

CR 2015/15

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2015

Public sitting

held on Wednesday 29 April 2015, at 3 p.m., at the Peace Palace,

President Abraham presiding,

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

VERBATIM RECORD

ANNÉE 2015

Audience publique

tenue le mercredi 29 avril 2015, à 15 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

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

COMPTE RENDU

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

 Registrar Couvreur

Présents : M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Caçado Trindade
Greenwood
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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H.E. Mr. Edgar Ugalde Álvarez, Ambassador on Special Mission,

as Agent;

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

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

comme conseillers scientifiques et experts.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre le second tour de plaidoiries du Nicaragua en l'affaire relative à *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*. Je donne maintenant la parole à Son Excellence M. Argüello Gómez, agent du Nicaragua. Vous avez la parole, Monsieur l'ambassadeur.

Mr. ARGÜELLO: Thank you, Mr. President. Mr. President, distinguished Members of the Court, good afternoon.

1. My presentation today will centre on the question of sovereignty over the territory in dispute.

2. In this respect, it is necessary to separate two phases of the dispute as presented by Costa Rica. The first phase is the territorial claim presented by Costa Rica when it filed its Application in 18 November 2010 and maintained during the proceedings for provisional measures and when filing its Memorial.

3. Costa Rica presented maps indicating that the border started in the east side of Harbor Head Lagoon and followed the coastline but inside the bar of land that extended from present day Punta de Castilla in Harbor Head all the way to the present day main mouth of the San Juan River. [Tab 1 on] This claim can be clearly seen on the screen with the 1988¹ Costa Rican map where we see that the contour of the border is inside the surrounding feature which is clearly part of Nicaraguan territory [tab 1 off]. This is reiterated in other maps included in Costa Rica's Memorial dated 1966² and 1970³, that are included in tab 14 of your folders.

4. The second phase of the Costa Rican claim was made during the hearings on provisional measures held in October 2013 [tab 2 on]. Costa Rica claimed that the territory in dispute comprised the whole area out to sea including the surrounding outer feature. In this image⁴ we now appreciate the increase in Costa Rica's territorial claim. In response to Judge Donoghue's

¹MCR, Vol. V, Ann. 185.

²*Ibid.*, Ann. 222.

³*Ibid.*, Anns. 178-179.

⁴Satellite image, 14 Sep. 2013, Costa Rica's Request for new provisional measures, 23 Sep. 2013, att. PM-28, detailed area. *Certain Activities* 2nd round CR judges' folder, tab 19.

question, Professor Kohen indicated that the part of the surrounding feature (sandbank) located between Harbor Head Lagoon and the sea appertained to Nicaragua⁵. We will say some more on this point when we respond to Judge Donoghue's question.

5. Nicaragua's position is that the whole area is part of its territory. [Tab 2 off]

6. The first and most important basis for Nicaragua's claim is based on the international instruments that have delimited and demarcated its territory. These instruments are by now well known by the Court: the delimitation Treaty of 1858, the Arbitral Award of President Cleveland of 1888 and the five Arbitral Awards of General Alexander dating from 1897 to 1900.

7. In yesterday's session, Costa Rican counsel quoted these documents profusely and selectively, with one very telling exception. They have forgotten the Cleveland Award. It was not mentioned by counsel in the oral pleadings and it is not mentioned in the submissions. Why? Because it gives the lie to everything they have been arguing.

8. I am not complaining that Costa Rica mentions Article II of the Jerez-Cañas Treaty of 15 April 1858 that stipulates that the border between Nicaragua and Costa Rica [tab 3 on] "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 three . . . miles distant from Castillo Viejo"⁶.

9. But Costa Rican counsel seems to forget that both Parties were not in agreement on the exact location of the starting-point of the boundary. That is why they had recourse to the arbitration of President Cleveland who indicated the exact and *unmovable* location of the starting-point. [Tab 3 off]

10. The Award of President Cleveland of 22 March 1888 declared in point three (1) [tab 4 on]: "The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of *Punta de Castilla* at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858."⁷ [Tab 4 off]

⁵CR 2015/14, p. 33, para. 31. See tab 19 of Costa Rica's judges' folder of 28 April 2015.

⁶*Treaty of Limits of 1858, MCR, Vol. II, Ann. 1; emphasis added.*

⁷*Cleveland Award, MCR, Vol. II, Ann. 7; emphasis added.*

11. Perhaps Costa Rica ignores President Cleveland because he *does not* say that the border follows the mouth of the river. He says that it is located at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, *as they both existed on the 15th day of April 1858*. That is, at a *fixed unmovable* point that does not follow the changes in the river mouth.

12. When the question of the starting-point of the demarcation was before arbitrator engineer Alexander, the situation became completely clear. The First Award of September 1897 deals with this question. The Court will not find in the Award any place where Alexander indicated he was looking for the mouth of the river. His Award goes to great length to find where Punta de Castilla was located because that was the fixed starting-point for the border. It turns out that Alexander was faced with the fact that the original Punta de Castilla in the previous 40 years — since the 1858 Treaty — “has long been swept over by the Caribbean Sea”⁸. Therefore, he went to great pains to establish where it would have been located because that was the fixed starting-point of the border. If the location of the mouth of the river had been the determining factor, he would have simply decided where the mouth was located at that moment. But he was not looking for the mouth of the river, only for Punta de Castilla.

13. Before going on with the analysis of the Award and the implications for the present-day situation, it is useful to point out that Costa Rica has brought before this Court a maritime delimitation case against Nicaragua in respect of the Caribbean Sea⁹. [Tab 5 on] The starting-point for that delimitation according to the Memorial filed on 3 February 2015 is located somewhere by the present main mouth of the San Juan River, a few kilometres from the fixed point determined in the 1858 Treaty and Cleveland and Alexander Awards¹⁰. This brings into perspective the real interest of Costa Rica in this case. This clarifies the incredible ado started by Costa Rica over 250 ha of what the Secretary-General of the Organization of American States, surprised, called a “swamp”¹¹ when he visited the site. The case is really about a substantial

⁸Award of 30 Sep. 1897, MCR, Vol. II, Ann. 9.

⁹*Dispute concerning Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Memorial of Costa Rica, 3 Feb. 2015.

¹⁰Image is taken from Costa Rica’s Memorial in the *Certain Activities* case, Ann. 196.

¹¹CMN, Vol. II, Ann. 26, White Book, *The Truth Costa Rica Hides*, p. 15.

amount of maritime spaces that would be generated by a change in the boundary terminus. That is what this case is about. [Tab 5 off]

14. To examine the present-day situation let us place on screen the sketch attached to Alexander's 1897 Award. You might remember that in my first presentation I pointed out that the First Alexander Award calls attention to the existence of an important island at the mouth of the San Juan River. In his words: "The great feature in the local geography of this bay, since our earliest accounts of it, has been the existence of an island in its outlet, called on some early maps the island of San Juan."¹²

15. [Tab 6 on] Here we have this island on the screen marked in red. In the three-hour session of yesterday morning Costa Rica did not refer to this "great feature" or to anything involving it. So, I will have to go over this material more carefully because they appear to have deliberately ignored the importance given by Alexander to this feature and which I pointed out in my last speech.

16. If you look at the sketch you will note also that the indication of the line of demarcation sought by Costa Rica in 1897, that this claim of Costa Rica consisted principally of claiming sovereignty over the whole of the island of San Juan. In Alexander's words,

"Now, the whole claim of Costa Rica is based upon the assumption that on April 15, 1858, the date of the Treaty, a connection existed between the island and the eastern headland, and that this converted the island into mainland . . .

But even if that be true, it would be unreasonable to suppose that such temporary connection could operate to change permanently the geographical character and political ownership of the island."¹³

17. So, Alexander decided that this island appertained to Nicaragua. Where has it gone since he issued his Award? Costa Rica is silent because it knows it is part of the disputed territory.

18. In Nicaragua's Counter-Memorial¹⁴ we point out that the position of Costa Rica in 1897 was that the border should follow a channel headed *west* (to the left of the sketch-map) and Alexander clearly ruled that it should follow a channel heading *east* (to the right of the sketch-map) into Harbor Head Lagoon.

¹²Award of 30 Sep. 1897, MCR, Vol. II, Ann. 9.

¹³*Ibid.*

¹⁴CMN, p. 28, para. 2.19.

19. Well, almost 120 years after Alexander's Award it turns out that Costa Rica is now again claiming what Alexander denied it: sovereignty over San Juan island and a channel heading west to the Punta Arenas area and not east to Harbor Head Lagoon. [Tab 6 off]

20. At this point I must indicate that although the question asked by Vice-President Yusuf was addressed to Costa Rica, what follows will give Nicaragua's point of view generally on the subject of his question. It will also respond generally to Judge Donoghue's question. But, since this last was posed directly to Nicaragua, at the end of this presentation I will give a more direct reply to Judge Donoghue.

21. Mr. President, let us turn to the situation on the ground when Alexander was selecting channels or *caños*.

22. First, he noted, as quoted above¹⁵, that already in 1858 the island of San Juan was connected in the dry season to the right margin. You will note that this means that the channel separating the island of San Juan from the right bank could not have been navigable year round, even at the time of the 1858 Treaty, that is, 40 years before Alexander first saw the San Juan River.

23. In his Award, Alexander refers to this area and states "That the peculiarity of this Bay . . . is that the River brings down very little water during the annual dry season . . . so that a man might cross dry-shod."¹⁶

24. What does all this amount to? [Tab 7 on] Firstly, on the sovereignty over the island of San Juan. If we look at the map on the screen that was compiled by the Binational Commission Nicaragua/Costa Rica on 30 September 1897, we clearly see that a sandbank is running from the island of San Juan towards Punta de Castilla and that from Punta de Castilla another sandbank is running in the opposite direction. Both sandbanks are running to meet each other in the middle of the mouth of Harbor Head Lagoon. The first interesting thing about this map (and note the authors call it a "plano", that is, a map and not a sketch like General Alexander's contemporaneous one); the first interesting thing about this map is that the sandbank protects the island of San Juan from the Caribbean Sea. [Tab 7 off] This sandbank is still there, as can be appreciated in almost all the cartography and aerial and satellite photos that are in the files on tab 14 of your folders

¹⁵See para. 16 above.

¹⁶Award of 30 Sept. 1897; MCR, Vol. II, Ann. 9.

[Tab 14 (b)-14 (c) on/off]. Also, on the screen, as an example, the 1988 Costa Rican map that shows clearly the sandbank. [Tab 1 on]

25. The point is, if the sandbank is still out there, what happened to the island of San Juan? It could not have been swallowed by the sea because the sandbank would have been the first to go. It naturally serves as a shield for the island. So, even if Costa Rica refuses to acknowledge the issue, the territory of the island is out there precisely in the area in dispute.

26. I will not try to pontificate to the Court on the legal consequences emanating from the channel separating the island of San Juan from the mainland having diminished in size substantially or having totally disappeared. It is generally accepted that when a watercourse forming the limit between two sovereigns disappears, then the border between both areas continues to follow the original channel. So the land that comprised the Nicaraguan island of San Juan is still there, it still appertains to Nicaragua, and it is possible to establish its location on the ground. [Tab 1 off]

27. But let me make it clear that this is not the limit of the mainland of Nicaragua with Costa Rica. That limit follows what the Alexander Award clearly said,

“On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the left or southeastward, and shall follow the water’s edge around the harbor until it reaches the river proper by the first channel met.”¹⁷

28. This has been repeated ad nauseam but it is the only way to follow and respect Alexander’s decision. As I indicated in my first speech, the first channel met was not identified by Alexander who could easily have said that it was the channel separating the island of San Juan from the mainland, which was the channel indicated in his sketch. In short, he could have used any other identification mark if he considered that this channel was invariable. But no, the first channel was not invariable. The only invariable part of the border was the starting-point that President Cleveland said was at Punta Arenas at the mouth of the river “as they both existed on the 15th day of April 1858”¹⁸.

29. If the island of San Juan was connected to the mainland in 1858 it is obvious that a careful engineer and soldier like Alexander would realize in 1897 that it was quite probable that in some years the channel separating the island would clog up permanently. That is the only sensible

¹⁷Award of 30 Sept. 1897; MCR, Vol. II, Ann. 9.

¹⁸Cleveland Award; MCR, Vol. II, Ann. 7.

explanation why he did not indicate a fixed channel. Alexander did not conceive that Harbor Head should become an enclave inside Costa Rica, which is what this State now wants. He knew there would always be changes in the channels in that area. He stated as much in his Second Award,

“the San Juan river runs through a flat and sandy delta in the lower portion of its course and that it is obviously possible that its banks will not only gradually expand or contract but that there will be wholesale changes in its channels”.¹⁹

30. Professor Kohen stated that it was not possible to have a movable frontier that would be dancing around. What is certain is that Alexander was not thinking of a wallflower stuck fixedly to the floor, or he would have made it clear, in fact he acknowledged “that the boundary line must necessarily be affected in future”²⁰. Alexander was leaving the mouth of Harbor Head Lagoon to Nicaragua since this was envisioned at that time as the mouth of the interoceanic canal that eventually would be excavated across Nicaragua along the San Juan River. He would not be leaving an enclaved harbour to Nicaragua. After the First Alexander Award was rendered, Costa Rica was very angry and there was talk of war. This was reported in the news in Central America and the United States. Here is how general Alexander, an experienced Confederate General, described the situation in his letters from San Juan del Norte [tab 8 on]:

“I think that Costa Rica having lost control of the mouth of the Canal here by my decision would not regret an excuse for going to war and trying to capture it as a prize for she believes she could whip Nicaragua and I believe so too.”²¹ [Tab 8 off]

A confederate general speaking.

31. Mr. President, Members of the Court, in sum,

- (a) the island of San Juan is located in the area in dispute and is indisputably Nicaraguan territory, as General Alexander expressed it to be.
- (b) The “first channel met” selected by Alexander was not navigable all year round. There is no reason to belittle the present-day channels as being inconceivable as a border by Alexander.

¹⁹Award of 30 Sept. 1897; MCR, Vol. II, Ann. 9.

²⁰*Ibid.*

²¹Folder 41, Oct. 1897, Wednesday morning 13 Oct. 1897, in the Edward Porter Alexander Papers, No. 7, Southern Historical Collection, The Wilson Library, University of North Carolina at Chapel Hill, available online at <http://memoriacentroamericana.ihnca.edu.ni/uploads/media/Fondo%20Edward%20Porter%20Alexander.%20Expediente%20No.%2041.pdf> (last checked on 29 April 2015).

32. Profesor Kohen asserted yesterday²² that it was necessary to “*démonter une fois pour toutes l’interprétation nicaraguayenne visant à transformer l’expression ‘first channel met’ en ‘first caño met’.*” And he goes on to say that *caño* does not mean channel in English but only a creek or stream or a *ruisseau* in French. First of all, I must point out it is not Nicaragua’s translation. It is the translation that the Binational Commission agreed on in 1897²³ and has been used ever since by both countries. It is used by Costa Rica in its Rejoinder defining *caño* as follows: “channel, water course that runs through muddy, flooded terrain, or through palustrine or lacustrine wetlands, whose depth and appearance change as a function of the level of water”²⁴.

33. I would have dismissed this as simply another *plaisanterie* from Professor Kohen but the point is of interest and goes beyond his intent, if there was one at all. The engineers, lawyers and other members of the Binational Commission in 1897 were clear that the channel Alexander was talking about was not the English Channel or had any such grandiose meaning. They knew they were referring to a very minor feature that was clogged up part of the year. They agreed to call it a *caño*.

34. Mr. President, Members of the Court, what is the answer to today’s situation? Nicaragua maintains and reaffirms that the *caño* that was cleaned in 2010 is now the first *caño* met. But Nicaragua has always maintained that there are many other *caños* that are navigable, certainly during the rainy season, and several all year round if the vegetation is cleared up.

35. In this respect, the Court does not have to take Nicaragua’s word for it. Although Nicaragua cannot enter the area and take its own experts inside the disputed territory, there are two independent experts that have confirmed the existence of natural *caños*.

36. First, the Report of the Ramsar Advisory Mission No. 77, dated August 2014 [tab 9a on] states that: “The area is characterized by a complex mosaic of water courses and bodies, many of which may be of natural origin.”

²²CR 2015/14, p. 27, para.11 (Kohen).

²³In Minute No. VII of the Proceedings of the Binational Commissions, Nicaragua and Costa Rica agreed to a common Spanish translation of the Alexander Award of 30 Sept. 1897, which had already been put on record in English in Minute V of the Proceedings.

²⁴Centro Científico Tropical (CCT), *Follow-up and Monitoring Study Route 1856 Project-EDA Ecological Component*, Jan. 2015, p. 6; RCR, Vol. III, Ann. 14.

37. You can see on screen photographs from the Ramsar report of some of the natural channels they had found just around the area they were covering. [Tab 9a off]

38. Second, and very telling, the Costa Rican expert Professor Thorne very clearly confirmed this position. Here is what he said.

39. Professor Thorne was shown a map prepared by the United States Defense Mapping Agency (DMA) in 1988 based on aerial photography taken in 1961 with updated photoplanimetric methods from 1987. He agreed that the DMA map depicts a Y-shaped channel connecting the San Juan River to Harbor Head Lagoon and, based on the map's legend, testified that it is "intended to be a perennial water course"²⁵. Professor Thorne later testified, in response to a question from Judge Greenwood, that a map produced in 1949 by Costa Rica's National Geographical Institute was likely intended to depict the same "Y-shaped distributaries in the manner of the 1988 map"²⁶.

40. Professor Thorne also agreed that the 1988 DMA map was produced in collaboration with Costa Rica's official mapping agency, the Instituto Nacional Geografico. And he further agreed that the Instituto's own map, also published in 1988, showed the same perennial channels connecting the San Juan River to Harbor Head Lagoon as are showed in the DMA map.

41. Even though the 1988 DMA map was based on aerial imagery, Professor Thorne testified that, to be considered fully reliable, it should be checked in the field. He testified:

"in conducting any kind of fieldwork, the use of remote sensing is becoming almost *de rigueur* and it is a fantastic source of information. But, you cannot tell everything from 1,000 km in space — or even from an aircraft — and so I am a supporter of the concept of 'ground truthing', perhaps not everywhere, but [in] terms of checking some of the apparent features of an image taken by a satellite or by an aircraft, it is preferable to do some checks on the ground."²⁷

42. Professor Thorne was clear that the tree canopy in the disputed area makes it impossible to determine with reliability from satellite imagery or aerial photography, one way or the other, whether there are channels that connect the San Juan River to Harbor Head Lagoon. He based this determination on his personal experience [tab 9b on], during cross-examination Mr. Reichler asked:

²⁵CR 2015/3, p. 23 (Thorne).

²⁶*Ibid.*, p. 39 (Thorne).

²⁷*Ibid.*, p. 24 (Thorne).

“Would the [1988 DMA] map be reliable, in your opinion, if its depictions of channels connecting the river to the lagoon *had* been confirmed by a field check?”

Mr. Thorne responded:

“In as much as — based on my overflight on 7 July 2011 and my inspection of the imagery, some aerial photographs, some satellite images — what I would take from my personal experience is that the canopy of the forest makes it extremely difficult to see the ground . . . So where that leads me, I think, is that in terms of verifying the conditions of those particular waterway features — if that is what you are asking me about — then ground truthing would be highly advisable.”²⁸ [Tab 9b off]

43. Professor Thorne’s agreement on the necessity of a field check is also evident from his answer to Mr. Reichler’s question whether a good way to confirm whether the perennial channels shown on the 1988 DMA and official Costa Rican maps exist would be for a technical expert, or group of experts, to do a field check. [Tab 10 on] I quote Mr. Thorne’s response:

“I agree entirely, that would be an excellent way of establishing whether a channel exists at a given location or does not exist at that location. It would have to be done before there were artificial interventions in the way of cleaning, clearing or excavating channels. But if it could be done *a priori*, I agree entirely.”²⁹ [Tab 10 off]

44. When Mr. Wordsworth, during re-examination, showed Professor Thorne an aerial image taken in 1961 and asked if it assists in determining whether the channels depicted in the 1988 map “joins to the Rio San Juan?”, Professor Thorne responded: “I am not able to tell from this particular image. It is not a high enough quality, the tree canopy is obscuring the water course we believe to be Y-shaped and in that location.”³⁰

45. Just like aerial images, photographs taken from the San Juan River cannot, Professor Thorne testified, substitute for ground-truthing. Although such photographs might “yield useful evidence”, he was insistent that “any image, remotely sensed or otherwise, is not a complete substitute for a field inspection, in person”³¹.

46. Professor Thorne also testified that on-site ground truthing is needed to determine whether the channels connecting the river to the lagoon are navigable and by what type of vessel. Upon being asked whether a “field check would be able to determine whether the channels are

²⁸CR 2015/3, p. 24 (Thorne).

²⁹*Ibid.*, p. 31 (Thorne).

³⁰*Ibid.*, p. 37 (Thorne).

³¹*Ibid.*, p. 38 (Thorne).

navigable and, if so, by what kind of vessels”, he testified: “Well, if I was going to check that, I would attempt to navigate them in the vessel that was of interest. And if I was able to navigate the channel in that vessel, I would conclude that it was navigable.”³²

47. Professor Thorne agreed that the San Juan River and Harbor Head Lagoon, at least some of the time, are hydrologically connected in the area where Nicaragua cleared the *caño* in 2010. Consistent with Costa Rica’s own report to Ramsar in October 2010, Professor Thorne agreed that the area between the San Juan and the lagoon is “an extensive block of flooded forest”³³. And, upon being asked whether “during overbank floods there may be a connection between the Rio San Juan and the southern tip of Harbor Head Lagoon”, Professor Thorne testified: “During extreme events I am sure there is a connection between the Rio San Juan and all of its adjacent wetlands, including the southern end of the Harbor Head Lagoon.”³⁴

48. Yesterday, none of Costa Rica’s counsel said a word about Professor Thorne’s testimony on any of these points. They have no response to them. In fact, they appear to have abandoned Professor Thorne altogether. He has not been in Court the past two days. Nicaragua, as its counsel have said, takes Professor Thorne at his word. And, according to his words, the most reliable evidence that is before the Court, [tab 11 on] is the 1988 US DMA map, prepared in collaboration with Costa Rica’s own official mapping agency, and that agency’s own official map of the same year, that show that there are perennial channels connecting the San Juan River to Harbor Head Lagoon. On this evidence, the Court may find that one of these channels is the first channel met. In Nicaragua’s view, such a finding is fully justified. [Tab 11 off]

49. However, if the Court wants to be completely convinced, then, in Nicaragua’s view, it should follow Professor Thorne’s advice, and appoint a team of technical experts, including Professor Thorne himself, to perform the field check, the “ground truthing”, that he recommended.

50. Mr. President, distinguished Members of the Court, permit me to turn to another subject, which I will phrase in a question. Why did Nicaragua not pay more attention to the cartography showing the greater part of the area in dispute as part of Costa Rica?

³²CR 2015/3, p. 25 (Thorne).

³³*Ibid.*, p. 27 (Thorne).

³⁴*Ibid.*, p. 29 (Thorne).

51. In the first place it has to be clear that the tiny area in dispute had never been on any priority list of the very small cartographic department of Nicaragua. Perhaps a way of bringing this across is to point out that the priority of the Binational Commission that had been put in place in 1991 was to reach an agreement in densifying the markers along the border with Costa Rica but from marker 2, placed 3 miles from Castillo Viejo, to marker 20 on reaching the Pacific Ocean; that is, the problems were with the markers placed on the land border. Why? Because these markers were placed many miles apart and there were farms and houses in the area that needed to know on which side of the border they were located. There were land disputes that could only be resolved by determining who the authority was that could decide the issue.

52. In the 250-ha area in dispute there were no farmers or inhabitants or competing private claims over land. There were farms on the Costa Rican side, but none in the area in dispute in possession of a person that wanted to know under what authority he was. Nicaraguan officials and the military went in and out of the area unopposed and unchallenged. In short, no person or authority was putting pressure on the cartographic office to come down and verify on the ground where the border exactly was located. The cartographic office was satisfied that all its international maps had indications that they had not been verified on the ground. The problem only arose and became immediately of the highest priority when the dredging process started.

53. Nicaragua has filed numerous affidavits³⁵ from different authorities that have been working in the area for several decades that give faith that they entered and patrolled or visited the area in dispute without challenge. Costa Rica dismisses these affidavits pointing out that the Court cannot give them credence because they are Nicaraguan authorities. Mr. President, Members of the Court, there is one interesting observation on this.

54. In the late 1920s the engineer corps of the United States Army were surveying the area for the interoceanic canal that the United States was planning to cut through Nicaragua. A fuller account of this can be read in the Nicaraguan Memorial in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*³⁶. [Tab 12 on] For present purposes I would point your attention to the

³⁵See CMN, Anns. 80-90.

³⁶Memorial of the Government of Nicaragua in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Vol. I, pp. 94-95, paras. 2.74-2.76, 28 April 2003.

map on the screen which was prepared by the United States Engineer Office between 1929-1931³⁷. You will note that the border follows roughly the area Nicaragua claims. Now, to prepare that map the American engineers covered all that ground which was essential for determining the feasibility and the route the canal was to follow. These engineers were not opposed by Costa Rican authorities. The conclusions and all the on the ground investigations including notes on *caños* in the area are public records in the United States. But the point here is that they entered the area in a quite open manner, known to everyone in the area, and they did this under the authority of Nicaragua and they were not challenged by Costa Rica. [Tab 12 off]

55. In fact the only evidence of Costa Rican activity in the disputed area is paper evidence. Ramsar had never set foot in the area in dispute before 2011. The area was included as a Ramsar site in an inexact map presented by Costa Rica that also included areas located about 10 km inside other undisputed parts of Nicaraguan territory³⁸.

56. The first time that the Costa Rican authorities came into the area was on 20 and 22 October 2010³⁹. Heavily armed security forces of Costa Rica entered the disputed area — or should we use the favourite word of Costa Rica, “invaded” the disputed area? [Tab 13 on] They raised a Costa Rican flag for the first time in history in the disputed territory. But, as was to be expected from a force that didn’t know the ground they were entering, they found that the conditions were very harsh and abandoned the post, leaving the Costa Rican flag as the only inhabitant in the area. [Tab 13 off] After the Costa Rican forces left, the Nicaraguan forces, who knew the area well, came in and stayed until the Court ordered them out. Yes, they might have left one day after Judge Bennouna asked the question because, as I was later informed, they were taking down the camp and were not going to leave the Nicaraguan flag in place unattended as their military rules do not allow for that.

57. Mr. President, Professor Pellet will have more to say on the location of the boundary. In Nicaragua’s view it follows the 2010 *caño*, but if the Court determines that it does not, then it must in any event follow the first channel met. We have shown that the first channel met could be no

³⁷CMN, Vol. V, Ann. 123.

³⁸In fact the co-ordinates of the site given by Costa Rica to Ramsar indicate that the starting-point is more than 10 km inside undisputed Nicaraguan territory. CMN, *Certain Activities* case, p. 352, para. 6.109.

³⁹CMN, Vol. II, Ann. 26, White Book.

farther from Punta Castilla than the Y-shaped channel depicted as perennial on both of the 1988 maps. But if the Court has any doubt, we submit that the proper course would be to appoint a commission of technical experts, as recommended by Professor Thorne, to perform a field check, a ground-truthing and report to the Court on the existence and location of any channels in this area connecting the San Juan River proper to the lagoon, and to report on whether these channels are navigable and, if so, by what kind of vessel.

58. Mr. President, before asking you to call Mr. Reichler to the podium I will answer Judge Donoghue's question.

59. The question Judge Donoghue states is:

“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?”

60. My response:

1) The Cleveland Award of 22 March 1888 provided that: [Tab 4 on]

“the boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of *Punta de Castilla* at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858”.⁴⁰ [Tab 4 off]

2) It was General Alexander's task to determine on the ground where Punta de Castilla was located. He discovered that the exact spot where Punta de Castilla was located in 15 April 1858 had long been swept over by the Caribbean Sea and proceeded to describe the direction the line should follow:

“Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass, at its nearest point, 300 feet on the northwest side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the left, or southeastward, and shall follow the water's edge around the harbor until it reaches the river proper by the first channel met.”⁴¹

3) The present feature extends from the border area marked by Alexander at the entrance of Harbor Head Lagoon to Isla de San Juan on Nicaraguan territory. [Tab 14a on] The evolution

⁴⁰Cleveland Award, MCR, Vol. II, Ann. 7; emphasis added.

⁴¹Alexander Award 30 Sep. 1897, MCR, Vol. II, Ann. 9.

of this feature can be appreciated in this map drawn by the Binational Territorial Commission in 1897⁴² where we can see the sandbar extending from the island of San Juan in the direction of the sandbank extending from Punta de Castilla. These banks have united and for more than a hundred years have been in the situation we at present appreciate. [Tab 14a off]

- 4) [Tab 14b-14c on] Although occasionally the Caribbean Sea breaks through, the sandbank is now solid ground with vegetation as can be appreciated in these recent aerial photographs⁴³ and satellite imagery⁴⁴.
- 5) To the question whether this feature exists today and does it comprise land territory that can appertain to a State, the answer is yes. This feature exists today, it has vegetation and it can appertain to a State. [Tab 14b-14c off]
- 6) This feature appertains to Nicaragua for the following reasons:
 - (a) This feature existed in Alexander's time and he cut through it separating it from the Costa Rican headland and leaving it on the Nicaraguan side. [Tab 14d on] At Alexander's time, the feature had vegetation as can be appreciated in the map titled *Greytown Harbor* from Survey by Officers of U.S.G.B. Newport, B.F.Tilley, 1898⁴⁵. [Tab 14d off]
 - (b) Whether in Alexander's time this feature was land territory or not, the main point of the delimitation and demarcation was that Nicaragua was to have and control the outlet to the sea. If a sandbank formed at the close of the mouth of Harbor Head, it would have to appertain to Nicaragua, if not Costa Rica would control the mouth of the harbour.
 - (c) This feature is as much grounded on Isla de San Juan as it is on the Punta Arenas headland. If there is any question of attribution, points (a) and (b) above clarify the point.
 - (d) All Costa Rican maps show this area as appertaining to Nicaragua. See for example at tab 14 of the folders, a 1966 and a 1988 map, both reproduced in Costa Rica's Memorial;

⁴²MCR, Vol. V, Ann. 169.

⁴³CMN, Vol. II, Ann. 26, White Book, p. 66.

⁴⁴Satellite image of 29 Jan. 2011, produced by Costa Rica on 29 July; fig. I.19 (Thorne).

⁴⁵MCR, Vol. V, Ann. 170.

the first one prepared by the United States Corps of Engineers and the latter by the Geographical Institute of Costa Rica in collaboration with the Defense Mapping Agency-Interamerican Geodetic Survey.

61. This ends my answer to Judge Donoghue's question. Thank you, this ends my presentation.

Mr. President, Members of the Court, thank you for your attention. Mr. President, may I ask that you now please call Mr. Reichler.

Le PRESIDENT : Merci, Monsieur l'ambassadeur. Je donne la parole à M. Reichler.

Mr. REICHLER: Mr. President, Members of the Court, good afternoon.

DREDGING

1. I will address Nicaragua's dredging programme, and Costa Rica's failure to demonstrate that the programme causes it harm. In so doing, I will respond to the remarks made by my friend, Ambassador Sergio Ugalde, yesterday.

2. Happily, Mr. President, there are now quite a few points of agreement between the Parties, especially on the most critical issues.

3. First, Costa Rica has acknowledged that Nicaragua has the right to dredge the river in order to maintain its navigability. That is no longer disputed, if it ever was. In any event, the Cleveland Award makes Nicaragua's right to dredge undeniable.

4. Second, Ambassador Ugalde yesterday expressly agreed:

(a) that the Lower San Juan River is subject to the accumulation of sediment⁴⁶;

(b) that this causes problems for navigation⁴⁷;

(c) that there is a need for dredging in order to maintain navigation on the main channel of the Lower San Juan River⁴⁸; and

(d) that Nicaragua designed its dredging programme to deal with these problems with the aim of facilitating navigation⁴⁹.

⁴⁶CR 2015/14, p. 49, para. 2 (Ugalde).

⁴⁷*Ibid.*

⁴⁸*Ibid.*, p. 60, para. 49 (Ugalde).

5. Citations to these four very explicit admissions by Ambassador Ugalde are provided in the footnotes to my presentation, which will appear in the transcript.

6. Third, Costa Rica has now abandoned its claims of actual harm. It no longer alleges that Nicaragua's dredging programme has caused a significant diversion of the Colorado River's flow. Of course, there is no way Costa Rica could continue to maintain such a claim when its own expert, Professor Thorne, has concluded that the dredging programme's impact on the flow of the Colorado is "meagre"⁵⁰ and "negligible"⁵¹.

7. Nor does Costa Rica continue to claim that the dredging of the river has harmed wetlands downstream, either in the disputed area or on the right bank of the river in territory that is indisputably Costa Rican. That claim has now been reduced to one of risk of harm, requiring an EIS⁵², and I will return to that shortly.

8. In addition, Costa Rica has now dropped its claim that Nicaragua has harmed it by depositing sediment on its territory. As I showed in the first round, UNITAR/UNOSAT concluded that there were no such deposits on Costa Rican territory⁵³. Ambassador Ugalde accepted yesterday that the photo he displayed in the first round depicted a sediment pile on Nicaragua's territory, not Costa Rica's⁵⁴.

9. Finally, Costa Rica has dramatically downgraded its claim of harm caused by the clearing of *caños* in 2010 and 2013. Costa Rica did not dispute Mr. Loewenstein's submissions that these impacts were minimal⁵⁵. Instead, Mr. Wordsworth argued that, for purposes of determining whether there has been a breach of its sovereignty or of the Court's Order on Provisional Measures, the "precise minutiae of damage" — those are his words — are not germane, but are relevant only to the assessment of compensation⁵⁶. Costa Rica said nothing to suggest that the alleged damage from the *caños* was anything more than just that — minute.

⁴⁹*Ibid.*, p. 49, para. 3 (Ugalde).

⁵⁰Thorne Summary Report for *Certain Activities* case, March 2015, p. 11, para. 4.16 (a).

⁵¹Thorne 2011 Report for *Certain Activities* case; MCR, App. 1, p. (vii).

⁵²CR 2015/14, pp. 51-56, paras. 8-33 (Ugalde).

⁵³CR 2015/6, pp. 21-22, para. 43 (Reichler).

⁵⁴CR 2015/14, p. 60, para. 47 (Ugalde).

⁵⁵See CR 2015/7, pp. 12-22 (Loewenstein).

⁵⁶CR 2015/14, p. 21, para. 37 (Wordsworth).

10. To sum up, Mr. President, this is now agreed: Nicaragua has the right to dredge; dredging is required to maintain the navigability of the Lower San Juan; Nicaragua's dredging programme was designed with that aim; it has caused no harm to the Colorado River, the wetlands downstream, or any other Costa Rican territory; and the clearing of *caños* has had only minimal, or minute, effect. The Court will recall that Professor Thorne testified in regard to the latter that, at the locations of the two 2013 *caños*, there were no mature trees cut, and the vegetation that was disturbed has fully recovered naturally⁵⁷.

11. So, Costa Rica's case now boils down to one thing: EIS. That is now the sum and substance of it. They claim that Nicaragua's 2006 EIS was inadequate, because, according to them, it did not sufficiently address the potential impact of the dredging programme on the wetlands downstream⁵⁸. And they claim that a new EIS would be required if Nicaragua were to significantly expand its current dredging programme⁵⁹.

12. Mr. President, Ambassador Ugalde has very helpfully simplified the case that is before you. And Nicaragua can simplify it further. I am instructed by the Agent of Nicaragua to state that Nicaragua agrees with Costa Rica that, if it were to expand its current dredging programme substantially beyond what is presently authorized, it would conduct a new EIS, and obtain a new authorization from its environmental protection agency, MARENA, before it could begin to implement that programme. This is not only an international obligation, but a national one. Nicaragua's own laws prohibit EPN, or any other public or private entity, from carrying out new or expanded works without conducting an EIS, and obtaining the requisite permit from MARENA.

13. Furthermore, Nicaragua agrees with Costa Rica that the EIS for any expanded dredging programme would be a transboundary EIS, assessing potential impacts on Costa Rican territory, including the Colorado River. And, as part of that transboundary EIS, Nicaragua would notify and consult with Costa Rica about the expanded programme. Consultation with Costa Rica, however, does not imply that Nicaragua must obtain Costa Rica's consent. That would give Costa Rica a veto over Nicaragua's works of improvement, which would contradict both the Cleveland Award

⁵⁷CR 2015/3, p. 42 (Thorne).

⁵⁸CR 2015/14, p. 52, paras. 16-17 (Ugalde).

⁵⁹*Ibid.*, pp. 56-57, paras. 34-36 (Ugalde).

and the requirements of transboundary EIS. It has been well established, at least since the *Lac Lanoux* case, that consultation, in good faith, with a neighbouring State is required; but that State's consent is not.

14. So there is no dispute over Nicaragua's obligation to perform a transboundary EIS, and to notify and consult with Costa Rica, before it could begin to implement an expanded dredging programme. This is important because it fully addresses the problems that Costa Rica associates with such an expanded programme. Ambassador Ugalde continues to assert that Nicaragua intends to widen the river, by cutting away at its banks, but all he offers are the same stale assertions that we have heard before, unsupported by any evidence whatsoever⁶⁰. He displayed three photos yesterday which showed nothing more than Nicaraguans navigating close to the Costa Rican bank — but what's wrong with that? Nicaragua is sovereign over every bit of the river right up to the bank. My friend told you the Nicaraguans were engaged in the nefarious work of trimming tree branches⁶¹, which obstructed navigation. They did it from their boats. What's wrong with that? The Cleveland Award gives Nicaragua that right. Where is the harm to Costa Rica?

15. Ambassador Ugalde invoked Professor Thorne's answer to a question from Judge Tomka, in support of his assertion that the dredging programme would have "devastating effects"⁶² — those are Ambassador Ugalde's words, not Professor Thorne's — on the wetlands downstream. Here is what Professor Thorne actually said in response to Judge Tomka: "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"⁶³. "*If it cuts off the sediment supply.*"

16. Nowhere in his testimony, or in his seven written reports, did Professor Thorne say that Nicaragua's current dredging programme cuts off, or is likely to cut off, sediment supply. To the contrary, he made it absolutely clear that, in his opinion, the current dredging programme is overwhelmed by the supply of sediment coming from upstream, so much so that it cannot keep up

⁶⁰CR 2015/14, p. 59, para. 45 (Ugalde).

⁶¹*Ibid.*

⁶²*Ibid.*, p. 56, para. 33 (Ugalde).

⁶³CR 2015/12, p. 52 (Thorne); emphasis added.

with it⁶⁴. Far from cutting off the supply of sediment, Professor Thorne has stated that the dredging is stirring up even more sediment, which is then transported downstream⁶⁵. Moreover, if we were losing hundreds of hectares of wetland due to coastal erosion, or even one hectare, there would be some evidence of that. There is none. Plainly, Professor Thorne was talking about potential harm from an expanded dredging programme, not the modest one Nicaragua is currently executing.

17. Professor Thorne expressed the opinion that the dredging Nicaragua is now carrying out may not be the best way to resolve the problem of navigation in the Lower San Juan River; he believes that it would be wiser for Nicaragua to address this problem by implanting wooden, in-stream training structures below the water level, as the United States Army Corps of Engineers has done in the Lower Mississippi⁶⁶. But he said that this would not eliminate the need for dredging: “I am not saying there is no dredging requirement, there is — but spot dredging of the tops of the shoals during the low season when you just need to knock the top off to get your 2 m draft boat through. That is what I would say.”⁶⁷

18. Professor Thorne is a man of good will, as are, I might add, Nicaragua’s experts. I am also instructed by the Agent of Nicaragua to inform the Court that Professor Thorne’s views on how best to solve the problems caused by excessive sedimentation of the Lower San Juan, especially the obstruction of navigation, will be communicated to the appropriate authorities in Managua, so that they can give his views the consideration they deserve. Nicaragua, of course, wants to do what is best for the river, *its* river. But nothing that Professor Thorne has said changes these fundamental facts, which Costa Rica now accepts: (1) it is Nicaragua’s right to dredge the river; (2) dredging is required to facilitate navigation, which is obstructed by the excessive accumulation of sediment in certain stretches of the Lower San Juan; and (3) there is no evidence that Nicaragua’s current dredging programme, as opposed to a hypothetical expanded programme that Costa Rica fears, causes any harm to Costa Rica.

⁶⁴CR 2015/12, p. 46 (Thorne).

⁶⁵Thorne Summary Report for *Certain Activities* case, March 2015, p. 7, paras. 4.4-4.5.

⁶⁶CR 2015/12, p. 52 (Thorne).

⁶⁷*Ibid.*, pp. 52-53 (Thorne).

19. These conclusions are supported by Professor van Rhee's testimony, to which Ambassador Ugalde also referred. He recalled Professor van Rhee's statement that Nicaragua's current dredging programme is insufficient to reverse the situation, where the San Juan River is progressively contributing more of its flow to the Colorado River and less to the Lower San Juan⁶⁸. I do not see how this helps Costa Rica's case, except to re-emphasize that the dredging programme, as currently implemented, does not materially reduce the Colorado River's flow. In order to reverse this situation, according to Professor van Rhee, an expanded dredging programme would be required⁶⁹. Precisely. And Nicaragua has no plans for such a programme, and will not undertake one, if ever, unless it first performs a new EIS justifying it.

20. So this brings us to the only remaining issue concerning dredging: Ambassador Ugalde's claims, that Nicaragua (*a*) did not prepare an EIS prior to carrying out its current dredging programme; and (*b*) that its 2006 EIS for this programme was inadequate. Apart from these two claims being somewhat inconsistent with one another, they have no merit.

21. Mr. President, it cannot be seriously disputed that, in 2006, Nicaragua prepared an extensive EIS for the current dredging programme, well before it commenced. Parts of that EIS are in the record. They were submitted as annexes to Nicaragua's Counter-Memorial⁷⁰. The entire EIS consists of 225 pages, plus hundreds of pages of technical appendices⁷¹. It was on the basis of this EIS that MARENA authorized the programme⁷². So now we are down to the question of whether its contents are adequate. But Mr. President, the adequacy of Nicaragua's EIS — as distinguished from its existence — is a matter of national law, not international law. This is what the Court held in *Pulp Mills*: "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case"⁷³. And there is no evidence that the 2006 EIS failed to fulfil the requirements of

⁶⁸CR 2015/14, pp. 55-56, para. 31 (Ugalde).

⁶⁹CR 2015/6, p. 35 (Reichler and van Rhee).

⁷⁰Environmental Impact Study for Improving Navigation on the San Juan de Nicaragua River (excerpts), Sep. 2006; CMN, Vol. II, Ann. 7; Project Design Study (excerpts), Sep. 2006; CMN, Vol. II, Ann. 8.

⁷¹CR 2011/2, p. 38, para. 22 (Reichler).

⁷²CMN, paras. 5.77-5.78.

⁷³Case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 83, para. 205.

Nicaraguan law, which are very similar to those of Costa Rican law. In fact, Ambassador Ugalde read to you from a Nicaraguan document stating that the 2006 EIS was sufficient, and that no additional EIS was required, to satisfy Nicaraguan law⁷⁴. There is no evidence otherwise.

22. However, for the sake of completeness, let us examine the adequacy of Nicaragua's 2006 EIS. Ambassador Ugalde told you yesterday that it failed to assess, and said nothing about, impacts on the flow rate of the Colorado River⁷⁵. He was mistaken. At tab 15 of your folders, and on the screen, you can find two excerpts from the 2006 EIS. The first is from one of the appendices. It says, following some rather sophisticated mathematical calculations which proceed it, which you can see in the tab: "we require just 2.01% of additional flow volume for the section of the new channel to function permanently, maintaining the same current characteristics of the channel or San Juan River"⁷⁶. The other excerpt is from the main body of the EIS. It is at tab 16, and now on the screen. I will take you right to the conclusion: "This of course does not substantially harm the flow of the Colorado River, since we will only take 5% of the total flow, ensuring permanent navigation on the San Juan River."⁷⁷

23. Mr. President, you will recall that, in September 2010, Costa Rica's Foreign Minister, relying on studies conducted by Costa Rican experts, publicly stated that such a diversion of flow would have no harmful effect on the Colorado River or Costa Rica⁷⁸. In fact, as calculated by Professor Thorne, if there has been a diversion of flow, it is no more than 1.5 per cent, which Professor Thorne characterized as "meagre"⁷⁹ and "negligible"⁸⁰.

⁷⁴CR 2015/14, p. 54, paras. 23, 25 (Ugalde).

⁷⁵*Ibid.*, p. 51, para. 11 and p. 53, para. 19 (Ugalde).

⁷⁶Project Design Study (excerpts), Sep. 2006, p. 18; CMN, Vol. II, Ann. 8.

⁷⁷Environmental Impact Study for Improving Navigation on the San Juan de Nicaragua River (excerpts), Sep. 2006, p. 10; CMN, Vol. II, Ann. 7.

⁷⁸Speech of Mr. René Castro Salazar, Former Minister for Foreign Affairs and Worship of Costa Rica, before the Environmental Commission of the Legislative Assembly of Costa Rica, 8 Sep. 2010; CMN, Vol. II, Ann. 24, pp. 402-403; see also Esteban A. Mata, "Chancellery accepts Nicaraguan plan to dredge San Juan River", *La Nación*, Costa Rica, 8 Sep. 2010, reproduced in Complete Nicaraguan White Book, p. 39; CMN, Vol. II, Ann. 26, p. 451 ("Castro said that he was satisfied with Nicaragua's technical environmental impact justifications . . . 'There is an environmental impact study made by Nicaragua and we have made our own analyses', justified Chancellor Castro.")

⁷⁹Thorne Summary Report for *Certain Activities* case, Mar. 2015, p. 11, para. 4.16 (a).

⁸⁰Thorne 2011 Report for *Certain Activities* case, p. (vii); MCR, App. 1.

24. Ambassador Ugalde also criticized Nicaragua's 2006 EIS on the ground that it failed to adequately measure flow rates in the San Juan River⁸¹. Wrong again. We can see this by turning back to tab 15. These three pages, from the same appendix to the EIS that I just referred to, are headed: "Gauging in the Project Area."⁸² As you can read at your convenience, measurements were taken at eight different areas along a 42 km stretch of the river⁸³: "To determine the behaviour, characteristics and volumes of water that move in the river, seven measurements were taken."⁸⁴ You can see in this document the averages of these seven measurements for each of the eight locations⁸⁵. That amounts to a lot of measurements.

25. Now this bring us to what Costa Rica repeatedly refers to as "the Ramsar report", on which it now bases its entire case regarding dredging. Let us review the undisputed facts concerning this document. Nicaragua, on its own initiative, invited a Ramsar advisory mission to inspect its dredging operation. As is Ramsar's standard practice, the advisory mission submitted a draft report to Nicaragua, so that Nicaragua could comment on it, and Ramsar could take Nicaragua's comments into account before preparing a final report. Nicaragua did comment on the Ramsar draft, as Ambassador Ugalde helpfully showed you yesterday, pointing out what Nicaragua considered a number of serious errors in the draft⁸⁶. Ramsar's response, dated 19 December 2011,

⁸¹CR 2015/14, p. 51, para. 11 and p. 52, para. 14 (Ugalde).

⁸²Project Design Study (excerpts), Sep. 2006, p. 16; CMN, Vol. II, Ann. 8.

⁸³*Ibid.*, pp. 16-18.

⁸⁴*Ibid.*, p. 16.

⁸⁵*Ibid.*, pp. 16-18.

⁸⁶CR 2015/14, pp. 53-54, paras. 20-25 (Ugalde); discussing "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 of Nicaragua, to Mr. Anada Tiega, Secretary General of the Ramsar Convention on Wetlands, 30 Nov. 2011, tab 37 of Costa Rica's judges' folder for 28 Apr. 2015.

was included in Costa Rica's folder yesterday⁸⁷, and for the Court's convenience is included in ours today, at tab 17 and on the screen:

“We are grateful for the communication sent on 30 November 2011, referring to the considerations on the Ramsar Advisory Mission No. 72 to the Wildlife Refuge of the San Juan River Ramsar site. In this regard, the team of the Ramsar Mission . . . will analyse the considerations sent and will be contacting you in case any clarification is necessary to have a final version of the document.”⁸⁸

In fact, Ramsar never again contacted Nicaragua about this mission, and it never produced a final version of the document. Nicaragua has been waiting to hear from Ramsar for over four years. But Ramsar has done nothing, at least as far as Nicaragua is aware, since its letter of 19 December 2011.

26. Mr. President, from these facts, several conclusions can be drawn. First, the document relied on by Costa Rica is not an official “Ramsar report”. It is a draft that Ramsar never finalized. Second, Ramsar did not respond to Nicaragua's very well-placed criticisms of the draft. The excerpt from the appendix to the 2006 EIS, at tab 15, concerning “Gauging in the Project Area”, shows that Nicaragua was right and the Ramsar draft was wrong about whether Nicaragua had measured flow rates in the San Juan River. Perhaps the Ramsar people did not read the appendices to the 2006 EIS. Third, the draft pertains only to the “Wildlife Refuge of the San Juan River” Ramsar site. That is the river itself. It called for more study, and ongoing monitoring of the hydrology, hydrogeology and hydrodynamics of the river — that is, *Nicaragua's* river. It said nothing about measuring any impacts on the wetlands on the right bank.

27. But how could it? The right bank belongs to Costa Rica, and Ramsar was surely aware that Nicaragua could not enter or perform studies in Costa Rican territory. Nor could Nicaragua send its officials into the disputed area because of the Court's March 2011 Order, of which Ramsar certainly was also aware.

28. But the draft did get at least one thing right: “[T]he dredging of the San Juan River with the purpose of improving river navigation will effectively improve navigation on the river during a

⁸⁷Letter from Mr. Anada Tiega, Secretary General of the Ramsar Convention on Wetlands, to Ms Juanita Argeñal Sandoval, Minister of Environment and Natural Resources of Nicaragua, 19 Dec. 2011, tab 38 of Costa Rica's judges' folder for 28 Apr. 2015. See also today's judges' folder, tab 17.

⁸⁸*Ibid.*

certain period of time.”⁸⁹ It endorses the dredging of the river. The draft goes on to say: “it is expected that over time the river will fill with sediment once again downstream from the delta”⁹⁰. And that is exactly why Nicaragua has been required, not only to carry out its initial capital dredging programme, but to engage in maintenance dredging to redredge the sediments that continue to accumulate in the channel that Nicaragua has excavated. Professor van Rhee, a dredging expert with more than 30 years of experience in the field⁹¹, told us that this is entirely normal in river dredging, and that maintenance dredging is always required after the initial capital dredging is performed⁹². Ambassador Ugalde repeatedly mischaracterized this ordinary maintenance dredging to preserve the excavated channel as a different programme. It is not. As Professor van Rhee explained, maintenance dredging does not change any of the flow rates or have any different impacts than the initial capital dredging⁹³.

29. And that reduces Costa Rica’s case on dredging to absolutely nothing.

30. Mr. President, I will close by responding to two additional comments made by Ambassador Ugalde, and then by offering Nicaragua’s answers to questions put by Judges Cançado Trindade and Xue in regard to dredging. Ambassador Ugalde said that Nicaragua still asks for an order declaring that it may restore the river to its condition in 1858⁹⁴. This is wrong. Nicaragua is not including that in its submissions.

31. Then, Ambassador Ugalde accused me of being wrong when I said that there was no evidence in the record to support his assertion that Nicaragua’s “ultimate aim” was to “refashion geography” and divert most of the Colorado River’s flow⁹⁵. He accused me of “miss[ing]” this evidence⁹⁶. Well, Mr. President, it *is* possible that I might have missed something, although I do take pride, when discussing evidence in this Great Hall, in being comprehensive and accurate. In

⁸⁹Ramsar Secretariat, Draft “Report: Ramsar Advisory Mission No. 72: Wetland of International Importance Refugio de Vida Silvestre del Río San Juan, Nicaragua”, 18 Apr. 2011, extract of English translation provided at tab 36 of Costa Rica’s judges’ folder for 28 Apr. 2015, pp. 42-43.

⁹⁰*Ibid.*, p. 43.

⁹¹Van Rhee Summary Report, March 2015, para. 1.

⁹²CR 2015/6, p. 33-34 (van Rhee).

⁹³*Ibid.*

⁹⁴CR 2015/14, p. 59, para. 44 (Ugalde).

⁹⁵*Ibid.*, p. 58, para. 44 (Ugalde).

⁹⁶*Ibid.*

this case, the Parties, between them, have submitted many thousands of pages of documents. And it is possible that I missed something in one of them. After all, I am not Judge Greenwood, who misses nothing. But, as it turns out, I missed nothing in this case, or at least nothing of the sort that Ambassador Ugalde has described.

32. I looked carefully at the documents to which he referred the Court, at tabs 39 to 43 of Costa Rica's judges' folder⁹⁷. All of these are newspaper articles that I had read several times before. None of them says that Nicaragua's aim is to "refashion geography." There is one article that cites a Nicaraguan official as proposing a diversion of the Colorado River's flow, but as Costa Rica itself has acknowledged⁹⁸, that statement was retracted⁹⁹. Further, the 2006 EIS concluded, as you have seen, that the diversion would be no more than 5 per cent¹⁰⁰, thus harmless to Costa Rica, and the actual diversion has been a "meagre" 1.5 per cent¹⁰¹. If there was anything useful in these articles, Ambassador Ugalde would have done what all good advocates do: he would have highlighted the text and projected it on the screen. If I have missed anything in this case, it is not in the newspaper articles to which he referred you.

33. I come now to Nicaragua's answers to questions from the Court. Judge Cançado Trindade asked:

"In the course of the oral arguments this week, references have been made to the natural sedimentation process and the constant morphological changes of the area, in particular around the mouth of the San Juan River. In your assessment, are recent or current dredging works final, or would there be a need for clearing the *caño* constantly, from time to time? In case such clearing is regarded as necessary, how can it be technically conducted to the satisfaction of both Parties?"

34. As the experts of both Parties have stated, in their written reports and oral testimony, because of sediment accumulation, there is a need for regular and repeated dredging of the Lower San Juan River and its navigable channels. This includes what Nicaragua regards as the first channel met, and all other channels in Nicaragua's territory. Under the Cleveland Award, it is

⁹⁷CR 2015/14, p. 58, para. 44 (Ugalde).

⁹⁸CR 2015/3, p. 57, para. 13 (Ugalde).

⁹⁹Declaration of Virgilio Silva Munguia (EPN), doc. 15 submitted by Nicaragua on 4 Jan. 2011 in connection with the oral hearings on provisional measures.

¹⁰⁰Environmental Impact Study for Improving Navigation on the San Juan de Nicaragua River (excerpts), Sep. 2006, p. 10; CMN, Vol. II, Ann. 7.

¹⁰¹Thorne Summary Report for *Certain Activities* case, Mar. 2015, p. 11, para. 4.16 (a).

Nicaragua's right to dredge the river and keep the channels navigable, without a need to obtain Costa Rica's consent. However, when there is a risk that the dredging or clearing activities might significantly harm Costa Rican territory, Nicaragua is obligated to conduct a prior transboundary environmental impact assessment, which would include notification to, and good faith consultation with, Costa Rica, in order to avoid or mitigate any potential adverse impacts.

35. Judge Xue asked:

“In order to possibly assess the intolerable level of sediments in the Lower San Juan, could Nicaragua inform the Court during the second round of oral hearings whether in the past century it has done dredging operations on the Lower San Juan; if so, how frequently such operations have been done and each time, approximately how many tons of sediments they dredged, if such data is available?”¹⁰²

36. Nicaragua did not dredge the Lower San Juan prior to the commencement of the current dredging programme. The reasons are these. First, there was no need to dredge prior to the 1970s, because the river did not naturally carry much sediment, and sediment did not accumulate to any harmful degree, before then. The massive quantities of sediment that now characterize the river are mainly the result of Costa Rica's deforestation of its side of the river, between Boca San Carlos and the delta, from the 1940s to the late 1990s and the conversion of this land to agricultural use. Mr. Brenes very helpfully confirmed the massive deforestation during this half century when he displayed the image from the journal *Environmental Monitoring and Assessment* last week¹⁰³. To be sure, as he showed, there has been some reforestation since then. But the clearing of the landscape and the consequent erosion of soils into the river had already been accomplished and the damage continues, because the primary forests are now almost completely gone.

37. On the screen, and at tab 18, is what Costa Rica's expert geologist wrote in September 2011, before Nicaragua presented its Memorial in the *Road* case — this is Dr. Astorga to whom I am referring:

“The rivers of San Carlos and Sarapiquí contribute an important volume to the water flow of the San Juan River, on average around 500 cubic metres per second. For this reason, it is absolutely clear that those rivers contribute a substantial part to the sediment load of the San Juan River, approximately 60% of the entire sediment

¹⁰²CR 2015/10, 21 April 2015, p. 66 (Xue).

¹⁰³CR 2015/11, pp. 14-15, para. 5 (Brenes).

load. This is especially evident because those confluents drain land used predominantly for agricultural production with only small amounts of forests.”¹⁰⁴

Deforestation. The Court will recall Mr. Wordsworth’s irritation with two of Nicaragua’s experts, Professor Kondolf and Dr. Andrews, when they pointed to Costa Rica’s deforestation of its land, and conversion to agricultural usage, as the most significant cause of sedimentation of the river. As you can see, this was what Costa Rica’s own expert concluded before Nicaragua made an issue of it in its Memorial.

38. It took several decades for the sedimentation resulting from Costa Rica’s deforestation to clog up the river. But by the 1970s, when this first became a problem, as the Court is well aware, Nicaragua was engulfed in civil war. During much of the 1980s, the area below the delta was controlled by paramilitary forces fighting against Nicaragua from bases inside Costa Rica. The combat ended only in 1990, but the Government’s focus then was on national reconciliation and recovery from the ravages of the war. It was only in the early 2000s that Nicaragua had rebounded sufficiently to embark on a dredging project of this nature.

39. Mr. President, this concludes my presentation. I thank you and the Members of the Court for your patient attention. I ask that you call Professor McCaffrey to the podium, perhaps after a break.

Le PRESIDENT : Merci, Monsieur Reichler. La Cour va maintenant se retirer pour une pause de 15 minutes. L’audience est suspendue.

L’audience est suspendue de 16 h 15 à 16 h 30.

¹⁰⁴Allan Astorga Gättgens, “Technical Report: Geology, Sedimentology and Tectonics within the Surroundings of the San Juan River and Calero Island”, Sep. 2011, p. 21, provided to Nicaragua by Costa Rica on 16 Mar. 2015 in response to Nicaragua’s request of 24 Feb. 2015; judges’ folder, tab 18.

Le PRESIDENT : Veuillez vous asseoir. Je donne la parole au professeur McCaffrey.

Mr. McCAFFREY:

**NICARAGUA’S RIGHT TO DREDGE: NICARAGUA HAS NOT BREACHED
ANY ENVIRONMENTAL OBLIGATIONS**

Nicaragua has not breached its environmental or other obligations

1. Merci, Monsieur le président. Mr. President, distinguished Members of the Court, this afternoon I will respond to Costa Rica’s arguments concerning alleged breaches of environmental and other obligations. At the end of my remarks I will offer answers to two of the questions asked by Judge Bhandari, the third one will be answered by Mr. Reichler tomorrow.

1. Alleged breaches of environmental obligations

2. First, Mr. President, the environmental obligations. Costa Rica persists in its effort to shoe-horn contemporary international environmental law into a 19th century treaty and arbitral award. Nicaragua is well aware of the tendency of this Court and other tribunals to interpret some treaties in an evolutionary manner. But such interpretations should obviously not contradict the object and purpose of the treaty or render it a hollow shell; otherwise it would be inconsistent with the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties.

3. Yesterday Dr. Parlett argued that the *lex specialis* principle leaves ample room for the application of principles of international environmental law to matters governed by the 1858 Treaty and the 1888 Cleveland Award, and that the Treaty and Award should be interpreted in light of those principles as they stand today¹⁰⁵. She proceeded to put on your screens what she described as Article 3 (6) of the Cleveland Award and to give you a close interpretation of it as seen by Costa Rica.

4. In fact, Dr. Parlett only put half of paragraph 6 on your screens; she left out the crucial second sentence, stating that Costa Rica “has the right to demand indemnification” for any damage caused to Costa Rican territory or navigation rights by Nicaragua’s works of improvement. This, together with the opening words of paragraph 6, “Costa Rica cannot prevent . . . Nicaragua” from

¹⁰⁵CR 2015/14, p. 45, para. 19 (Parlett).

carrying out works of improvement, give Nicaragua freedom to undertake such works, subject only to an obligation to compensate Costa Rica for any damage of the kinds referred to by President Cleveland that may be caused by those works. The Court will recall that Costa Rica had argued quite vehemently before President Cleveland that it *could* prevent Nicaragua from carrying out such works. President Cleveland decisively slammed the door on that idea in paragraph 6. But Costa Rica continues to make it anyway, *res judicata* or not.

5. Dr. Parlett's argument on this point was simply a repetition of what Costa Rica had argued at length earlier, with its interpretation in rather agonizing detail of the word "provided". Nicaragua responded to that argument in two separate interventions in the first round¹⁰⁶. I will not repeat those responses here.

6. However, Mr. President, Dr. Parlett's *lex specialis* argument does deserve a moment's attention. First, she rather cleverly puts the question backwards, asking "whether the 1858 Treaty and the 1888 Award override the application of environmental obligations under general principles of law and under international treaties"¹⁰⁷. It should be whether the *lex specialis* leaves room for the applicability of any other rules of law. Dr. Parlett proceeds to misstate the *lex specialis* rule, requiring that "Nicaragua . . . point to [a] provision of the 1858 Treaty or the 1888 Award that excludes the application of rules relating to protection of the environment"¹⁰⁸. Again, this turns the *lex specialis* principle on its head. The question is rather one of consistency, or compatibility, of the other rules with the *lex specialis*.

7. Applying this test, the words "Costa Rica cannot prevent" clearly mean that Nicaragua is free to proceed with works of improvement. Costa Rica "cannot prevent" Nicaragua from doing this by claiming that Nicaragua should delay undertaking the works pending the fulfillment of whatever other obligations Costa Rica thinks should apply. Quite simply, "cannot prevent" means "cannot prevent".

8. Dr. Parlett further said that I had "effectively conceded last week that environmental law obligations do not 'conflict in any way' with the 1858 Treaty and the 1888 Award, while at the

¹⁰⁶CR 2015/7, p. 38 (Pellet) and p. 29 (McCaffrey).

¹⁰⁷CR 2015/14, p. 45, para. 17 (Parlett).

¹⁰⁸*Ibid.*, pp. 45-46.

same time maintaining that the San Juan River was somehow immune, on the basis of *lex specialis*, from the application of all of those non-conflicting obligations”¹⁰⁹. She seems to have missed the explanation at the outset of my speech on the *Road* case last Tuesday that

“This case, unlike *Certain Activities*, does not involve claims by Costa Rica concerning Nicaragua’s dredging of the San Juan River, cleaning *caños*, or anything of the sort, all of which were dealt with by President Cleveland in his 1888 Award. Instead, it involves . . . the breathtakingly careless construction of a road.”¹¹⁰

That was my explanation and this careless construction of a road is something that is not governed by the Treaty or the Cleveland Award. Therefore, there is a clear possibility of conflict between *lex specialis* and the other obligations regarding dredging and similar issues in *Certain Activities*, but there is no possibility of a conflict in the *Road* case. The 1858 Treaty is, of course, not inapplicable in the *Road* case, but it applies not to Costa Rica’s road construction but to Nicaragua’s sovereignty over the San Juan, which is what is being trampled upon as a result of Costa Rica’s construction of the road.

9. Then Dr. Parlett addressed the term “damage”, as used by President Cleveland, and concluded that it means “any ‘damage’ and not merely ‘significant harm’”. Thus, she says, it constitutes “a more stringent obligation . . . than general international law”¹¹¹. Mr. President, we are all familiar with the maxim, *de minimis non curat lex*. I cannot believe that President Cleveland, a very capable lawyer, intended by using the term “damage” *simpliciter*, to mean insignificant damage. If so, why would he also have said that Costa Rica would have a right to claim indemnification for it? What would there be to indemnify?

10. Costa Rica also points to the Cleveland Award’s provisions for “asking the opinion” of Costa Rica under paragraph 10 and obtaining Costa Rica’s consent under paragraph 11, where injury to its “natural rights” was involved, in both cases as to a possible canal. Costa Rica feigns confusion about why these provisions do not also suggest that notification and consultation are required in respect of dredging¹¹². Mr. President, again, President Cleveland was not sloppy. If he had intended to require notification and consultation with regard to dredging, he clearly knew how

¹⁰⁹CR 2015/14, p. 46.

¹¹⁰CR 2015/10, p. 32 (McCaffrey).

¹¹¹CR 2015/14, p. 46.

¹¹²*Ibid.*, p. 47, para. 25.

to say so and would have said so. But Costa Rica ignores the *travaux* of the Award, which was cited by Nicaragua¹¹³, showing that Costa Rica made a big to-do of what it claimed to be its right to prevent Nicaragua from dredging, a right that President Cleveland declared to be non-existent. Clearly, in light of what the arbitrator said about “asking the opinion” of Costa Rica, and even obtaining its consent in respect of possible injury, both relating to canal construction, he would have said Nicaragua should ask the opinion of Costa Rica before dredging, rather than saying Costa Rica could claim indemnity for any damage resulting from dredging, if he had intended to do so.

11. Mr. President, Costa Rica repeats its charges as to Nicaragua’s environmental impact study concerning its dredging project on the Lower San Juan. It says Nicaragua did not consider transboundary impacts of its dredging programme, which I take to mean impacts on the flow of the Colorado branch of the San Juan River.

12. Mr. Reichler has already shown you that Nicaragua’s EIS fully addressed this issue and concluded there was no possibility of a significant diversion of the Colorado’s flow and both Parties’ experts agreed that there was none.

13. As Mr. Reichler has shown, Nicaragua did consider transboundary impacts as part of its 2006 EIS¹¹⁴, and because there is no new programme and no plans for an expanded one, no new EIS is required.

14. Any duty to notify and consult would not be triggered because both countries’ studies have shown that Nicaragua’s dredging programme poses no likelihood of significant harm to Costa Rica, and indeed that there has been no such harm from the inception of the programme to date.

2. Other Alleged Breaches

a. Alleged Breaches of Costa Rica’s Navigational Rights

15. Mr. President, I now turn to other alleged breaches by Nicaragua. I will begin with Costa Rica’s additional allegations that Nicaragua has breached its navigational rights.

¹¹³CR 2015/7, p. 39, para. 45 (McCaffrey).

¹¹⁴See, e.g., CMN, p. 150, para. 5.40; pp. 151-152, para. 5.43; pp. 154-155, para. 5.47; and p. 172, para. 5.78.

16. Dr. Del Mar trotted out a veritable parade of horrors yesterday to illustrate what she called “harassment” of Costa Rican citizens in violation of the 1858 Treaty and your Judgment in the *Navigational and Related Rights* case. She echoed the familiar refrain — I would call it a stuck record but I am not sure that expression has much meaning anymore — that hapless Costa Ricans are preyed upon by Nicaraguan border control authorities. The underlying assumption, of course, is that Costa Ricans have every right in the world to navigate on the San Juan and it is for Nicaragua to prove otherwise.

17. But you were clear in your 2009 Judgment, Mr. President. You said that Costa Rica has the right to navigate on the San Juan, Nicaragua’s territory, for the purposes of commerce. You also, in your *dispositif*, carved out carefully limited exceptions. The one that would be applicable to Dr. Del Mar’s “victims” is contained in paragraph (1) (f) of the *dispositif*, which reads as follows: “The Court . . . (1) (f) . . . Finds that the inhabitants of the Costa Rican bank of the San Juan River have the right to navigate on the river between the riparian communities for the purposes of the essential needs of everyday life which require expeditious transportation; . . .”¹¹⁵

18. So, there are three qualifications to this right: first, navigation must be between riparian communities; second, it must be “for the purposes of the essential needs of everyday life”; and third, those needs must “require expeditious transportation”. And, Mr. President, it must be remembered that Nicaraguan authorities have to make these determinations on the spot. Obviously, it is for the person or persons seeking to navigate on the river — again, Nicaragua’s territory — to prove to the satisfaction of the authorities that they have met these conditions.

19. The individuals whose affidavits are cited by Dr. Del Mar were obviously unable to carry that burden. Of the eight affidavits she cited, two concerned the journalists already discussed in these hearings¹¹⁶, five have to do with one incident involving invitees to a farm who were not actually engaged in commerce¹¹⁷, and the last was the case made so much of by Ms Del Mar,

¹¹⁵*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 270, para. (1) (f).

¹¹⁶*Certain Activities*, MCR, Anns. 27 and 28, Affidavits of Franklin Gutierrez Mayorga and Jeffrey Prendas Arias. Cf. CR 2015/7, p. 51, para. 26 (Pellet).

¹¹⁷*Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, RCR, Anns. 62, 63, 64, 65 and 66, Affidavits of Victor Julio Vargas Hernandez, William Vargas Jimenez, Mayela Vargas Arce, Gabriela Vanessa Lopez Gomez, Claudio Arce Rojas.

involving a man who, from all that appears from the affidavit, only wanted to travel to the nearest town, without showing that his trip was for commercial purposes or that he “require[d] expeditious transportation” “for the purposes of the essential needs of everyday life”¹¹⁸. All in all, a remarkably good record for Nicaragua’s authorities.

20. Nicaraguan authorities must in any event be left some margin of appreciation in making these determinations, which must be made quickly, on boats bobbing in the water, and in the context of the officers’ responsibility to control immigration and protect Nicaraguan territory.

21. When all of these considerations are taken into account, it is remarkable, Mr. President, that Costa Rica can come up with so few cases, considering that there are approximately 450 riparian inhabitants that use the river every day. Often, multiple times in a single day. Apart from the journalists who appear not to have been riparians, the evidence presented by Costa Rica concerns two incidents since 2009 — one, involving five persons. But Costa Rica make the cases seem to be many, because of the hall of mirrors effect created by its constant repetition of them. The disrespectful treatment in one case is regrettable and Nicaragua by no means condones it. But Mr. President, is it appropriate to make a international incident or impose international responsibility every time an uncouth border guard hassles a would-be visitor or immigrant? If Nicaraguans who are “lawfully on Costa Rican territory” are free to use the road as Professor Kohen told us in response to Judge Greenwood’s question¹¹⁹, so are Costa Ricans who are lawfully on the river, and thus lawfully in Nicaragua, free to use it. There is a parallelism here that seems to have been lost on Costa Rica.

(b) *The provisional measures orders*

22. Mr. President, I turn finally to one of Costa Rica’s favourite themes, Nicaragua’s alleged violations of the Court’s Provisional Measures Orders. Yesterday, Dr. Parlett wondered if she was in a time machine, hearing my colleague Professor Pellet address this question in these hearings¹²⁰. I can assure her that she was not.

¹¹⁸*Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, RCR, Vol. IV, Ann. 67, Affidavit of Ruben Francisco Valerio Arroyo.

¹¹⁹CR 2015/13, p. 54 (Kohen).

¹²⁰CR 2015/14, p. 39 (Parlett).

23. Costa Rica has conceded that Nicaragua has not violated the 2013 Order. It has also recognized that Nicaragua's Agent told you in these hearings that he got the message delivered in your 2013 Order. Ambassador Argüello said: "Nicaragua deeply regrets the actions following the 2011 Order on Provisional Measures that led the Court to determine, in November 2013, that a new Order was required. The Court need not doubt that Nicaragua received and understood [this] message."¹²¹ But Costa Rica says despite this clear statement, that you should now order satisfaction, compensation, and a guarantee of non-repetition¹²², notwithstanding the fact that you have already addressed this situation in your new Provisional Measures Order of 2013.

24. Mr. President, for this reason Nicaragua believes what Costa Rica now requests would be redundant, and that there is therefore no need for future remedial measures.

ANSWERS TO JUDGE BHANDARI'S QUESTIONS 1 AND 3

25. Mr. President, I will now answer two of the questions put to the Parties by Judge Bhandari, questions 1 and 3. My colleague, Paul Reichler, will answer question 2 tomorrow as I indicated earlier. Questions 1 and 3 are as follows:

"1. How, if at all, should the authorities I have just mentioned be applied by the Court in assessing whether Costa Rica exercised sufficient care in constructing the Road? . . . [and]

3. What exactly is the standard of care that should be applied to Costa Rica in this case? For instance, is it one of recklessness? Negligence? Due diligence? Strict liability? Or something else?"

26. Mr. President, in answering these questions, Nicaragua would begin by emphasizing that in its view the populations of both countries deserve to benefit from the highest possible standards of environmental protection. Furthermore, Nicaragua of course agrees with the statement in Principle 7 of the Rio Declaration that "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities."¹²³

27. As far as Costa Rica and Nicaragua are concerned, as the Court is aware from the written and oral pleadings, the two States have adopted and implemented modern environmental laws

¹²¹CR 2015/5, p. 18, para. 42 (Arguello).

¹²²CR 2015/14, pp. 40-41, para. 8 (Parlett).

¹²³Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), Principle 7.

including high standards of protection. In addition, the States of Central America have also adopted environmental and related laws of this kind. Thus the standard to be applied to Costa Rica in this case — by which Judge Bhandari was referring to the *Road* case — is the one the Court has applied in other, similar, cases involving developing countries in Latin America, notably the *Pulp Mills* case, namely, that of due diligence. Further in the case of transboundary environmental harm, the standard is one of significant harm. As that term is defined by the ILC [International Law Commission]. Tomorrow, Nicaragua will show you that Costa Rica has caused significant harm to Nicaragua in the *Road* case.

28. Mr. President, Members of the Court, that concludes my presentation this afternoon. Thank you very much for your kind attention. Mr. President, I would be grateful if you would now call on my colleague Professor Alain Pellet.

Le PRESIDENT : Merci. Je donne la parole au professeur Pellet.

M. PELLET : Merci beaucoup, Monsieur le président

LE TRACÉ DE LA FRONTIÈRE ET SES CONSÉQUENCES EN MATIÈRE DE RESPONSABILITÉ

1. Monsieur le président, Mesdames et Messieurs de la Cour, chaque affaire est un *unicum* — ne m'en veuillez pas pour cette banalité ; les platitudes peuvent avoir du bon ! Et d'ailleurs, ce lieu commun a été cautionné hier par Marcelo Kohen¹²⁴. L'affaire qui nous occupe confirme ce lieu commun de façon éclatante : elle n'entre dans aucune des deux grandes catégories de contentieux soumis en général à la Cour : les litiges frontaliers, d'une part, les affaires de responsabilité, d'autre part. Le Costa Rica vous l'a soumise comme relevant de la seconde — et très dramatiquement : invasion militaire, occupation de guerre... Elle se révèle cependant comme portant d'abord sur un problème, compliqué, de délimitation frontalière. Et, à vrai dire, sauf si vous en veniez à considérer, comme le Costa Rica vous le demande avec beaucoup d'insistance, que le tracé de la frontière relève de l'évidence, le conflit frontalier conditionne, et je dirais même

¹²⁴ CR 2015/14, p. 38, par. 47 (Kohen).

éclipse complètement, l'affaire en responsabilité que l'autre Partie a cru pouvoir vous soumettre — sans doute pour satisfaire son opinion publique.

2. Je me propose donc, dans un premier temps, de prendre le relais de ce qu'a montré l'ambassadeur Argüello au début de cet après-midi, à savoir que, décidément, la frontière n'est pas là où le Costa Rica l'affirme ; et, dans un second temps, que, dès lors, les réparations qu'il demande doivent être rejetées — et qu'elles le devraient d'ailleurs de toute manière même si vous estimiez, en contradiction avec les termes clairs des textes applicables, qu'elle n'est pas non plus située à la rive gauche du premier chenal rencontré le long de la rive méridionale de Harbor Head Lagoon.

I. Le tracé de la frontière

3. Monsieur le président, la question du tracé de la frontière est le préalable obligé à tout règlement du différend que le Costa Rica a soumis à la Cour même si, comme je viens de le rappeler, il l'a présenté comme un pur litige en responsabilité : vous ne pouvez pas, Mesdames et Messieurs les juges, vous prononcer sur celle-ci sans avoir déterminé d'abord sur le territoire de quelle Partie ont pris place les faits prétendument internationalement illicites que l'Etat requérant attribue au Nicaragua. Ceci veut dire que vous devez inévitablement, peut-être pas vous prononcer expressément sur l'emplacement de la frontière dans le dispositif de votre arrêt (encore que ce ne serait pas forcément une mauvaise idée si l'on veut faire en sorte que le véritable différend qui oppose les Parties soit réglé avec l'autorité de la chose jugée...), mais en tout cas, vous devez vous convaincre qu'il vous appartient de déterminer où cette frontière se trouve *avant* de prendre quelque position que ce soit sur la responsabilité.

4. A cet égard quatre solutions, abstraitement possibles, s'offrent à vous :

- ou bien, premièrement, vous estimez que la frontière se trouve là où le Costa Rica la place ;
- ou bien, deuxièmement, vous optez pour celle qui correspond à notre ferme conviction ;
- ou bien, troisièmement, vous tranchez pour un tracé alternatif mais, pour être franc, je n'en vois pas se dessiner — j'élimine l'hypothèse pour l'instant, j'y reviendrai un peu plus tard ;
- ou bien, quatrièmement et finalement, vous estimez n'être pas suffisamment éclairés et il faudra en tirer les conséquences.

J'examinerai successivement les deux premières hypothèses à la lumière des arguments mis en avant hier par nos contradicteurs dans la très modeste mesure où notre agent n'y a pas complètement répondu. Et je discuterai dans la seconde partie de mon exposé, celle consacrée à la responsabilité, les conséquences qui résulteraient également des deux autres possibilités qui vous sont ouvertes.

1. L'impossibilité du tracé frontalier défendu par le Costa Rica

[Projection n° 1 — La frontière selon le Costa Rica]

5. Il a fallu du temps, Monsieur le président, et l'opportune question du vice-président Yussuf, pour que le Costa Rica se résigne à nous dire où, selon lui, passe la frontière. Encore n'a-t-il fait que la projeter furtivement à la toute fin de la plaidoirie de Sam Wordsworth. Vous pouvez la voir en ce moment plus à loisir. Elle nous permet de combiner deux jeux intéressants — celui auquel nous a conviés le Costa Rica : «A la recherche du *caño* perdu»¹²⁵ et, un autre, plus classique : «chercher l'erreur».

6. Pour figurer la frontière, nous avons tous utilisé l'image satellite tirée de la page 353 du mémoire costa-ricien ou, plus exactement, de la page I-29 du rapport Thorne annexé à ce mémoire¹²⁶. C'est sur elle que M^e Wordsworth a tracé la frontière que vous pouvez voir en rouge sur la projection actuelle — mais il s'est gardé d'expliquer précisément comment il l'avait tracée, même s'il a donné quelques indications sur lesquelles je reviendrai. Ceci dit, sur le principe, les Parties sont d'accord. Ce ne peut être que conformément à la première sentence Alexander : «[the description made by General Alexander], together with the attached sketch-map, established with binding effect the precise line of the boundary in the area currently at issue»¹²⁷ — c'est une citation de M. Wordsworth au début de nos audiences. Donc, je retourne à ma citation favorite, celle sur laquelle doit se fonder toute tentative pour déterminer le tracé de la frontière — dont je souligne qu'aucun conseil du Costa Rica ne s'est hasardé à faire usage — le paragraphe final de la première sentence Alexander. Et je vais tenter de l'appliquer à la ligne frontière que vous a montrée M. Wordsworth :

¹²⁵ CR 2015/14, p. 23, par. 2 et p. 24, par. 4.

¹²⁶ Voir MCR, p. 353, appendice I, fig. I.19 et CMN, p. 330, fig. 6.8.

¹²⁷ CR 2015/2, p. 41, par. 18 (Wordsworth).

[Projection n° 1 — animation : effacer la ligne rouge puis la rajouter au fur et à mesure]

- «the initial line of the boundary [runs] as follows [...]: Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon»; apparemment, il n'y a pas de divergence là-dessus entre les Parties : le point de départ de la frontière terrestre ainsi décrite est bien là où il apparaît sur la carte costa-ricienne ;
- puis la frontière, je continue ma lecture de la sentence Alexander, «shall pass, at its nearest point, 300 feet [this is around 91 meters I think] on the northwest side from the small hut now standing in that vicinity»; ni les uns ni les autres ne semblent capables de dire où pouvait bien se trouver cette petite hutte ; mais, sous réserve peut-être de démarcation précise sur la bande de sable en question, nous semblons là aussi être d'accord ;
- «On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the left, or southeastward, and shall follow the water's edge around the harbour...»; jusque-là, toujours pas de divergence entre les Parties ;
- «until it reaches the river proper by the first channel met»; et c'est là ~~le point~~ qu'est le point crucial de l'opposition entre les Parties : le tracé retenu par le Costa Rica ne s'arrête ni au premier, ni au deuxième, ni au troisième, ni à vrai dire à aucun chenal ; il file droit jusqu'au fleuve proprement dit (*the river proper*) ; ceci est incompatible avec la phrase que je viens de lire («jusqu'à atteindre le fleuve proprement dit par le premier chenal rencontré»), mais c'est aussi incompatible avec la phrase qui suit ;
- «Up this channel, and up *the river proper*, the line shall continue to ascend as directed in the treaty»; «et jusqu'au fleuve proprement dit», voilà qui ne peut laisser aucun doute sur le fait que l'une des directives clefs en vue de délimiter la frontière est qu'elle ne suit pas le chenal principal, mais bien «le premier chenal rencontré» en suivant la rive de la lagune.

Ce sont là, Monsieur le président, deux erreurs fatales, car irréconciliables avec le texte clair de la première sentence Cleveland.

[Fin de la projection n° 1]

7. Du reste, nos contradicteurs, qui se sont bien gardés de se référer à cette description ont cherché à contourner le problème : l'un et l'autre — M^e Wordsworth et M. Marcelo Kohen — *ont décrit la frontière* défendue par le Costa Rica «à l'envers», si je puis dire. C'est-à-dire qu'au lieu

d'aller d'abord du nord-est au sud-ouest (*northeast and southwest*), puis d'obliquer vers le sud-est (*southeastward*) pour suivre la rive de Harbor Head Lagoon, ils négligent cette description pour focaliser l'attention exclusivement sur le fait que le Costa Rica est souverain sur la rive droite du fleuve dont ils postulent, au mépris du texte clair de la première sentence (que les deux suivantes ne remettent nullement en question), qu'il s'agit forcément de son chenal principal : «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» dit Sam Wordsworth citant (exceptionnellement) la troisième (mais soigneusement pas la première) sentence¹²⁸. Et il précise : «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»; en quoi ceci relève-t-il de l'évidence ? Il s'agit d'un delta et il est tout aussi logique de suivre le chenal le plus excentré surtout lorsque l'on fixe une frontière à la rive en admettant que les îles du fleuve — et tout le monde l'admet — appartiennent à l'Etat qui exerce sa souveraineté sur celui-ci.

8. Dans sa réponse au vice-président Yussuf, Marcelo Kohen part du même postulat et il poursuit :

[Projection n° 2 : La description de la frontière selon le Costa Rica]

- «La frontière dans le «territoire litigieux» suit donc la rive droite du fleuve San Juan dès son embouchure vers le sud» ;
- puis il repart à l'embouchure du fleuve (il s'agit toujours bien sûr du chenal principal) : «Vers l'est, depuis l'embouchure du fleuve jusqu'à la lagune Los Portillos, le territoire est par conséquent costa-ricien» ; mais notre contradicteur ne nous dit pas pour autant où passe la frontière ;
- ce n'est qu'ensuite qu'il en reprend la description : «La frontière suit ensuite le rivage autour de la lagune Los Portillos»¹²⁹.

CQFD ? Assurément c'est ce que le Costa Rica *veut* démontrer, mais sûrement pas en respectant les données de l'équation constituées par la sentence Alexander.

[Fin de la projection n° 2]

¹²⁸ CR 2015/14, p. 18, par. 28 (Wordsworth).

¹²⁹ *Ibid.*, p. 31.

9. Monsieur le président, je ne reviens ni sur la question de la frontière mobile (mais pas capricieuse), ni sur l'instabilité relative du delta et des chenaux la composant, dont notre agent, aujourd'hui promu conseil, a parlé. Je souhaite seulement souligner un point complémentaire : M^e Wordsworth fait grand cas de l'insistance mise par Alexander sur la notion d'«outlet for commerce», de «point de sortie pour le commerce»¹³⁰. Cela appelle quelques remarques :

- 1) contrairement à ses affirmations, cette notion n'est pas liée à celle de navigabilité : dans sa sentence du 30 septembre 1897, l'arbitre écarte à la fois le Colorado et le Taura, tous deux indiscutablement navigables, comme candidats possibles à constituer le fleuve frontalier, en disant : «It cannot follow either of them, for neither is an outlet for commerce, as neither has a harbor at its mouth»¹³¹ ;
- 2) tout port a disparu de la région depuis des lustres : Greytown n'était déjà plus que l'ombre de lui-même à la date de la sentence et, malgré son nom, Harbor Head n'a, aujourd'hui, rien d'un port et ne l'a peut-être jamais été ; et
- 3) si commerce il y a — ou pourrait y avoir — il est limité au seul tourisme, le véritable «outlet of commerce» dont bénéficie le Costa Rica (mais dont le Nicaragua est exclu) étant le Rio Colorado ; et, assurément, «aux fins du commerce réduit au tourisme», le *caño* qui, selon le Nicaragua, constitue la frontière fait aussi bien (et sans doute mieux) l'affaire que le chenal principal, de toute manière rendu inapte à une navigation quelconque en saison sèche du fait de la sédimentation de son lit — phénomène dont on sait ce qu'il doit à l'action du Costa Rica lui-même, et auquel le trop modeste dragage entrepris par le Nicaragua ne peut pas mettre fin. Quand je dis «ne peut pas», c'est «n'arrive pas».

10. Quoi qu'il en soit, c'est aussi à la lumière de ces données qu'il faut apprécier le bien-fondé des tracés frontaliers proposés respectivement par les Parties. Nous venons de le voir, celui soutenu par le Costa Rica ne prend nullement en considération le texte clair de la première sentence Alexander et ne tient pas compte des modifications que l'embouchure du

¹³⁰ CR 2015/2, p. 39-40, par. 13, p. 40, par. 14 et CR 2015/14, p. 14, par. 11 et 15, p. 15, par. 16, p. 16, par. 19, p. 17, par. 22 et p. 18, par. 26 (Wordsworth).

¹³¹ Première sentence arbitrale en vertu de la convention entre le Costa Rica et le Nicaragua du 8 avril 1896 pour la démarcation de la frontière entre les deux Républiques, 30 septembre 1897, Nations Unies, RSA, vol. XXVIII, p. 217 (MCR, vol. II, annexe 9).

San Juan a connues tant en ce qui concerne le réseau de ses canaux que l'évolution (régressive) de sa navigabilité ou l'action de l'érosion marine, et qui aboutit en outre à un résultat pour le moins singulier : l'octroi au Nicaragua d'une lagune enclavée !

[Projection n° 3 : La lagune enclavée]

11. Résultat tellement singulier que le professeur Kohen s'est bien gardé de vous montrer, Mesdames et Messieurs de la Cour, à quoi cela pouvait bien ressembler. Sans doute à ce que vous pouvez voir sur vos écrans en ce moment — également à l'onglet n° 21 de vos dossiers. Et ici encore, quelques brèves remarques, Monsieur le président, si je puis :

- le professeur Kohen à l'aplomb de comparer cette configuration à Makassar, qui appartient à Timor-Leste et est enclavé dans la partie occidentale, indonésienne, de l'île de Timor¹³², ou, encore plus osé !, à l'enclave (il y en a deux à vrai dire) que constitue Brunei dans l'île malaisienne de Sarawak¹³³ ; je lui suggère une autre comparaison : l'Alaska ; à moins au contraire que ce soit le Canada qui soit enclavé dans le territoire des Etats-Unis ?
- comme l'a expliqué l'ambassadeur Argüello tout à l'heure, cette invention de la lagune enclavée l'est uniquement avec d'évidentes arrière-pensées : le Costa Rica s'approprie tout simplement Head Harbor Lagoon dans le cadre de l'autre affaire qu'il vous a soumise au sujet de la *Délimitation maritime dans la mer des Caraïbes et l'océan Pacifique* ; ce que l'érosion marine n'a pas fait, l'appétit territorial du Costa Rica le réalise ; tout donne d'ailleurs à croire que l'enjeu — en tout cas l'un des enjeux — véritable de sa requête relative à *Certaines activités* est d'essayer de conduire la Cour à lui adjuger un point de départ de la délimitation maritime qui entraînerait des gains considérables de zones marines ;
- en outre, si vous deviez, Mesdames et Messieurs les juges, donner suite, même partiellement, à sa suggestion, c'est alors que vous porteriez un grave coup au principe de la stabilité des frontières auquel il proclame son attachement¹³⁴ : il est clair qu'Alexander estimait que toute la façade maritime se trouvant au nord-ouest du point où la frontière qu'il décrit commence — c'est-à-dire lorsqu'elle traverse «le banc de sable séparant la mer des Caraïbes

¹³² Voir le dossier des juges du 28 avril 2015, onglet n° 26.

¹³³ *Ibid.*, onglet n° 27.

¹³⁴ CR 2015/2, p. 27, par. 24 (agent), p. 48, par. 7, p. 70-71, par. 67-71 (Kohen) et CR 2015/14, p. 29-30, par. 17-19.

des eaux de Harbor Head Lagoon» («across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon») — il est clair, disais-je, qu'Alexander estimait que toute cette façade maritime appartenait au Nicaragua et son graphique, pour rudimentaire qu'il soit, en témoigne également.

[Fin de la projection n° 3 - Projection n° 4 : Le tracé frontalier]

12. La ligne frontière que le Nicaragua vous propose de retenir, Mesdames et Messieurs de la Cour, tient pleinement compte de toutes ces considérations, avec lesquelles le tracé costa-ricien est totalement incompatible :

- il suit à la lettre la description de la frontière dans la sentence Alexander ;
- il en vaut une autre pour ce qui est de constituer un *outlet of commerce* dans la situation actuelle, dans laquelle il n'y a de toute façon plus de port et plus guère de commerce ;
- tout en restant fidèle à l'esprit de la délimitation arrêtée par la sentence de 1897, il est adapté à la situation actuelle, ce qui répond aux directives générales relatives à l'interprétation des traités conclus pour une longue période ou sans limitation de durée, telles qu'elles ressortent de votre arrêt de 2009 dans l'affaire du *San Juan n° I*¹³⁵ ;
- notre tracé ne prive pas, au mépris du principe de la stabilité des frontières, le Nicaragua de la façade maritime que lui avait reconnue la sentence Alexander ; et
- il n'aboutit pas à la solution aberrante que constitue l'enclavement de la lagune.

[Fin de la projection n° 4 — Projection n° 5 : Cartes confirmatives du tracé frontalier]

13. Au surplus, cette frontière raisonnable n'a rien d'une invention ou d'une «revendication artificielle»¹³⁶. Elle est représentée sur de nombreuses cartes — elles défilent actuellement à l'écran et figurent à nouveau dans vos dossiers (sous l'onglet n° 23). Je les avais déjà montrées lors du premier tour¹³⁷, mais les avocats du Costa Rica n'y ont pas prêté attention. Je suis sûr, Mesdames et Messieurs de la Cour, que l'intérêt de ces cartes ne vous aura pas échappé, mais comme cela, vous les avez sous la main. De son côté, M. Kohen en a invoqué deux, à l'appui du tracé frontalier défendu par le Costa Rica, datées de 1988, qui ont la même origine (des photos

¹³⁵ Voir *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, C.I.J. Recueil 2009, p. 242-244, par. 63-71.

¹³⁶ CR 2015/14, p. 23, par. 2 (Kohen).

¹³⁷ Voir CR 2015/5, p. 30-32, par. 21.

aériennes de 1961) et qui figurent sous l'onglet n° 24 du dossier de ce jour — l'ambassadeur Argüello vous les a montrées tout à l'heure. Ces deux cartes figurent des chenaux ou *caños* expressément qualifiés de «pérennes», comme l'a confirmé le professeur Thorne lors de son contre-interrogatoire du 14 avril¹³⁸. Je n'y insiste pas : l'ambassadeur Argüello a déjà attiré votre attention sur ces cartes.

14. Il a également rappelé que, contrairement aux affirmations de nos contradicteurs¹³⁹, les autorités nicaraguayennes avaient été présentes dans le territoire comme l'attestent les affidavits joints à notre contre-mémoire (ce sont les annexes 80 à 89 qui figurent dans le volume III). Ces documents «méritent un détour», Mesdames et Messieurs les juges : ils montrent que depuis, en tout cas, la chute de la dictature somoziste, la police et l'armée nicaraguayennes ont procédé à d'assez nombreuses opérations de contrôle et à des arrestations dans la zone que le Costa Rica revendique pour sienne. Certes, il s'agit d'une présence policière qui n'est ni dense ni permanente — et il y a certainement moins de contrôles d'alcoolémie là-bas qu'à La Haye — mais, compte tenu du caractère fort peu hospitalier de cette région pratiquement inhabitée, cela est déjà beaucoup. Selon une jurisprudence constante,

«[i]l est impossible d'examiner des décisions rendues dans les affaires visant la souveraineté territoriale sans observer que, dans beaucoup de cas, le tribunal n'a pas exigé de nombreuses manifestations d'un exercice de droits souverains pourvu que l'autre Etat en cause ne pût faire valoir une prétention supérieure. Ceci est particulièrement vrai des revendications de souveraineté sur des territoires situés dans des pays faiblement peuplés ou non occupés par des habitants à demeure.»¹⁴⁰

~~Vous aurez reconnu l'arrêt de la CPIJ dans l'affaire du Groënland oriental.~~

[Fin de la projection n° 5]

II. La (non-)question de la responsabilité

15. Il va de soi, Mesdames et Messieurs de la Cour, que la position que vous prendrez en ce qui concerne l'emplacement de la frontière conditionne celle que vous adopterez en matière de responsabilité. Je montrerai cependant qu'à moins que vous considériez que le professeur Kohen

¹³⁸ CR 2015/3, p. 23 (Thorne).

¹³⁹ Voir MCR, p. 174-176, par. 4.55-4.57 et CR 2015/2, p. 57, par. 30 (Kohen).

¹⁴⁰ *Statut juridique du Groënland oriental, arrêt, 1933, C.P.J.I. série A/B n° 53*, p. 46 ; voir aussi : *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 682, par. 134 et *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 712, par. 174.

est fondé à prétendre que «le Costa Rica ne pouvait imaginer une revendication nicaraguayenne comme celle formulée en 2010»¹⁴¹ — hypothèse qui ne me paraît pas très sérieuse (mais que les conseils de l'Etat requérant martèlent abondamment¹⁴² comme pour se persuader eux-mêmes d'une évidence improbable) —, il me semble presque évident que vous ne pourriez faire droit, sauf à cette condition, aux demandes de réparation qu'a faites le Costa Rica, que la frontière soit située à la rive droite du *caño* qui est à l'origine de toute l'affaire, ou qu'elle soit située ailleurs. Ce n'est donc que par souci de ne rien laisser au hasard que je discuterai succinctement, dans un second temps, les conséquences — ou certaines des conséquences — que le Costa Rica voudrait vous faire tirer de la responsabilité alléguée du Nicaragua telles qu'elles sont énoncées dans ses très prolixes conclusions finales.

1. La Cour ne peut que rejeter les conclusions du Costa Rica

16. Il me semble, Mesdames et Messieurs les juges, que nous avons montré à suffisance, tant dans notre contre-mémoire que durant les présentes audiences, que la frontière établie par le traité de 1858, interprété par les sentences Cleveland et Alexander, suivait bien la rive occidentale de Harbor Head Lagoon, pour longer la rive droite du *caño* contesté et rejoindre «le fleuve proprement dit», toujours en suivant sa rive droite. Si tel est le cas, il est bien évident que le Nicaragua ne saurait être tenu pour internationalement responsable des faits que le Costa Rica lui reproche.

17. *Quid* de l'hypothèse — que je n'évoque que pour surplus de droit — où vous ne seriez pas totalement convaincus ? Eh bien, Monsieur le président, cela ne devrait rien changer à l'absence de responsabilité du Nicaragua. Qu'en serait-il en effet ? Comme je l'ai dit tout à l'heure, trois autres voies s'ouvriraient à la Cour.

18. Elle pourrait fixer la frontière le long d'un autre *caño* par exemple au débouché de l'un des chenaux pérennes en «Y» que l'on voit sur les photographies de 1961¹⁴³ ou sur les cartes de 1988¹⁴⁴ — même si je n'aperçois pas bien la logique de la chose : pourquoi choisir un deuxième ou

¹⁴¹ CR 2015/2, p. 48, par. 8 (Kohen).

¹⁴² Voir *ibid.* et CR 2015/14, p. 28, par. 13 (Kohen) ou CR 2015/4, p. 35, par. 4 (Kohen). Sur la question de la nature du différend : CR 2015/2, p. 19, par. 3 (Ugalde), p. 47-54, par. 6-24 et p. 71-72, par. 72-73 (Kohen), ou CR 2015/3, p. 10, par. 2 (Wordsworth).

¹⁴³ Dossier des juges, 29 avril 2015, onglet n° 24.

¹⁴⁴ Dossier des juges, 29 avril 2015, onglet n° 24.

un troisième chenal s'il en existe un premier ? Mais supposons que tel soit le cas : quel que soit le *caño* que vous retiendriez, il est clair qu'en choisissant un tracé frontalier que ni l'une ni l'autre des Parties n'avait tenu pour acquis, vous ne pourriez reprocher au Nicaragua d'avoir ignoré où se trouvait la frontière quand bien même, le «*caño Pastora*» se trouverait en territoire costa-ricien : il aura fallu des centaines de pages de plaidoiries écrites — elles se comptent même en milliers, je pense — plusieurs rapports d'experts, et la moitié de trois semaines d'audiences pour que vous puissiez la déterminer à la surprise de l'une comme l'autre des Parties ; on ne saurait reprocher ni à l'une ni à l'autre de ne l'avoir pas respectée.

19. Ce raisonnement vaut *a fortiori* si un doute subsistait dans l'esprit de la majorité d'entre vous et que vous ordonniez un «supplément d'instruction» afin de déterminer, par une expertise indépendante ou une «descente sur les lieux», l'emplacement du «premier chenal rencontré» sur la rive de Harbor Head Lagoon en venant de la mer des Caraïbes, et afin d'effectuer, le cas échéant, d'autres vérifications sur place. Cela serait possible en vertu de l'article 50 de votre Statut, qui dispose, qu'«[à] tout moment, la Cour peut confier une enquête ou une expertise à toute personne, corps, bureau, commission ou organe de son choix». Et cela s'est fait au moins une fois — mais avant la fin de la procédure orale : dans l'affaire du *Détroit de Corfou*¹⁴⁵, la Cour a considéré «que certains points débattus entre les Parties rendaient une expertise nécessaire, a formulé ces points et a confié l'expertise à un comité composé» d'experts ayant la nationalité de pays tiers. C'est également suite à une suggestion faite durant les plaidoiries orales que la CPIJ a décidé «de procéder à une descente sur les lieux afin de voir sur place l'ensemble des installations, canaux et voies d'eau, auxquels [avait] trait le ... litige» relatif aux *Prises d'eau à la Meuse*¹⁴⁶. Ceci vous est également loisible en vertu de l'article 66 de votre Règlement. Moyennant quoi, je tiens à redire que cette solution ne serait à nos yeux qu'un pis-aller car il nous semble que vous avez assez d'éléments pour vous prononcer — en faveur du tracé que nous proposons en tout cas ! Ceci étant, si vous reteniez cette solution, le Nicaragua coopérerait pleinement à cette vérification de terrain quelle qu'en soit la forme. Mais il va de soi que, dans une telle hypothèse, il ne saurait être

¹⁴⁵ *Détroit de Corfou (Royaume-Uni c. Albanie)*, fond, arrêt, C.I.J. Recueil 1949, p. 9. Voir aussi *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/États-Unis d'Amérique)*, nomination d'experts, ordonnance du 30 mars 1984, C.I.J. Recueil 1984, p. 165.

¹⁴⁶ *Prises d'eau à la Meuse*, arrêt, 1937, C.P.J.I. série A/B n° 70, p. 9.

question de responsabilité : on ne peut pas reprocher à une Partie d'avoir ignoré l'emplacement précis de la frontière alors que vous-mêmes, Mesdames et Messieurs de la Cour, forts de vos compétences (que je m'interdis de qualifier pour que notre équipe ne soit pas taxée de flagornerie, qu'elle soit collective ou sélective) et d'un débat contradictoire, vous auriez été vous-mêmes hésitants à décider.

20. Et, à vrai dire, il en irait de même dans l'hypothèse, que je ne peux guère envisager au terme de cette procédure, où vous donneriez raison à la Partie costa-ricienne et fixeriez la frontière à la rive droite du chenal principal du fleuve, ce qui reviendrait à accepter l'in vraisemblable demande du Costa Rica d'enclaver Harbor Head Lagoon dans son territoire. Nous serions alors ramenés à la situation du Nigéria dans l'affaire qui l'opposait au Cameroun¹⁴⁷ ou à celle de la Colombie au regard de l'arrêt du 19 novembre 2012¹⁴⁸. Je pense m'être suffisamment exprimé sur ce point dans ma plaidoirie du premier tour sans avoir été contredit, et je me permets de vous y renvoyer¹⁴⁹. La conclusion est claire : il faudrait vraiment que l'emplacement de la frontière soit l'évidence même pour que vous considériez que son non-respect avant sa fixation avec l'autorité de la chose jugée entraîne la responsabilité de l'un ou l'autre des protagonistes. Je vois mal comment il pourrait en aller ainsi dans la présente affaire dans laquelle la configuration changeante du delta et de la côte, combinée à une nature peu hospitalière et à l'absence de population n'ont pu que renforcer les incertitudes et les excuser — et nos longs débats témoignent pour le moins que ces incertitudes ont quelque fondement.

21. Monsieur le président, quelle que puisse être la position qu'adoptera la Cour quant à la ligne frontière et, par voie de conséquence, quant à la souveraineté territoriale sur le territoire litigieux, elle ne peut, je crois, que rejeter la requête en responsabilité de l'Etat requérant.

2. Les remèdes demandés par le Costa Rica

22. Et cela pourrait presque me dispenser de commenter les improbables — pour ne pas dire invraisemblables — conclusions du requérant. Mais au risque de vous décevoir puisqu'il nous

¹⁴⁷ *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 451-452, par. 315 et p. 452, par. 319.

¹⁴⁸ *Différend territorial et maritime (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2012 (II)*, p. 718, par. 250.

¹⁴⁹ CR 2015/7, p. 54-57, par. 35-36 (Pellet).

reste un peu de temps, Monsieur le président, je souhaite tout de même en dire quelques mots car elles sont, à maints égards, révélatrices de ce que l'on pourrait appeler la «politique judiciaire» du Costa Rica.

23. Elles sont improbables pour plusieurs raisons et d'abord par leur longueur très inhabituelle — aussi exagérée que l'est leur contenu. Mais cela tient à une erreur de perspective, voire à une erreur de droit même si, finalement, je la crois bénigne. Nos amis de l'autre côté de la barre font en effet une confusion entre, d'une part, les conclusions (*submissions*) lues à la fin des audiences et, d'autre part, les arguments qu'ils ont fait valoir. L'article 60, paragraphe 2, du Règlement distingue soigneusement les deux aspects. J'en donne une lecture rapide : «A l'issue du dernier exposé présenté par une partie au cours de la procédure orale, l'agent donne lecture des conclusions finales de cette partie sans récapituler l'argumentation». Or l'essentiel de ces *vingt-six* demandes, ~~vingt-six~~ Monsieur le président, revient à prier la Cour de reprendre dans le dispositif de son arrêt à venir les arguments que le Costa Rica a fait valoir à l'appui de sa position et qui, si vous les suiviez, Mesdames et Messieurs les juges, feraient partie des motifs de votre arrêt, mais pas du dispositif.

24. Certes, il peut y avoir des exceptions, au moins apparentes, à cette distinction. C'est en particulier le cas lorsque la Cour se laisse convaincre de rendre un jugement déclaratoire — ce qui n'est en principe pas exclu¹⁵⁰, mais encore faut-il que ce jugement soit «susceptible d'application ou d'exécution à un moment quelconque de l'avenir»¹⁵¹. Au surplus, il faut de bonnes raisons, des raisons particulières, pour que la Cour reprenne l'énoncé d'obligations existantes dans son dispositif — comme vous l'avez fait remarquer, par exemple dans notre affaire : les motifs de vos arrêts suffisent normalement «à répondre au souhait [d'une partie] que soient précisées par la Cour les obligations [de l'autre] à son égard»¹⁵².

25. En l'espèce, le Costa Rica n'a aucunement expliqué en quoi la reprise de ses arguments juridiques dans le dispositif de l'arrêt s'imposerait ou présenterait un intérêt particulier. Le seul de

¹⁵⁰ Affaire du Cameroun septentrional (*Cameroun c. Royaume-Uni*), exceptions préliminaires, arrêt, C.I.J. Recueil 1963, p. 37.

¹⁵¹ *Ibid.*

¹⁵² Différend relatif à des droits de navigation et des droits connexes (*Costa Rica c. Nicaragua*), arrêt, C.I.J. Recueil 2009, p. 268-269, par. 154.

ses avocats qui se soit exprimé sur ce point, le professeur Kohen, a seulement considéré que la constatation des violations de ses obligations internationales attribuées au Nicaragua «bien que nécessaire, n'est pas suffisante»¹⁵³ — piètre justification qui, *a priori*, ne devrait pas être de nature à vous convaincre d'accueillir la longue litanie de demandes «déclaratoires» figurant sous le paragraphe 2) des conclusions costa-riciennes. (Pour votre commodité, Mesdames et Messieurs les juges, ces conclusions sont reproduites sous l'onglet n° 25 de vos dossiers.)

26. Pourtant, Monsieur le président, parmi ces demandes, quelques-unes ont retenu plus particulièrement notre attention. C'est le cas d'abord de celle — nouvelle — figurant au paragraphe 2) a), vous appelant à dire et juger que «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». Dans cet esprit, cette demande rejoint la conclusion suivante, que vous trouvez au paragraphe 2) b) i), sur le respect de la souveraineté et de l'intégrité territoriales du Costa Rica dans les frontières délimitées par le traité de 1858 et les deux premières sentences Alexander — je note en passant l'absence de la sentence Cleveland et de la troisième sentence Alexander. Je comprends cette omission, Monsieur le président, elles ne sont pas de nature à conforter la thèse¹⁵⁴ du Costa Rica comme l'a à nouveau expliqué notre agent au début de cette audience. Au-delà de ces oublis, soigneusement calculés, je note, d'une part, que le Costa Rica s'est enfin aperçu que l'affaire concerne un territoire litigieux (*disputed territory*) et, d'autre part, que la première chose que doit faire la Cour est de se prononcer sur la souveraineté sur le territoire en question. Je relève également que ces deux conclusions recourent les deux premières demandes que le Nicaragua avait formulées à la fin de son contre-mémoire et qu'il maintient.

27. Cette concordance des conclusions des deux Parties justifie, je crois, que la Cour se prononce, dans le dispositif de son arrêt, sur le tracé de la frontière et la souveraineté territoriale en résultant. Les deux Parties le lui demandent. Mais, dès lors, les choses devraient s'arrêter là, au moins en ce qui concerne le strict terrain de la responsabilité ; comme je viens de le montrer, lorsqu'un territoire est contesté, il n'y a pas lieu pour la Cour d'entrer en

¹⁵³ CR 2015/4, p. 34, par. 1 (Kohen).

¹⁵⁴ Voir notamment CMN, p. 32-33, par. 2.31-2.36, p. 34, par. 2.40, p. 58-59, par. 3.17-3.18, p. 302, par. 6.23 et p. 305, par. 6.29-6.31 et CR 2015/5, p. 24-25, par. 10 et p. 15-16, par. 26 (Pellet).

matière rétrospectivement sur le terrain de la responsabilité : ce n'est qu'à compter de sa décision sur le contentieux territorial — et pour l'avenir — qu'il est possible de déterminer lequel des deux Etats est chez lui et peut prétendre «y exercer, à l'exclusion de tout autre Etat, les fonctions étatiques»¹⁵⁵, selon la célèbre formule de Max Huber.

28. Même si je me refuse à les prendre au sérieux et donc à les commenter, je ne peux résister à la tentation de relever le caractère outrancier des trois demandes suivantes qui montrent à quel point le Costa Rica et ses conseils ont le goût de l'exagération et de la dramatisation. Malgré nos objections, un peu ironiques je dois dire¹⁵⁶, nos amis de l'autre équipe persistent et signent et continuent à parler qui d'invasion¹⁵⁷, qui d'occupation militaires¹⁵⁸. Ni une contestation frontalière, ni le nettoyage ou le curage d'un chenal dans une zone inhospitalière et disputée, ni même l'installation d'un campement militaire temporaire (et prestement déplacé) sur un territoire litigieux, n'appellent de tels qualificatifs ; et de telles déclarations par votre haute juridiction ne seraient certainement pas de nature à régler paisiblement le différend entre les deux Etats mais ne feraient évidemment que jeter de l'huile sur le feu — on a quelquefois l'impression que tel est le but recherché par nos contradicteurs... La demande visant à faire mettre à la charge du Nicaragua les dépens occasionnés par la troisième demande en indication de mesures conservatoires est du même acabit. Parce qu'ils ont perdu la deuxième¹⁵⁹, ~~est-ce qu'on~~ devrait-on demander que les dépens soient à leur charge ?

29. Deux autres remarques — mais deux seulement. Monsieur le président, sur cette liste hypertrophiée de demandes déclaratoires, je voudrais faire deux remarques qui concernent ce que l'on pourrait appeler deux «obsessions costa-riciennes» :

— la première est la déclaration concernant le droit de navigation du Costa Rica sur le fleuve San Juan de Nicaragua¹⁶⁰ dont l'Etat requérant précise qu'il est perpétuel mais omet de

¹⁵⁵ Sentence arbitrale (Max Huber), 4 avril 1928, *Ile des Palmes (Pays-Bas c. Etats-Unis d'Amérique)*, Nations Unies, RSA, vol. II, p. 281.

¹⁵⁶ Voir CR 2015/7, p. 49, par. 23 (Pellet).

¹⁵⁷ CR 2015/14, p. 10, par. 1, p. 18, par. 29, p. 22, par. 41 (Wordsworth).

¹⁵⁸ *Ibid.*, p. 26, par. 9, p. 38, par. 47 (Kohen), et p. 66, par. 1 (agent).

¹⁵⁹ *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)*, mesures conservatoires, ordonnance du 16 juillet 2013, C.I.J. Recueil 2013, p. 230.

¹⁶⁰ Conclusion 2 c) ii).

rappeler qu'il est limité «aux fins du commerce»; j'ai déjà eu l'occasion de dire que cette demande, de toute manière infondée, était hors sujet, je ne peux que répéter en particulier que saisir l'occasion de la présente affaire pour essayer d'obtenir la modification ou l'abrogation du décret de 2001, fût-ce par des moyens laissés au choix du Nicaragua, est particulièrement artificiel ;

- la seconde de ces obsessions costa-riciennes concerne le dragage du fleuve ; elle est reflétée dans pas moins de *cinq* des conclusions du Costa Rica¹⁶¹ ! Ceci dit, nous convenons que, même si une seule conclusion eût suffi, la question est au cœur du litige que le Costa Rica vous a soumis. Le Nicaragua vous demande donc également de vous prononcer sur la question et de constater, dans le dispositif de votre arrêt, que (je cite le point iii) des conclusions de notre contre-mémoire) «(iii) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River». Il est vrai que vous avez rappelé, dans votre arrêt de 2009, que la question était réglée «dans le dispositif de la sentence Cleveland. Cette sentence a en effet décidé, ... que le Nicaragua peut exécuter les travaux d'amélioration qu'il estime convenables, à condition que lesdits travaux ne perturbent pas gravement la navigation sur les affluents du San Juan appartenant au Costa Rica» ; et, estimant que «[l]e Nicaragua n'ayant nullement expliqué en quoi la sentence précitée ne suffirait pas à préciser les droits et obligations des Parties sur ces questions», vous avez rejeté sa demande à cet égard¹⁶². Il me semble, Monsieur le président, que les contestations récurrentes du droit du Nicaragua par le Costa Rica — répétées abondamment au cours de la présente procédure constituent une justification à cette nouvelle demande — et ce d'autant plus qu'ici encore les Parties s'accordent à considérer qu'une décision revêtue de l'autorité de la chose jugée d'un arrêt rendu par la Cour mondiale sur ce point serait utile. Il nous paraît en revanche superflu de répéter le texte même des instruments pertinents étant entendu qu'ils réglementent complètement tant le droit très large reconnu au

¹⁶¹ Voir les paragraphes 2 c) iii), 2 c) v), 2 d), 3 b) et 3 b) iii).

¹⁶² *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, C.I.J. Recueil 2009, p. 269, par. 155.

Nicaragua que ses limites — et celles-ci ne comprennent pas l'obligation de notification ou de consultation préalable avec le Costa Rica — qui peut exister par ailleurs à certaines conditions. Mais M^e Reichler et le professeur McCaffrey (encore lui !) ont suffisamment précisé les choses à cet égard et montré qu'il fallait raison garder en ce qui concerne l'impact et plus encore les effets préjudiciables, à vrai dire inexistantes, de ces activités de dragage.

30. Monsieur le président, Mesdames et Messieurs les juges, le Costa Rica a cru pouvoir escamoter une incertitude sur l'appartenance d'un tout petit territoire peu hospitalier et qui n'est guère fréquenté que par les trafiquants de drogue et les policiers (nicaraguayens) les traquant, en vous soumettant une affaire en responsabilité dont il a fait une sorte de «grande cause nationale». Du même coup, il espérait sans doute obtenir une approbation *ex ante* au moins implicite quant au point de départ de la frontière maritime entre les deux Etats qu'il vous a soumise par ailleurs. Nous pensons avoir montré :

- que la solution du litige passait nécessairement par la détermination de la frontière ;
- que celle-ci telle qu'elle avait été déterminée dans le traité de 1858 interprété par la sentence Cleveland, puis précisée par la première sentence du général Alexander, à son tour éclairée à certains égards par ses deuxième et troisième sentences, que ce tracé ne pouvait pas correspondre à celui enfin «dévoilé» furtivement hier grâce à l'insistance de certains d'entre vous — après quatre ans de procédure ;
- que, pour déterminer la frontière, il convenait de suivre la méthode prônée par Alexander, qui impose de spécifier quel est le premier chenal rencontré sur la rive de Harbor Head Lagoon en venant de la mer des Caraïbes ;
- que l'érosion marine (d'ailleurs non exclusive d'accrétion dans d'autres zones voisines) ne saurait justifier que le Nicaragua soit privé de la façade maritime que lui reconnaissait la sentence Cleveland jusqu'à «the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858», point précisé ensuite dans la sentence Alexander de 1897 ;
- que, dès lors, aucun fait internationalement illicite ne peut être retenu à la charge du Nicaragua ;

- que si, par impossible, vous ne reteniez pas le tracé que cet Etat vous a soumis, vous devriez sans doute procéder ou faire procéder à une reconnaissance des lieux, qui seule serait, dans ce cas, de nature à lever les incertitudes ; et
- qu'en tout état de cause, les doutes concernant l'emplacement de la frontière, qui demeureront jusqu'au prononcé de votre arrêt, excluent que vous donniez suite aux conclusions du Costa Rica concernant la responsabilité alléguée du Nicaragua.

Merci, Mesdames et Messieurs de la Cour d'avoir écouté patiemment mon exposé, qui clôt les plaidoiries du Nicaragua — sous réserve, bien entendu, des conclusions que notre agent va lire maintenant si vous voulez bien lui redonner la parole, Monsieur le président.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne la parole à l'agent du Nicaragua, M. l'ambassadeur Argüello Gómez.

Monsieur l'ambassadeur, vous avez la parole.

Mr. ARGÜELLO:

1. Thank you Mr. President. Mr. President, distinguished Members of the Court, we have heard from Costa Rica a shopping list of submissions that shed light on several points and reveal the real reasons behind this case: (1) that Costa Rica contests the boundary line as established by the Cleveland Award and Alexander determining Punta de Castilla as the starting and immovable point of the boundary; (2) that Costa Rica rejects Nicaragua's right to clean the river, in particular its right to dredge the San Juan River to improve navigation; (3) that Costa Rica aims at having a veto over Nicaragua's activities on the river, which are contemplated in the relevant treaties; and finally that (4) Costa Rica continues to misconstrue its right to free navigation and attempts to reopen the *Navigational Rights* case by challenging Nicaragua's right to regulate navigation through the course of the whole river and in relation to *all* users of the river.

Mr. President, Members of the Court, I will now proceed to read Nicaragua's final submissions.

FINAL SUBMISSIONS

For the reasons explained in the written and oral phase Nicaragua requests from the Court to:

(a) Dismiss and reject the requests and submissions of the Republic of Costa Rica.

(b) Adjudge and declare that:

- (i) Nicaragua enjoys full sovereignty over the *caño* joining Harbor Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards;
- (ii) Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards;
- (iii) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River;
- (iv) The only rights enjoyed by Costa Rica on the San Juan de Nicaragua River are those defined by said Treaty as interpreted by the Cleveland and Alexander Awards.

2. Mr. President, distinguished Members of the Court, this ends the final submissions of Nicaragua. But Nicaragua wishes to reiterate its long-standing commitment to the rule of law and to the decisions of this highest tribunal. On behalf of Nicaragua I thank you, all of you, for your attention, and also extend my gratitude to the judges, the Registry, the Secretariat, interpreters and general staff. Finally, I would like to specially thank the members of the Nicaraguan team for their committed job. Thank you very much.

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 Nicaragua, comme elle l'avait fait hier pour les conclusions finales présentées par le Costa Rica.

Cela nous amène à la fin des audiences consacrées aux plaidoiries des Parties en l'affaire relative à *Certaines activités menées par le Nicaragua dans la région frontalière*

(Costa Rica c. Nicaragua). La Cour se réunira à nouveau demain matin pour entendre le second tour de plaidoiries du Nicaragua en l'affaire relative à la *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*.

L'audience est levée.

L'audience est levée à 17 h 45.
