely how far its works had progressed since Costa Rica had been able to obtain images depicting them<sup>134</sup>. These facts are, of course, particularly relevant to Costa Rica's request for a costs order in this case.

### **B. Costa Rica's compliance with the provisional measures Orders**

11. In Nicaragua's first round of oral argument it pursued its counter-claim alleging that Costa Rica breached your provisional measures Orders. As I discussed these issues in Costa Rica's first round, I can be brief. There are four issues.

12. One: Nicaragua said that Costa Rica had abused the Court's Orders permitting it to send civilian personnel to the disputed territory to prevent irreparable prejudice being caused to the environment there. This is not correct. There is no evidence that anyone other than Costa Rican

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<sup>129</sup>Cf. CR 2015/7, p. 44, para. 11 (Pellet).

<sup>130</sup>See Nicaraguan National Port Authority Technical Management, Technical Execution Report, "Closure of the Trench to the North of the Eastern Channel, San Juan de Nicaragua", Ann. 1 "description of the works"; Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-252, 9 Dec. 2013.

<sup>131</sup>Cf. CR 2015/7, p. 43, paras. 7-8 (Pellet).

<sup>132</sup>Cf. CR 2015/7, p. 44, paras. 9-10 (Pellet).

<sup>133</sup>CR 2015/4, pp. 41-42, para. 22 (Kohen). See also letter from Nicaragua to the ICJ, ref. HOL-EMB-193, 10 Oct. 2013; letter from Costa Rica to the ICJ, ref. ECRPB-073-13, 11 Oct. 2013; and letter from Nicaragua to the ICJ, ref. HOL-EMB-197, 11 Oct. 2013, p. 3.

<sup>134</sup>See CR 2013/26, p. 21, para. 44 (Crawford).

environmental personnel and personnel from Ramsar *was* sent to the disputed territory. Nicaragua's assertions as to the presence of police and evidence-gathering missions are unsupported conjecture.

13. Two: Nicaragua complained that Costa Rica did not give sufficient notice to Nicaragua, and did not try hard enough to reach common solutions with Nicaragua, before it dispatched civilian personnel to the disputed territory<sup>135</sup>. As I explained in opening, Costa Rica was diligent in giving advance notice of its visits to the disputed territory to Nicaragua, to the Court, and to Ramsar<sup>136</sup>. Costa Rica also attempted to reach common solutions with Nicaragua, proposing co-ordination in respect of security of the disputed territory, resulting in a bilateral agreement on the subject<sup>137</sup>. Pursuant to that agreement, Costa Rica kept Nicaragua informed of issues arising in respect of its obligation to secure the disputed territory, from its own undisputed territory<sup>138</sup>. You will also recall that Costa Rica attempted to co-ordinate in its implementation of Ramsar's recommendations with respect to the 2013 *caños*, including by carrying out joint measurements on

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<sup>135</sup>CR 2015/7, p. 48, para 21 (Pellet).

<sup>136</sup>See, for example, letter from the Acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-DVM-217-2011, 30 Mar. 2011; MCR, Ann. 75; letter from the Acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-046-12, 27 Jan. 2012; CMN, Ann. 75; letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-105-13, 28 Feb. 2013; att. 1 to letter from Costa Rica to the ICJ, ref. DM-AM-109-13, 28 Feb. 2013; letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-678-13, 6 Dec. 2013; att. CR-3 to letter from Costa Rica to the ICJ, ref. ECRPB-0-12, 21 Feb. 2014; letter from the Acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM- AM-108-14, 7 Mar. 2014; att. CR-2 to letter from Costa Rica to the ICJ, ref. ECRPB-070, 21 May 2014; letter from the Acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM- AM-348-14, 17 July 2014; att. 1 to letter from Costa Rica to the ICJ, ref. ECRPB-090-2014, 22 Aug. 2014; letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-0707-14, 7 Nov. 2014; *Road* case, RCR, Ann. 47; letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-0774-11-14, 2 Dec. 2014; att. CR-I to letter from Costa Rica to the ICJ, ref. ECRPB-020-2015, 20 Feb. 2015; and letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-0818-14, 12 Dec. 2014; *Road* case, RCR, Ann. 55.

<sup>137</sup>See Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-172-11, 18 Mar. 2011; MCR, Ann. 72; Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE-DM-AJST-327-03-11, 24 Mar. 2011; MCR, Ann. 73; Note from the Acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-214-11, 29 Mar. 2011; MCR, Ann. 74; Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE-DM-350-04-11, 1 Apr. 2011; MCR, Ann. 77; Note from the Acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-226-11, 4 Apr. 2011; MCR, Ann. 79; Peñas Blancas Declaration (Costa Rica and Nicaragua), 12 Apr. 2011; MCR, Ann. 85; and Mechanism of Coordinated Police and Security Actions between Costa Rica and Nicaragua, Guatemala, 6 May 2011; MCR, Ann. 89.

<sup>138</sup>Note from the Deputy Minister of Security of Costa Rica to the Chief of the Police of Nicaragua, ref. 612-2011-DV-WN, 30 May 2011; MCR, Ann. 91.

the San Juan. You will recall Nicaragua's refusal<sup>139</sup>. In all these circumstances, Costa Rica fully complied with its obligation to co-ordinate with Nicaragua with respect to implementation of your 2011 and 2013 Orders.

14. Three: Nicaragua said Costa Rica repeatedly and systematically conducted overflights of the disputed territory<sup>140</sup>. This is not correct. The only evidence to which Nicaragua referred are diplomatic Notes written by Nicaragua. The most recent one of those appears to be Nicaragua's protest of February 2012<sup>141</sup>, which complained about flights over Nicaraguan territory — giving co-ordinates for those alleged incursions — and about a statement allegedly made by one individual about overflights of the disputed territory. As Costa Rica explained to Nicaragua in March 2012, that statement was wrong. Costa Rica has not conducted routine overflights of the disputed territory<sup>142</sup>. As to the alleged incursions into Nicaraguan airspace, the co-ordinates given by Nicaragua, indicated on the image now on your screens, are well south of the San Juan River, in undisputed Costa Rican territory, and far from the disputed territory<sup>143</sup>. There are obvious reasons to reject the allegations contained in Nicaragua's protest Note.

15. Four: Nicaragua also said that Costa Rica breached your 2011 Order by constructing the Road. I will not trouble you with submissions on that point, save to affirm that Costa Rica maintains that this in no way aggravated the dispute underlying the *Certain Activities* case<sup>144</sup>.

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<sup>139</sup>See Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-0639-10-14, 21 Oct. 2014; *Road* case, RCR, Ann. 40; Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE/DM/AJ/439/1014, 27 Oct. 2014; *Road* case, RCR, Ann. 41; Note from the Acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-0672-14, 28 Oct. 2014; *Road* case, RCR, Ann. 42; Note 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. 2014; *Road*, RCR, Ann. 43; Note from the Acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-0697-14, 5 Nov. 2014; *Road* case, RCR, Ann. 45; see also *Road* case, RCR, paras. 2.31-2.32.

<sup>140</sup>CR 2015/7, p. 47, para. 19 (Pellet).

<sup>141</sup>Note from Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs of Costa Rica, ref. MRE/DM-AJ/116/02/12, 13 Feb. 2012; CMN, Ann. 76, cited in CMN, para. 9.48, and referred to in CR 2015/7, p. 47, fn 170 (Pellet).

<sup>142</sup>Note from Minister for Foreign Affairs of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-146-12, 15 Mar. 2012; Ann. CR-1 to letter from Costa Rica to the ICJ, ref. ECRPB-034-12, 29 Aug. 2012.

<sup>143</sup>See also, Note from Minister for Foreign Affairs of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-146-12, 15 Mar. 2012; Ann. CR-1 to letter from Costa Rica to the ICJ, ref. ECRPB-034-12, 29 Aug. 2012, where this was explained by reference to an annexed map.

<sup>144</sup>See CR 2015/4, p. 33, para. 26 (Parlett).

## II. REMAINING ISSUES AS TO THE APPLICABLE ENVIRONMENTAL LAW RÉGIME

16. I turn to discuss the remaining issues that divide the Parties as to the applicable environmental law régime. Costa Rica accepts that Nicaragua is able to dredge the San Juan River, and Nicaragua has made clear that it intends to continue to do so. There will no doubt be other projects on either side of the border which might give rise to questions of transboundary harm, significant harm, and for which assessment, notification, and consultation may be required. A statement from the Court as to how those issues are to be managed in the particular geographical and legal context of the boundary between these two States will provide an essential blueprint for their relationship going forward.

17. In so far as the San Juan River is concerned, it appears that there are only two issues of principle that continue to divide the Parties. They are:

- (a) first: whether the 1858 Treaty and the 1888 Award override the application of environmental obligations under general principles of law and under international treaties; and
- (b) second: whether Nicaragua has a right to cause damage to Costa Rica and to occupy its territory.

18. On the second of these two issues, you have just heard from Professor Kohen, and I will not repeat his submissions.

19. On the first of these two issues, the question of *lex specialis*, Costa Rica regrets that Nicaragua elected not to engage in its first round Friday before last<sup>145</sup>, with the explanation given by Costa Rica in its opening, on Tuesday two weeks ago<sup>146</sup>. In the light of this, there are two fundamental points that I am compelled to repeat:

- (a) first, to rely on *lex specialis*, Nicaragua must show that the 1858 Treaty and the 1888 Award have excluded the application of other rules, or that the obligations arising under international environmental law are inconsistent with Nicaragua's rights and obligations under the 1858 Treaty and the 1888 Award<sup>147</sup>; and

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<sup>145</sup>See CR 2015/7, paras. 19-24; pp. 31-32, paras. 28-29; pp. 38-39, paras. 44-46 (McCaffrey).

<sup>146</sup>CR 2015/3, pp. 50-54, paras. 17-26 (Parlett).

<sup>147</sup>*Ibid.*, p. 51, para. 18 (Parlett).

(b) second, all of Nicaragua's rights and obligations under the 1858 Treaty and the 1888 Award must be interpreted in the light of principles for the protection of the environment in force today<sup>148</sup>.

20. As to the first of these two issues, Nicaragua cannot point to any provision of the 1858 Treaty or the 1888 Award that excludes the application of rules relating to protection of the environment. In addition, Nicaragua effectively conceded last week that environmental law obligations do not "conflict in any way" with the 1858 Treaty and the 1888 Award<sup>149</sup>, while at the same time maintaining that the San Juan River was somehow immune, on the basis of *lex specialis*, from the application of all of these non-conflicting obligations<sup>150</sup>. While we look forward to an explanation of quite how these two positions can be reconciled, as it is currently pleaded, we understand Nicaragua's position to be the following.

21. First, Nicaragua insists on its sovereignty — its dominion and imperium — over the waters of the San Juan<sup>151</sup>. It seizes upon Article 2, paragraph 3, of the 1971 Ramsar Convention, which provides that "[t]he inclusion of a wetland in the List [of Wetlands of International Importance] does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated"<sup>152</sup>. If the intended implication is that because Nicaragua is sovereign over the San Juan, its activities on it are immune from obligations arising from environmental law, then that is indeed a wholesale displacement of environmental law, which would not apply to any territory over which a State is sovereign. It is patently wrong.

22. Second, Nicaragua suggests that paragraph 3 (6) of the 1888 Award is inconsistent with an obligation under general international law, or under treaty, not to cause significant transboundary harm. You have seen this paragraph numerous times in the last two weeks, and I

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<sup>148</sup>*Ibid.*, p. 53, para. 24 (Parlett), referring to the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment*, *I.C.J. Reports 1997*, pp. 77-78, para. 140; *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; and *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](http://www.pca-cpa.org/showpage.asp?pag_id=1392), para. 452.

<sup>149</sup>CR 2015/10, p. 33, para. 4 (McCaffrey).

<sup>150</sup>*Ibid.*, p. 32, para. 3 (McCaffrey).

<sup>151</sup>See, e.g., CR 2015/7, p. 24, para. 4 (McCaffrey).

<sup>152</sup>Convention 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. 2 (3).

will not read it out again, but I would emphasize that Nicaragua's right to carry out works of improvement is explicitly conditioned on there being no resulting "damage" to Costa Rican territory. So, in fact, this provision imposes a more stringent obligation on Nicaragua than general international law, because it prohibits any "damage" and not merely "significant harm". As Professor Kohen has already explained, this is not a "harm now, pay later" provision. It is not inconsistent with an obligation not to cause significant transboundary harm; to the contrary, it imposes an obligation not to cause *any* transboundary harm.

23. Third, Nicaragua says, Article VIII of the 1858 Treaty, together with paragraph 3 (11) of the 1888 Award, are inconsistent with an obligation to notify and consult in respect of any works on the San Juan other than canal construction works.

24. Article VIII of the 1858 Treaty, which you now see on your screens, imposes specific obligations on Nicaragua if it proposes to construct a canal<sup>153</sup>. Indeed, as Cleveland confirmed, and this is clear from paragraph 3 (11) of his Award, if the proposed canal will cause injury to Costa Rica's rights, Costa Rica's "consent is necessary" for the project to proceed<sup>154</sup>.

25. Quite how this requirement to notify, consult, and obtain Costa Rica's consent in respect of canal projects is inconsistent with an obligation to notify and consult in respect of any other works on the San Juan — including dredging — is difficult to see. In Costa Rica's submission, it is entirely consistent with it, and the suggestion that the two States in 1858, and President Cleveland in 1888, were implicitly excluding any future developments in international environmental law is not credible, to say the least. Professor McCaffrey told you that the 1888 Award "has virtually occupied the field in this connection, leaving little, if any, room for . . . additional obligations"<sup>155</sup>. Costa Rica does not agree.

26. This brings me to the well-established point that even treaties and awards of the nineteenth century must be interpreted in the light of principles relating to the protection of the

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<sup>153</sup>Costa Rica-Nicaragua Treaty of Limits (Cañas-Jerez), San José, 15 April 1858; MCR, Ann. 1, Article VIII.

<sup>154</sup>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, para. (3) 11.

<sup>155</sup>CR 2015/7, p. 30, para. 23 (McCaffrey).

environment that are in force today<sup>156</sup>. That fundamental point of interpretation, reflected in Article 31 (3) (c) of the Vienna Convention on the Law of Treaties, is completely ignored by Nicaragua<sup>157</sup>, and that is unsurprising because it completely undermines Nicaragua's assertions as to the consequences of the *lex specialis* of the 1858 Treaty and the 1888 Award.

27. Finally, I should just mention that Professor McCaffrey disavowed the binding character of obligations under the 1971 Ramsar Convention, in particular Article 5 (1), in his pleadings in the first round in the *Certain Activities* case<sup>158</sup>, and then he said in the *Road* case that Costa Rica had "blatantly violat[ed]" its obligation to consult in respect of the Road<sup>159</sup>, under the same provision of the same Convention. He said in the *Certain Activities* case that the 1992 Biodiversity Convention uses language of aspiration "to encourage the parties" in respect of sharing of information<sup>160</sup>; and then he said in the *Road* case that Costa Rica "blatantly violat[ed]" its obligation to share information under the 1992 Biodiversity Convention<sup>161</sup>. Both cannot be right.

28. In conclusion, Nicaragua has breached its obligations arising under your provisional measures orders. Costa Rica is entitled to reparation for those breaches, and it is now the appropriate time to award that reparation.

29. As to the applicable legal régime going forward, which is of great importance to Costa Rica and no doubt to Nicaragua also, Nicaragua's activities on the San Juan are limited by its obligations relating to protection of the environment as are applicable under general international law and under treaties. Any *lex specialis* of the 1858 Treaty and the 1888 Award does not render the San Juan immune from environmental regulation.

30. Mr. President, Members of the Court, I thank you for your kind attention, and Mr. President, I ask that you invite Ambassador Sergio Ugalde to the podium.

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<sup>156</sup>See CR 2015/3, p. 53, para. 24 (Parlett), referring to the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, pp. 77-78, para. 140; *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; and *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](http://www.pca-cpa.org/showpage.asp?pag_id=1392), para. 452.

<sup>157</sup>Cf. CR 2015/7, pp. 28-30, paras. 19-24; pp. 31-32, paras. 28-29; pp. 38-39, paras. 44-46 (McCaffrey).

<sup>158</sup>CR 2015/7, p. 32, para. 29 (McCaffrey).

<sup>159</sup>CR 2015/10, p. 43, para. 40 (McCaffrey).

<sup>160</sup>CR 2015/7, p. 35, para. 35 (McCaffrey).

<sup>161</sup>CR 2015/10, p. 43, para. 40 (McCaffrey).



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

Mr. UGALDE:

#### **NICARAGUA'S DREDGING PROGRAMME AND THE WAY FORWARD**

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

#### **A. Sedimentation in the Lower San Juan River and Nicaragua's dredging programme**

2. There is no dispute that the Lower San Juan is subject to aggradation of sediment. The evidence is that the process of accumulation of sediment became an issue from around the mid-19th century<sup>162</sup>. In more recent times, but still before construction of the Road, the Nicaraguan authorities had noted the effect of these problems on navigation, for example in 2006<sup>163</sup>. There are various natural processes that contribute to this condition, as Professor Thorne pointed out in his evidence<sup>164</sup>. But in any case, what is clear is that the process of sedimentation and the problems for navigation it causes commenced long before the events giving rise to the cases before you<sup>165</sup>.

3. There is also no dispute that, given the problem, Nicaragua designed a dredging programme in 2006 to attempt to deal with it<sup>166</sup>. That programme initially foresaw dredging along some 42 km of the Lower Río San Juan, from around the bifurcation with the Colorado River all the way to its mouth, with the aim of facilitating navigation<sup>167</sup>. However, that programme was not the one implemented. Almost immediately after inception of the programme in 2010, the scope of

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<sup>162</sup>See e.g., Despatch of 26 February 1959 from the United States Consul in San Juan del Norte; CMN, Ann. 2.

<sup>163</sup>Environmental Impact Study for Improving Navigation on the San Juan River (excerpts), Sep. 2006; CMN, Ann. 7, p. 7; *Certain Activities*, Written Statement of Professor Cornelis Van Rhee, 15 Mar. 2015, para. 6; CR 2015/6, p. 35 (van Rhee).

<sup>164</sup>CR 2015/12, p. 30 (Professor Thorne).

<sup>165</sup>See e.g. CR 2015/6, p. 35 (van Rhee and Reichler).

<sup>166</sup>Environmental Impact Study for Improving Navigation on the San Juan River, excerpts, Sep. 2006; CMN, Ann. 7; Project Design Study, excerpts, Sep. 2006; CMN, Ann. 8.

<sup>167</sup>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; Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015, p. 10.

the programme was modified<sup>168</sup>, and it has focused on large-scale dredging in the delta area<sup>169</sup>. This occurred without any of the requisite consideration of environmental and other impacts which were necessary<sup>170</sup>.

4. It results clearly from Nicaragua's evidence that the dredging programme has not been working, in particular due to what appears to be the constant redeposition of sediment in the dredged channel<sup>171</sup>. As explained by Professor van Rhee, this has required constant redredging<sup>172</sup>. It would appear that this so-called "maintenance dredging"<sup>173</sup>, has involved Nicaragua redredging up to three times<sup>174</sup> in a single year, the volume of sediment which was originally estimated would be done in the initial sector of the project as "initial" or "capital dredging"<sup>175</sup>.

5. There is no dispute between the experts as to why this constant maintenance redredging is necessary<sup>176</sup>. Professor Thorne in his Written Statement explained how the effect of dredging is to reduce the slope of the river, thereby reducing flow speed, which reduces transport capacity,

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<sup>168</sup>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; 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; Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015, pp. 11-12.

<sup>169</sup>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. 14; 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; Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015, pp. 20 and 36-41; *Certain Activities*, Written Statement of Professor Cornelis Van Rhee, 15 Mar. 2015, para. 9; CR 2015/6, p. 26 (van Rhee).

<sup>170</sup>CR 2015/6, p. 26 (van Rhee).

<sup>171</sup>CR 2015/12, pp. 41-42 (Thorne and Reichler); see also *ibid.*, p. 45 (Thorne and Reichler).

<sup>172</sup>*Certain Activities*, Written Statement of Professor Cornelis Van Rhee, 15 Mar. 2015, para. 9; CR 2015/6, pp. 30-31 and 33 (van Rhee).

<sup>173</sup>CR 2015/6, p. 25 (van Rhee and Wordsworth) and p. 33 (van Rhee and Reichler).

<sup>174</sup>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; Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015, pp. 12 and 20; *Certain Activities*, Written Statement of Professor Cornelis Van Rhee, 15 Mar. 2015, para. 9; CR 2015/6, p. 26 (van Rhee); see also CR 2015/12, p. 45 (Thorne and Reichler).

<sup>175</sup>CR 2015/6, p. 25 (van Rhee and Wordsworth) and p. 33 (van Rhee and Reichler).

<sup>176</sup>See *Certain Activities*, Written Statement of Professor Colin Thorne, Mar. 2015, paras. 4.11-4.16; 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, 2011; MCR, App. 1, p. II-41; and Professor Cornelis van Rhee and Professor Huib de Vriend, The Influence of Dredging on the Discharge and Environment of the San Juan River, 2012; CMN, App. 2, p. 6.

meaning that sediment deposits<sup>177</sup>. In his oral evidence, Professor Thorne explained in far more direct terms that “if you dredge a deep hole in the channel, it will refill very quickly”<sup>178</sup>.

6. Precisely this consequence of the dredging programme was entirely foreseeable, as was predicted in the 2011 [Ramsar] report<sup>179</sup>, to which I will come in a minute, and by Professor Thorne in his 2011 report in this case<sup>180</sup>. The point is that Nicaragua’s current dredging programme was misconceived from its inception.

7. Professor van Rhee, Nicaragua’s dredging expert, recognized that the dredging programme is not working<sup>181</sup>. Professor Thorne agreed; his view was that so-called maintenance dredging would be required “forever”<sup>182</sup>.

### **B. The dredging programme risks causing significant harm and no proper transboundary EIA was carried out**

8. Nicaragua’s position on dredging now appears to be, on the one hand, to emphasize the necessity of dredging<sup>183</sup>, and on the other to assert, against the evidence, that it has not been proved that any significant harm has been caused, or is likely to be caused<sup>184</sup>.

9. But this does not meet Costa Rica’s case. First, whether or not there is a need for dredging in order to maintain navigability or to ensure a supply of fresh water to the wetlands<sup>185</sup>, is nothing to the point. It cannot justify the taking of measures without assessment of whether they would cause transboundary impacts.

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<sup>177</sup>*Certain Activities*, Written Statement of Professor Colin Thorne, Mar. 2015, paras. 4.11-4.16.

<sup>178</sup>CR 2015/12, p. 45 (Thorne and Reichler); see also *ibid.*, pp. 41-42 (Thorne and Reichler), *and p. 51 (Thorne and Wordsworth)*.

<sup>179</sup>Report of Ramsar Advisory Mission No. 72; Wetland of International Importance Refugio de Vida Silvestre del Rio San Juan, Nicaragua, 18 Apr. 2011, extract, English translation, annexed to letter from Costa Rica to the ICJ, ref. ECPRB-067-2015, 24 Apr. 2015; judges’ folder, tab 36, pp. 42-43, Sect. 5.2.1 and 46, Sect. 6, para.5.

<sup>180</sup>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, 2011; MCR, App. 1, pp. II-28 and II-41.

<sup>181</sup>CR 2015/6, p. 35 (van Rhee and Reichler).

<sup>182</sup>CR 2015/12, p. 46 (Thorne and Reichler); *see also ibid.*, p. 45 (*Thorne and Reichler*).

<sup>183</sup>CR 2015/6, p. 1, para.1, and pp. 10-13, paras. 3-13 (Reichler); and see CR 2015/7, p. 37, para. 40 (McCaffrey).

<sup>184</sup>CR 2015/6, p. 1, para. 1 and pp. 13-23, paras. 14-45 (Reichler).

<sup>185</sup>CR 2015/10, p. 12, para. 10 (Reichler).

10. Second, there is evidence of a risk of significant harm as a result of Nicaragua's dredging<sup>186</sup>, and evidence that Nicaragua failed properly to assess that risk. As a result, it has not complied with its obligations under international environmental law to conduct a transboundary EIA, and a fresh EIA is required in advance of any further dredging.

11. As I discussed in the first round<sup>187</sup>, the 2006 EIS<sup>188</sup> and associated documents<sup>189</sup> contain no analysis of flow rates, or of the potential impact of dredging on the division of flows between the Lower Río San Juan and the Colorado River<sup>190</sup>. Notably, this is a point to which Mr. Reichler did not respond.

12. But even leaving that point aside, a matter to which I will return, it is evident from the April 2011 Ramsar report<sup>191</sup> that the 2006 EIS could not be regarded as adequate even with respect to the programme originally envisaged.

13. Nicaragua was aware of the report and that it was highly relevant to this case, even if it disagreed with its findings. Yet it was only produced during the first week of these hearings, at Costa Rica's request. Given its contents, it is not difficult to surmise why Nicaragua did not include it in the record earlier.

14. The report confirms, first, that there was a risk of significant harm; second that the 2006 EIS did not contain any analysis of flows or any assessment of the risks of harm resulting from changes in the flow and fluvial dynamics of the Lower Río San Juan; and third, that such an assessment should have been undertaken by way of environmental impact assessment, prior to implementation of the dredging programme.

15. Relevant passages are highlighted in the translation of extracts from the report included at tab 36 of your folders<sup>192</sup>. For present purposes it suffices to turn to the "Conclusions" section.

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<sup>186</sup>*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, 2011; MCR, App. 1, pp. II-35-41 and II-42-51.*

<sup>187</sup>CR 2015/3, p. 68, paras. 63-65; p. 69-70, paras. 71-79 (Ugalde).

<sup>188</sup>Environmental Impact Study for Improving Navigation on the San Juan River, excerpts, Sep. 2006; CMN, Ann. 7.

<sup>189</sup>See e.g., Project Design Study, excerpts, Sep. 2006; CMN, Ann. 8.

<sup>190</sup>CR 2015/3, pp. 68-70, paras. 62-71 (Ugalde).

<sup>191</sup>Report of Ramsar Advisory Mission No. 72; Wetland of International Importance Refugio de Vida Silvestre del Río San Juan, Nicaragua, 18 Apr. 2011, extract, English translation, annexed to letter from Costa Rica to the ICJ, ref. ECPRB-067-2015, 24 Apr. 2015; judges' folder, tab 36.

16. Paragraph 5 of the Conclusions, on page 46, makes clear the conclusion of the Ramsar team that there was a risk of significant harm:

*“Any changes to the pattern of the fluvial dynamics of the San Juan River due to anthropogenic processes (channelling, dredging, diversion of waters, damming), will alter its flow as well as the dynamics of the associated wetlands and the distribution and abundance of the species living there; therefore, it is important to perform studies of the relevant environmental impacts prior to its implementation.”*<sup>193</sup>

17. Although the Ramsar advisory mission formally related only to the Nicaraguan wetland bordering the Lower Río San Juan, its conclusions as to the potential impacts of changes in fluvial dynamics are not so limited. Self-evidently, they apply equally to any protected wetlands in the vicinity of the river, including the one within Costa Rica.

18. Matters are even clearer if one looks at paragraph 2 near the bottom on page 46, where the Ramsar report states in terms that: “The EIA did not incorporate the analysis of aspects related to the hydrological, hydrogeological and hydrodynamic characteristics of the area of influence.”<sup>194</sup>

19. Of course, the conclusion of the Ramsar experts that there had been no analysis of the potential impact on hydrodynamics also necessarily entails that there had been no analysis of the potential impacts on the flows of the Colorado River.

20. Nicaragua has suggested that this is a “draft” report, and that a final version was never issued by Ramsar<sup>195</sup>. On Friday last week, together with the full versions of the two INETER reports requested by the Court<sup>196</sup>, Nicaragua also produced its “Considerations and Changes”, and the response from Ramsar<sup>197</sup>.

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<sup>192</sup>Report of Ramsar Advisory Mission No. 72; Wetland of International Importance Refugio de Vida Silvestre del Río San Juan, Nicaragua, 18 Apr. 2011, extract, English translation, annexed to letter from Costa Rica to the ICJ, ref. ECPRB-067-2015, 24 Apr. 2015; judges’ folder, tab 36, pp. 42-43, Sect. 5.2.1, and 46 and 47, Sect. 6.

<sup>193</sup>Report of Ramsar Advisory Mission No. 72; Wetland of International Importance Refugio de Vida Silvestre del Río San Juan, Nicaragua, 18 Apr. 2011, extract, English translation, annexed to letter from Costa Rica to the ICJ, ref. ECPRB-067-2015, 24 Apr. 2015; judges’ folder, tab 36, p. 46, Sect. 6, para. 5; emphasis added.

<sup>194</sup>Report of Ramsar Advisory Mission No. 72; Wetland of International Importance Refugio de Vida Silvestre del Río San Juan, Nicaragua, 18 Apr. 2011, extract, English translation, annexed to letter from Costa Rica to the ICJ, ref. ECPRB-067-2015, 24 Apr. 2015; judges’ folder, tab 36, p. 46, Sect. 6.

<sup>195</sup>See letter from the Agent of Nicaragua to the Registrar of the ICJ, ref. HOL-EMB-076-2015, 16 Apr. 2015, and CR 2015/7, p. 37, para. 40 (McCaffrey).

<sup>196</sup>Letter from the Registrar of the ICJ to the Agent of Nicaragua, ref. 145486, 21 Apr. 2015.

<sup>197</sup>Letter from the Agent of Nicaragua to the Registrar of the ICJ, ref. HOL-EMB-078-2015, 24 Apr. 2015.

21. Although unsolicited, Costa Rica raises no objection to these documents forming part of the record; we have translated both, and they are at tabs 37 and 38 of your judges' folders<sup>198</sup>.

22. As you can see, in its "Considerations and Changes" document sent to Ramsar on 30 November 2011, which is at tab 37, Nicaragua requested a large number of modifications to various sections of the report. For present purposes, and to provide a flavour of the changes Nicaragua requested, I will take you to two of them.

23. As regards the conclusion to which I have just referred, at page 29, Nicaragua requested its modification so that it read: "The EIA *included* the analysis of aspects related to the hydrological, hydrogeological and hydrodynamic characteristics of the area of influence."<sup>199</sup>

24. Nicaragua was accordingly requesting a complete reversal of the conclusions reached by the Ramsar experts, who had reached the obvious conclusion that a single set of measurements, taken in 2006, without any accompanying analysis, is insufficient and does not constitute an analysis of aspects related to hydrological, hydrogeological and hydrodynamic characteristics.

25. The first conclusion to which I referred, relating to the need for study of environmental impacts resulting from changes in the fluvial dynamics due to dredging, prior to implementation of the programme, was also one with which Nicaragua was unhappy. As you can see at the bottom of page 26, it requested deletion of the entire paragraph, on the basis that it made reference to "other activities not contemplated in the Project, such as *canalization, water diversion and damming*"<sup>200</sup>. In addition, over the page on page 27, Nicaragua asserted that "[a] new EIA cannot be

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<sup>198</sup>*Considerations and Changes of the Government of Nicaragua to the draft of Ramsar Mission Report No. 72; Wetland of International Importance Wildlife Refuge of the Rio San Juan, Nicaragua*, annexed to letter from Ms Juanita Argeñal Sandoval, Minister of Environment and Natural Resources to Mrs Anada Tiega, Secretary General of the Ramsar Convention on Wetlands, ref. DM.JAS.1359.11.11, 30 Nov. 2011, Ann. 3 to letter from the Agent of Nicaragua to the ICJ, ref. HOL-EMB-078, 24 Apr. 2015 (English translation: Ann. 3 to letter from the Agent of Costa Rica to the ICJ, ref. ECRPB-070-2015, 28 Apr. 2015), judges' folder, tab 37; letter from Mrs Anada Tiega, Secretary General of the Ramsar Convention on Wetlands to Ms Juanita Argeñal Sandoval, Minister of Environment and Natural Resources, 19 Dec. 2011, Ann. 4 to letter from the Agent of Nicaragua to the ICJ, ref. HOL-EMB-078, 24 Apr. 2015 (English translation: Ann. 1 to letter from the Agent of Costa Rica to the ICJ, ref. ECRPB-070-2015, 28 Apr. 2015); judges' folder, tab 38.

<sup>199</sup>*Considerations and Changes of the Government of Nicaragua to the draft of Ramsar Mission Report No. 72; Wetland of International Importance Wildlife Refuge of the Rio San Juan, Nicaragua*, annexed to letter from Ms Juanita Argeñal Sandoval, Minister of Environment and Natural Resources to Mrs Anada Tiega, Secretary General of the Ramsar Convention on Wetlands, ref. DM.JAS.1359.11.11, 30 Nov. 2011, Ann. 3 to letter from the Agent of Nicaragua to the ICJ, ref. HOL-EMB-078, 24 Apr. 2015 (English translation: Ann. 3 to letter from the Agent of Costa Rica to the ICJ, ref. ECRPB-070-2015, 28 Apr. 2015), judges' folder, tab 37, pp. 28-29.

<sup>200</sup>*Ibid.*, pp. 26-27.

recommended for a project that was already evaluated, and besides our legislation does not establish this procedure”<sup>201</sup>.

26. The response from the Ramsar Secretariat dated 19 December 2011, which is at tab 38, was short and stated that the suggestions put forward by Nicaragua would be considered<sup>202</sup>. We have not been provided with any further correspondence between Nicaragua and the Ramsar Secretariat. Certainly there is no evidence that Ramsar agreed with Nicaragua’s proposed amendments.

27. The Ramsar Advisory Mission took place in March 2011, and the report was based on an assessment of the 2006 EIA relating to what I referred to in the first round as the paper project. Its conclusions make clear the view of the Ramsar team that no appropriate transboundary environmental impact assessment had been carried out even as regards the original paper project. As such, the Ramsar report provides strong support for Costa Rica’s claim that the 2006 EIS did not and does not meet its obligation to carry out a proper transboundary EIA.

28. But that is not all. First, I have noted earlier, the dredging in the stretch immediately below the delta has led to extensive so-called maintenance dredging<sup>203</sup>. That is not something which was contemplated anywhere in Nicaragua’s 2006 EIS<sup>204</sup>, or the 2008 MARENA resolution<sup>205</sup>. This has involved the removal from the reach immediately downstream of the bifurcation of a total amount of sediment which is many times<sup>206</sup> over what was foreseen under the 2006 EIS, but without *any* consideration of the potential impacts upon the fluvial dynamics of the river and the surrounding wetlands.

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<sup>201</sup>*Ibid.*, p. 27.

<sup>202</sup>Letter from Mrs Anada Tiega, Secretary General of the Ramsar Convention on Wetlands to Ms Juanita Argeñal Sandoval, Minister of Environment and Natural Resources, 19 Dec. 2011, Ann. 4 to letter from the Agent of Nicaragua to the ICJ, ref. HOL-EMB-078, 24 Apr. 2015 (English translation: Ann. 1 to letter from the Agent of Costa Rica to the ICJ, ref. ECRPB-070-2015, 28 Apr. 2015), judges’ folder, tab 38.

<sup>203</sup>CR 2015/6, p. 25 (van Rhee and Wordsworth) and p. 33 (van Rhee and Reichler).

<sup>204</sup>*Environmental Impact Study for Improving Navigation on the San Juan River* (excerpts), Sep. 2006; CMN, Ann. 7.

<sup>205</sup>Ministry of Environment and Natural Resources of Nicaragua (MARENA), DGCA Administrative Resolution ref. No. 038-2008; MCR, Ann. 160.

<sup>206</sup>*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, Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015, pp. 10, 12 and 20.

29. The 2006 EIS<sup>207</sup> does not envisage dredging or redredging such vast amounts from that single stretch; it only assessed some aspects of the impact of dredging a far smaller amount. Indeed, the possibility that there would be additional “maintenance” dredging is nowhere mentioned in the 2006 EIS. It follows that the 2006 EIS did not assess any potential impacts of this vastly expanded project.

30. Professor van Rhee stated that he was not aware of any subsequent EIS which assessed the potential impacts of the additional dredging that has in fact been carried out<sup>208</sup>. Nicaragua has not suggested that any such assessment has been performed.

31. Professor van Rhee also made clear that even the actual dredging programme, including the extensive so-called maintenance dredging of the initial stretch, is insufficient to keep up with the rapid re-sedimentation of the river<sup>209</sup>. His frank view, as an expert on dredging, when asked about the prospects of the dredging programme successfully addressing the problem of reductions in flows in the Rio San Juan, was that “in order to reverse the situation, you really need a totally other dredging programme, of a different magnitude”<sup>210</sup>.

32. If Professor van Rhee is right, and the dredging programme is to be still further modified, for instance as a result of the addition of further dredgers — I note that there is evidence that Nicaragua intends to add ten new ones, bringing the total to 14 or 15<sup>211</sup> — that would make the need for a new EIA all the more pressing. Perhaps Nicaragua can explain tomorrow how bringing ten new dredgers fit with *its* modest dredging operation defence.

33. Finally, in this regard, there is evidence independent of the Ramsar report of the risk of significant harm from Nicaragua’s dredging programme. Professor van Rhee’s evidence was that dredging so as to increase flows was important to ensure the supply of sediment to the coast and prevent “the loss of coastal land which deprives species of their natural habitats”<sup>212</sup>. But you also

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<sup>207</sup>*Environmental Impact Study for Improving Navigation on the San Juan River* (excerpts), Sep. 2006; CMN, Ann. 7.

<sup>208</sup>CR 2015/6, p. 26 (van Rhee).

<sup>209</sup>CR 2015/6, p. 35 (van Rhee).

<sup>210</sup>*Ibid.*, p. 35 (van Rhee).

<sup>211</sup>*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, Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015, *pp. 15 and 88*.

<sup>212</sup>*Certain Activities*, Written Statement of Professor Cornelis Van Rhee, 15 Mar. 2015, para. 12.



heard last week the evidence of Professor Thorne, in response to a question from Judge Tomka, as to the potential devastating effects of removing large quantities of sediment from the river, and the risk of significant harm that exists as a result. He said that “dredging 730,000 cubic metres of sand from this river would starve the delta”<sup>213</sup>. He explained the risks of this as follows: “The dredging programme, if it cuts off the sediment supply, will starve the delta, the Caribbean Sea will take it away, we will lose hundreds of hectares of wetland due to coastal erosion.”<sup>214</sup>

### **C. The way forward**

34. So, going forward, what is the solution? Evidently, if Nicaragua is to fulfil its goals, what is required is a different programme. For the reasons I have explained, any such programme can only be undertaken following notification to Costa Rica and conduct of a new and transboundary EIA which adequately assesses the potential impacts of dredging of the scope which will be undertaken on fluvial dynamics, and on Costa Rican wetlands.

35. Provided that Nicaragua complies with its relevant obligations under the Cleveland Award and international environmental law, whether or not to undertake such a new programme is a matter entirely for it, as are its precise scope and modalities.

36. However, compliance by Nicaragua with its relevant international obligations requires:

- (a) first, that the project is undertaken only following the carrying out of a new transboundary EIA which properly assesses its potential impacts on the fluvial dynamics of the San Juan River — including any impacts upon the Colorado — and upon the protected wetlands;
- (b) second, that Nicaragua should notify Costa Rica of its project, provide a copy of the new transboundary EIA, and consult in good faith with Costa Rica in that regard; and
- (c) third, that, in compliance with the Cleveland Award<sup>215</sup>, the programme should not involve the occupation of or damage to Costa Rican territory, and should not significantly affect the flow of the Colorado River.

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<sup>213</sup>CR 2015/12, p. 52 (Thorne, in response to Judge Tomka).

<sup>214</sup>*Ibid.*, p. 52 (Thorne, in response to Judge Tomka).

<sup>215</sup>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, 22 Mar. 1888 (Cleveland Award); MCR, Ann. 7.

37. As recommended by Ramsar in 2011, it is “essential” that any such new EIA should involve analysis of a number of matters missing from Nicaragua’s 2006 EIS, and there must necessarily be ongoing monitoring and measurements, including of flow rates and of sediment loads.

38. As regards hydrology, Ramsar recommended in 2011, having reviewed the 2006 EIS, that it was essential to

“analyse the historic and current hydrological characteristics, considering the behaviour of the volumes of flow and the bed load in the area of influence, specifically regarding the variations in the hydrometric level of the San Juan River in representative segments along the main course”<sup>216</sup>.

39. Second, as to hydrodynamics, the Ramsar Report said it was essential to “analyse the hydrodynamic characteristics of the San Juan River, as regards to expected changes in the circulation of the water due to increase of the bathymetric section”<sup>217</sup>.

40. In that regard, the Ramsar team suggested that such monitoring should include, among other things, monthly measurements of flow rates and suspended solid loads. It stated:

“a. Monthly monitoring of the hydrometric levels between the delta and the mouth of the San Juan River, in representative sections along its main course, at least during the construction phase of the project”<sup>218</sup>; and

“b. Monthly monitoring of the concentration of suspended solids in water column in representative sections along the main course of the San Juan River.”<sup>219</sup>

41. Costa Rica fully agrees with the conclusions of the Ramsar Report, and notes that these mirror to a significant extent the position that Costa Rica has taken in these proceedings.

#### **D. Costa Rica’s concerns as to the real scope of Nicaragua’s dredging programme**

42. Mr. President, Costa Rica remains gravely concerned as to the underlying aims of Nicaragua’s dredging programme.

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<sup>216</sup>*Report of Ramsar Advisory Mission No. 72: Wetland of International Importance Refugio de Vida Silvestre del Rio San Juan, Nicaragua*, 18 Apr. 2011 (extract, English translation), annexed to letter from Costa Rica to the ICJ, ref. ECPRB-067-2015, 24 Apr. 2015, judge’s folder tab 36, p. 47 (Section 7).

<sup>217</sup>*Report of Ramsar Advisory Mission No. 72: Wetland of International Importance Refugio de Vida Silvestre del Rio San Juan, Nicaragua*, 18 Apr. 2011 (extract, English translation), annexed to letter from Costa Rica to the ICJ, ref. ECPRB-067-2015, 24 Apr. 2015, judge’s folder tab 36, p. 47 (Section 7).

<sup>218</sup>*Ibid.*

<sup>219</sup>*Ibid.*

43. Costa Rica fully maintains its position that Nicaragua's dredging programme is intended to refashion geography, and result in the diversion of flow from the Colorado. In that regard, there are three short points in relation to what has been said by Nicaragua.

44. First, Mr. Reichler complained that, although I asserted that the aim of Nicaragua's dredging programme was the "refashioning of the lower San Juan" on a number of occasions, he could not find citations underpinning my statements as to Nicaragua's "explicit stated intention" to do so<sup>220</sup>. It appears that Mr. Reichler missed the relevant part of my presentation that day<sup>221</sup>. I will not repeat again what was then said. The documents to which I referred evidencing Nicaragua's explicit stated intentions for its dredging programme are included at tabs 39 to 43 of your folders<sup>222</sup>. And while on this point, I note that Nicaragua did not retreat from the statements from its officials that the true purpose of the dredging is to deviate the maximum flow of the Colorado. Likewise, we heard nothing to justify or explain the purpose of Nicaragua's claim for declarations that it is entitled to execute works, including with a view to re-establishing the situation as it existed in 1858, "as it deems suitable".

45. Second, Mr. Reichler's refrain has been to stress the allegedly modest nature of the dredging programme<sup>223</sup>. He said there is no plan to widen the river, or disturb the Costa Rican bank in any way<sup>224</sup>. Yet, that is precisely what Nicaragua has been doing. Photographic evidence submitted to the Court in a number of reports, which are now on your screens, show that Nicaragua has indeed come to the Costa Rican bank, even after the second Order on provisional measures was issued<sup>225</sup>. To what end, then, has Nicaragua been cutting trees on the Costa Rican bank?

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<sup>220</sup>CR 2015/3, p. 56, para. 5; p. 57, para. 11; p. 60, para. 21; and p. 64, para. 41 (Ugalde).

<sup>221</sup>*Ibid.*, p. 14, paras. 16-19 (Ugalde).

<sup>222</sup>Government of Nicaragua *The San Juan de Nicaragua River. The Truths that Costa Rica Hides* (White Book), 29 Nov. 2010; CMN, Ann. 26, pp. 44-45, judges' folder, tab 39; *La Prensa* (Nicaragua), "They are going for the flow of the San Juan River", 25 Aug. 2009; MCR, Ann. 101, judges' folder, tab 40; *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](http://www.nacion.com/ln_ee/2009/agosto/25/pais2069754.html); Costa Rica's judges' folder for provisional measures hearing, 11 Jan. 2011, tab 78, judges' folder, tab 41; Confidencial.com (Nicaragua), "Pastora: I interpreted the Alexander Award", 30 Nov. 2010; MCR, Ann. 117, judges' folder, tab 42; *Tico Times* (Costa Rica) "Nicaragua Denies Reports of Intrusion into Costa Rica" *Tico Times*, 2 Nov. 2010; MCR, Ann. 111, judges' folder, tab 43.

<sup>223</sup>See, e.g., CR 2015/6, p. 12, paras. 9-10 (Reichler).

<sup>224</sup>CR 2015/6, p. 12, para. 10 (Reichler).

<sup>225</sup>"Nicaragua's Actions on the Costa Rican Bank", Attachment CR-9 to *Costa Rica's Fourth Report on Provisional Measures*, ref. 116-2014, 21 Nov. 2014; judges' folder, tab 44.

46. Third, despite Mr. Reichler's protestations to the contrary, the clear aim of its *caño* building activities was precisely an attempt to refashion the Lower San Juan. In that regard, Professor Pellet, whilst showing a slide depicting the course of the first *caño*, made an apparently *ex tempore* remark in which he wondered why Mr. Pastora and his workers had constructed the *caño* where they did, rather than taking the shorter, more direct route to the river<sup>226</sup>. The answer, of course, is obvious — the dog's leg course of the *caño*, with its entrance aligned with the meander cut made around the same time just upstream, has nothing to do with the clearing of what Nicaragua believed to be a historic "first channel met"; it has everything to do with an attempt to divert the course of the Lower Río San Juan through the Harbor Head Lagoon<sup>227</sup>.

47. Finally, I should also answer Mr. Reichler's suggestion that a photo<sup>228</sup> I showed you in the first round, depicting a massive sediment deposit site located close to the bank in Delta, was intended to mislead you and that I was suggesting it was on Costa Rican territory<sup>229</sup>. Obviously, I did no such thing. You can see the transcripts of what I said<sup>230</sup> at tab 47 of the judges' folder. This shows that I was referring not to the location shown in this photo, but to Nicaraguan activities in an entirely different location, near the mouth of the river.

### **E. Conclusion**

48. Mr. President, in light of the foregoing, I turn to respond to Judge Cançado Trindade's question<sup>231</sup>. We understand the question to relate to the navigation channel dredged by Nicaragua in the Lower San Juan, and not to the first *caño* built by Nicaragua and which has long since dried up.

49. As regards the first part of the question, concerning the natural sedimentation process and the morphological changes on the river, it is not disputed that there is a need for at least some localized dredging in order to maintain navigability on the main channel of the Lower San Juan.

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<sup>226</sup>CR 2015/5, p. 32, para. 21 (Pellet).

<sup>227</sup>*River morphology change*, Nicaragua's judges' folder, 16 Apr. 2015, tab 24 (AP1-10c) (Pellet); judges' folder, tab 45.

<sup>228</sup>Sediment Deposit Near Delta, The Road, RCR, Ann. 80, Photograph dated 14 Jan. 2015; judges' folder, tab 46.

<sup>229</sup>CR 2015/6, p. 21, paras. 41-42 (Reichler).

<sup>230</sup>CR 2015/3, pp. 59-60, paras 19-20 (Ugalde); extracts in judges' folder, tab 47.

<sup>231</sup>CR 2015/7, p. 64 (Judge Cançado Trindade).

As regards the second question, namely how dredging can be technically conducted to the satisfaction of both Parties, I refer once again to the Ramsar Report which, in its first recommendation, emphasized that

“it is necessary and recommended to have a strong cooperation between both countries for a more integrated management of activities that may potentially affect the river, as well as its comprehensive management and of its related wetlands of international importance. The most important cooperation would be regarding the exchange of information, agreeing on binational measures to restore the water quality of the San Juan River and protection measures, among others.”<sup>232</sup>

50. Costa Rica could not agree more, and sees co-operation as the only way by which the Parties may arrive at a solution which allows reasonable dredging of the Río San Juan to the extent required to ensure navigability, whilst taking account of Costa Rica’s legitimate legal and environmental concerns.

51. As Costa Rica has previously stated, it stands ready to co-operate with Nicaragua as regards a programme of joint measurements of flows and sediment loads on the Río San Juan as a whole. Further, it is ready to share information relating to measurements of flow and sediment concentrations on the Colorado River so as to facilitate Nicaragua’s carrying out of an EIA which will ensure the minimization of the environmental impacts of any dredging within the protected wetlands of both States.

52. Mr. President, Members of the Court, I thank you for your patient attention. Mr. President, I would ask that you give the floor to Dr. Katherine Del Mar.

Le PRESIDENT : Merci. Je vais demander à Mme Del Mar de prendre place à la barre. Mme Del Mar, je vous donne la parole.

Ms DEL MAR:

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<sup>232</sup>*Report of Ramsar Advisory Mission No. 72; Wetland of International Importance Refugio de Vida Silvestre del Río San Juan, Nicaragua*, 18 Apr. 2011 (extract, English translation), annexed to letter from Costa Rica to the ICJ, ref. ECPRB-067-2015, 24 Apr. 2015; judge’s folder, tab 36, pp. 46-47 (Section 7).

## **BREACHES OF COSTA RICA'S NAVIGATIONAL RIGHTS AND RESPONSE TO JUDGE BENNOUNA'S QUESTIONS**

### **A. Introduction**

1. Mr. President, Members of the Court, I am again addressing breaches by Nicaragua of Costa Rica's rights of navigation. I will first answer Judge Bennouna's questions, before responding to points made by counsel for Nicaragua. I will respond to Judge Bennouna's questions in French.

### **B. Réponses aux questions posées par le juge Bennouna**

2. Lors de l'audience du mercredi 15 avril 2015, le juge Bennouna a posé deux questions au Costa Rica. *Primo*, «est-ce que le Costa Rica attend de la Cour qu'elle se prononce sur la compatibilité avec l'arrêt de la Cour de 2009 sur le droit de navigation de réglementations édictées par le Nicaragua pour la mise en œuvre de cet arrêt ?»<sup>233</sup>

3. La réponse à cette question est «oui». Dans l'affaire relative à *Certaines activités*, le Costa Rica demande à la Cour de juger que le Nicaragua a violé les droits costa-riciens de libre navigation. Il n'y a rien de nouveau dans cette demande. Il a fait l'objet de la requête introductive d'instance<sup>234</sup> et du mémoire du Costa Rica<sup>235</sup>. L'un des moyens de restitution spécifiquement visé par le Costa Rica est l'abrogation par le Nicaragua des dispositions du décret n° 79-2009 ainsi que des régulations y annexées qui sont incompatibles avec le jugement de la Cour de 2009<sup>236</sup>.

4. La seconde question du juge Bennouna est la suivante : «Et si c'était le cas, le Costa Rica peut-il préciser le lien de cette question avec l'objet du différend ?»<sup>237</sup>

5. Dans l'affaire relative à *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, la Cour déclara que «Le paragraphe 1 de l'article 40 du Statut de la Cour stipule que l'«objet du différend» doit être indiqué dans la requête, et le paragraphe 2 de l'article 38 du Règlement de la Cour requiert que la «nature précise de la demande» soit indiquée dans la requête.»<sup>238</sup>

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<sup>233</sup> *Certaines activités*, CR 2015/4, p. 45 (Bennouna).

<sup>234</sup> *Certaines activités*, requête introductive d'instance, 18 novembre 2010, p. 26, par. 41 f).

<sup>235</sup> *Certaines activités*, MCR, p. 85, par. 3.40 ; p. 290-295, par. 6.54-6.61 ; p. 303, conclusions, par. 1 d).

<sup>236</sup> Voir CR 2015/4, p. 37, par. 8 (Kohen).

<sup>237</sup> *Certaines activités*, CR 2015/4, p. 45 (Bennouna).

<sup>238</sup> *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 1992, p. 266-267, par. 69 .

6. Les violations des droits de navigation costa-riens, y compris par l'adoption du décret n° 79-2009, ont toujours expressément fait partie des réclamations du Costa Rica à l'encontre du Nicaragua, leurs mention et examen paraissant dès la procédure écrite. Dans sa requête introductive d'instance en date du 18 novembre 2010, le Costa Rica a demandé à la Cour de dire et juger que, en raison de sa conduite, le Nicaragua avait violé son obligation de ne pas interdire la navigation de ressortissants costa-riens sur le San Juan<sup>239</sup>. A la page 25 de la requête du Costa Rica, le paragraphe 39 *d*) et sa note de bas de page 36 indiquent que :

«39. Tout en se réservant le droit d'exposer plus en détail les diverses violations de ses droits, le Costa Rica soutient que le Nicaragua a commis les violations du droit international suivants : ... *d*) Le Nicaragua a interdit la navigation du San Juan à des ressortissants costa-riens, en violation directe du traité de limites de 1858 et de l'arrêt rendu par la Cour le 13 juillet 2009 ... Outre la promulgation par le Nicaragua du décret n° 79, en violation directe de l'arrêt de la Cour du 13 juillet 2009.»<sup>240</sup>

7. De même, dans son mémoire, le Costa Rica établit la liste des violations par le Nicaragua des droits de navigation costa-riens<sup>241</sup>, et demande à la Cour de dire et juger que le Nicaragua a violé ces droits<sup>242</sup>. Il demande également à la Cour de dire et juger que le Nicaragua mette fin à ces violations et fournisse réparation<sup>243</sup>. Le mémoire vise expressément le décret n° 79-2009. Il présente une note de protestation formelle envoyée par le Costa Rica au Nicaragua dans les termes suivants :

«3.40 ... Le Costa Rica rappelait au Nicaragua «que [celui-ci] ne se conform[ait] pas pleinement aux termes de l'arrêt rendu par la Cour internationale de Justice le 13 juillet 2009. ... Le décret n° 79-2009 du Nicaragua est clairement contraire aux termes de cette décision. Des éléments indiquent par ailleurs que le droit de libre navigation du Costa Rica sur le San Juan, dont la portée a été définie dans cet arrêt, n'est pas respecté.»<sup>244</sup>

8. Pour toutes ces raisons, les violations des droits costa-riens de libre navigation, et en particulier la demande d'abrogation du décret n° 79-2009, ne constituent pas des griefs accessoires ou qui auraient été tardivement ajoutés aux réclamations portées par le Costa Rica, comme l'a

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<sup>239</sup> *Certaines activités*, requête introductive d'instance, 18 novembre 2010, p. 26, par. 41 *f*).

<sup>240</sup> *Certaines activités*, requête introductive d'instance, p. 24, par. 39 *d*).

<sup>241</sup> *Certaines activités*, MCR, p. 290-295, par. 6.54-6.61.

<sup>242</sup> *Certaines activités*, MCR, p. 303, par. 1 *d*) des conclusions.

<sup>243</sup> *Certaines activités*, MCR, par. 7.8, et par. 1 *h*) des conclusions.

<sup>244</sup> *Certaines activités*, MCR, p. 85, par. 3.40. Voir aussi *Certaines Activités*, MCR, annexe 62.

prétendu le conseil du Nicaragua<sup>245</sup>. Ils constituent des demandes qui relèvent de cette affaire. Même si ce n'était pas le cas (*quod non*), la demande du Costa Rica visant à l'abrogation du décret n° 79-2009 serait — pour reprendre les termes utilisés par la Cour dans l'affaire *Nauru* — «soit implicitement contenue dans la requête (*Temple de Préah Vihéar, fond, C.I.J. Recueil 1962*, p. 36) ou découlerait «directement de la question qui fait l'objet de cette requête» (*Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, C.I.J. Recueil 1974*, p. 203, par. 72)»<sup>246</sup>. Ceci est la conséquence du fait que la demande du Costa Rica découle directement de la violation de ses droits de libre navigation, lesquels ont toujours fait expressément partie de ses réclamations contre le Nicaragua. Toutefois, la compétence de la Cour pour connaître de la question est clairement établie dès la requête et elle n'a pas besoin de s'appesantir sur cette voie.

### **C. Response to points made by counsel for Nicaragua during the first round**

9. I turn now to the points raised by counsel for Nicaragua during the first round.

10. With respect to Decree No. 79-2009, counsel for Nicaragua stated that he had instructions from the Agent for Nicaragua that in so far as the Decree and the Regulatory Norms apply to tourism boats, they apply to *all* tourism boats, whether Costa Rican, Nicaraguan or belonging to third States<sup>247</sup>. That is certainly not apparent from the Decree itself, which contains a specific prohibition on the navigation of Costa Rican vessels transporting tourists without the authorization of Nicaragua<sup>248</sup>, which is on your screens. Further, as stated during the first round<sup>249</sup>, the requirement for individuals or corporations engaged in tourism in Costa Rica, and simply transiting along the San Juan, to register with the Nicaraguan National Registry of Tourism, or to

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<sup>245</sup> CR 2015/7, p. 52-53, par. 29-30 (Pellet).

<sup>246</sup> *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 266, par. 67 (références omises).

<sup>247</sup> CR 2015/7, p. 52, para. 28 (Pellet).

<sup>248</sup> *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, CMCR, Ann. 26, Decree No. 79-2009, p. 86, Art. 4 g).

<sup>249</sup> CR 2015/4, pp. 14-15, para. 14 (Del Mar).



sign agreements with Nicaraguan tourism companies<sup>250</sup>, is contrary to Article VI of the Treaty of Limits, and the Court's 2009 Judgment<sup>251</sup>, whether it is applied in a discriminatory fashion or not.

11. Counsel for Nicaragua also stated that the Decree and Regulatory Norms do not apply to Costa Rican riparians navigating the San Juan for the purpose of meeting their basic requirements of everyday life<sup>252</sup>. But the Decree says otherwise. Article 3 (b) of the Decree is now on your screens. It refers expressly to navigation by these individuals being regulated by the Nicaraguan Army<sup>253</sup>. During the first round, I addressed the ways by which the Nicaraguan Army "regulates" the navigation of the San Juan by Costa Rican riparians, by harassing them<sup>254</sup>. Costa Rica agrees with Professor Pellet that this is "scandalous"<sup>255</sup>. These are not mere "blunders"<sup>256</sup>, even if that were somehow a circumstance precluding wrongfulness. They are contemporaneous to the claim made by Nicaragua in its Memorial in the *Road* case, that Costa Rica has "lost" its right of free navigation<sup>257</sup>.

12. I pause here to say something about the evidence Costa Rica has submitted concerning the harassment of Costa Rican citizens navigating either for the purpose of commerce, or to meet the basic requirements of everyday life. The Nicaraguan Agent, Ambassador Argüello, stated during the first round of hearings that if Costa Rican citizens were being prevented from exercising their navigational rights, "it would have been easy for Costa Rica . . . to have obtained affidavits . . . from these people registering their complaints"<sup>258</sup>. Indeed, Costa Rica has. Affidavits were annexed to Costa Rica's Memorial<sup>259</sup>. Others were annexed to Costa Rica's

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<sup>250</sup> *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, CMCR, Ann. 26, p. 99, Regulatory Norms, Art. 67.

<sup>251</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 269, para. 156 (c).

<sup>252</sup> CR 2015/7, p. 52, para. 28.

<sup>253</sup> *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, CMCR, Ann. 26, Decree No. 79-2009, p. 86, Art. 3 (b).

<sup>254</sup> CR 2015/4, p. 17, paras. 24 and 25.

<sup>255</sup> CR 2015/7, p. 50, para. 26 (Pellet) (French original: "scandaleux").

<sup>256</sup> CR 2015/7, pp. 50-51, para. 26 (Pellet) (French original: "bavures").

<sup>257</sup> *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, MN, p. 127, para. 4.9.

<sup>258</sup> CR 2015/5, pp. 17-18, para. 40 (Argüello).

<sup>259</sup> *Certain Activities*, MCR, Anns. 27 and 28, Affidavits of Franklin Gutierrez Mayorga and Jeffrey Prendas Arias.

written pleadings in the joined case concerning the Road for the simple reason that these affidavits concern events that took place after the filing of Costa Rica's Memorial in this case<sup>260</sup>. They evidence Nicaragua's ongoing and serious breaches of Costa Rica's rights of navigation.

13. Nicaragua has continued to put forward a wrong interpretation of Costa Rica's right of navigation for the purposes of commerce during these hearings<sup>261</sup>. That right was explained clearly by the Court in paragraph 71 of the 2009 Judgment<sup>262</sup>. Navigation is for commercial purposes if the Costa Rican passenger has paid a price (other than a token price) to the boat operator to navigate on the San Juan. The activity to be performed by the paying passenger at his or her final destination is not relevant in this regard<sup>263</sup>.

14. It is simply not the case that Nicaragua has strictly complied with all the provisional measures indicated by the Court<sup>264</sup>, since it received — what counsel for Nicaragua terms — the Court's "warning" in the form of your second Order on provisional measures of November 2013<sup>265</sup>. By preventing Costa Rican personnel from navigating the San Juan in the ways I catalogued during the first round of hearings, Nicaragua breached the Court's Orders on provisional measures of 8 March 2011 and 22 November 2013 by aggravating the dispute, in addition to breaching Costa Rica's rights of navigation.

#### **D. Conclusion**

15. Mr. President, Members of the Court, that concludes my remarks. I thank you for your kind attention. Mr. President, I ask that you give the floor to Costa Rica's Agent, Ambassador Edgar Ugalde, to conclude Costa Rica's pleadings in this case, and to read Costa Rica's Submissions.

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<sup>260</sup> *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, RCR, Anns. 62, 63, 64, 65, 66, and 67, Affidavits of Victor Julio Vargas Hernandez, William Vargas Jimenez, Mayela Vargas Arce, Gabriela Vanessa Lopez Gomez, Claudio Arce Rojas, Ruben Francisco Valerio Arroyo. Cf. CR 2015/7, p. 51, para. 26 (Pellet).

<sup>261</sup> CR 2015/7, p. 52, para. 26 (Pellet).

<sup>262</sup> ~~Cf. CR 2015/7, p. 51, para. 26 (Pellet).~~

<sup>262</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 244, para. 71.

<sup>263</sup> Cf. CR 2015/7, p. 52, para. 26 (Pellet).

<sup>264</sup> CR 2015/7, p. 45, para. 14 (Pellet).

<sup>265</sup> CR 2015/7, p. 42, para. 6 (Pellet).

Le PRESIDENT : Merci, Madame. Je donne à présent la parole à l'agent du Costa Rica, M. l'ambassadeur Ugalde.

Mr. UGALDE-ÁLVAREZ:

1. Mr. President, Members of the Court, as Costa Rica comes to the end of the second round of hearings, and more generally to the conclusion of these protracted proceedings, my country trusts that this case has established, beyond any doubt, that Costa Rica has been subject to the unlawful military occupation of part of its territory by Nicaragua and other serious breaches by Nicaragua of its obligations under international law. Indeed, the core facts at issue in these proceedings are not in dispute.

2. As the Court will appreciate, relations between our neighbouring countries have entered a phase of heightened tensions after Nicaragua, without warning, called into question the well-established régime between the two countries in place since 1858, the very purpose of which was to provide a framework for long-lasting peace and prosperity. Nicaragua's rejection of the border régime by invading and occupying Costa Rican territory and by threatening Costa Rica's territorial integrity, together with its persistent breach of Costa Rica's rights of free navigation on the San Juan, and its implementation of a programme of dredging works on the San Juan River, regardless of the damage to Costa Rican territory that such works may entail, has destabilized peace and security in the region. By repeatedly breaching the Court's 2009 Judgment and several of the Court's Orders in the present proceedings, Nicaragua has directly challenged the authority of the Court.

3. Mr. President, Costa Rica is confident that your Judgment will serve to strongly dissuade Nicaragua from making further threats and carrying out further actions that violate Costa Rica's sovereignty, territorial integrity and other rights. It is important in this regard that Nicaragua's new claims over territory to the south-east of the outlet of the San Juan River into the Caribbean Sea be firmly rejected. Costa Rica trusts that the Court's Judgment will serve as a powerful reminder to Nicaragua of the important treaty and customary obligations that, as a member of the international community of States, it must uphold and respect.

4. Mr. President, Members of the Court, I will now proceed to read Costa Rica's submissions in the present case.

#### SUBMISSIONS

For the reasons set out in the written and oral pleadings, the Republic of Costa Rica requests the Court to:

(1) reject all Nicaraguan claims;

(2) adjudge and declare that:

(a) Sovereignty over the "disputed territory", as defined by the Court in its Orders of 8 March 2011 and 22 November 2013, belongs to the Republic of Costa Rica;

(b) By occupying and claiming Costa Rican territory, Nicaragua has breached:

(i) the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards;

(ii) the prohibition of the threat or use of force under Article 2 (4) of the Charter of the United Nations and Article 22 of the Charter of the Organization of American States;

(iii) the prohibition to make the territory of other States the object, even temporarily, of military occupation, contrary to Article 21 of the Charter of the Organization of American States; and

(iv) the obligation of Nicaragua under Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts.

(c) By its further conduct, Nicaragua has breached:

(i) *The obligation to respect Costa Rica's territory and environment*, including its wetland of international importance under the Ramsar Convention "*Humedal Caribe Noreste*", on Costa Rican territory;

(ii) Costa Rica's perpetual rights of free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the 1888 Cleveland Award and the Court's Judgment of 13 July 2009;

- (iii) the obligation to inform and consult with Costa Rica about any dredging, diversion or alteration of the course of the San Juan River, or any other works on the San Juan River that may cause damage to Costa Rican territory (including the Colorado River), its environment, or Costa Rican rights, in accordance with the 1888 Cleveland Award and relevant treaty and customary law;
  - (iv) the obligation to carry out an appropriate transboundary environmental impact assessment, which takes account of all potential significant adverse impacts on Costa Rican territory;
  - (v) the obligation not to dredge, divert or alter the course of the San Juan River, or conduct any other works on the San Juan River, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights under the 1888 Cleveland Award;
  - (vi) the obligations arising from the Orders of the Court indicating provisional measures of 8 March 2011 and 22 November 2013;
  - (vii) the obligation to consult with Costa Rica on the implementation of obligations arising from the Ramsar Convention, in particular the obligation to co-ordinate future policies and regulations concerning the conservation of wetlands and their flora and fauna under Article 5 (1) of the Ramsar Convention; and
  - (viii) the agreement between the Parties, established in the exchange of Notes dated 19 and 22 September 2014, concerning navigation on the San Juan River by Costa Rica, close to the eastern *caño* constructed by Nicaragua in 2013.
- (d) Nicaragua may not engage in any dredging operations or other works if and to the extent that these may cause damage to Costa Rican territory (including the Colorado River) and its environment, or which may impair Costa Rica's rights under the 1888 Cleveland Award, including its right not to have its territory occupied without its express consent.
- (3) to order, in consequence, that Nicaragua must:
- (a) repeal, by means of its own choosing, those provisions of the Decree 079-2009 and the Regulatory Norms annexed thereto of 1 October 2009 which are contrary to Costa Rica's right of free navigation under Article VI of the 1858 Treaty of Limits, the 1888 Cleveland Award, and the Court's Judgment of 13 July 2009;

- (b) cease all dredging activities on the San Juan River in the vicinity of Delta Costa Rica and in the lower San Juan River, pending:
  - (i) an appropriate transboundary environmental impact assessment, which takes account of all potential significant adverse impacts on Costa Rican territory, carried out by Nicaragua and provided to Costa Rica;
  - (ii) formal written notification to Costa Rica of further dredging plans in the vicinity of Delta Costa Rica and in the lower San Juan River, not less than three months prior to the implementation of any such plans; and
  - (iii) due consideration of any comments made by Costa Rica upon receipt of said notification.
- (c) make reparation in the form of compensation for the material damage caused to Costa Rica, including but not limited to:
  - (i) damage arising from the construction of artificial *caños* and destruction of trees and vegetation on the “disputed territory”;
  - (ii) the cost of the remediation measures carried out by Costa Rica in relation to those damages, including but not limited to those taken to close the eastern *caño* constructed by Nicaragua in 2013, pursuant to paragraph 59 (2) (E) of the Court’s Order on Provisional Measures of 22 November 2013;the amount of such compensation to be determined in a separate phase of these proceedings;
- (d) provide satisfaction so to achieve full reparation of the injuries caused to Costa Rica in a manner to be determined by the Court;
- (e) provide appropriate assurances and guarantees of non-repetition of Nicaragua’s unlawful conduct, in such a form as the Court may order; and
- (f) pay all the costs and expenses incurred by Costa Rica in requesting and obtaining the Order on Provisional Measures of 22 November 2013, including, but not limited to, the fees and expenses of Costa Rica’s counsel and experts, with interest, on a full indemnity basis.

Mr. President, Members of the Court, thank you for your kind attention. That concludes Costa Rica’s submissions.

Le PRESIDENT : Merci, Monsieur l'ambassadeur. La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom de la République du Costa Rica.

La Cour se réunira de nouveau demain, à 15 heures, pour entendre le second tour de plaidoiries du Nicaragua. L'audience est levée.

*L'audience est levée à 12 h 55.*

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