

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA
DANS LA RÉGION FRONTALIÈRE

(COSTA RICA c. NICARAGUA)

ET

CONSTRUCTION D'UNE ROUTE AU COSTA RICA
LE LONG DU FLEUVE SAN JUAN

(NICARAGUA c. COSTA RICA)

ARRÊT DU 16 DÉCEMBRE 2015

2015

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA
IN THE BORDER AREA

(COSTA RICA v. NICARAGUA)

AND

CONSTRUCTION OF A ROAD IN COSTA RICA
ALONG THE SAN JUAN RIVER

(NICARAGUA v. COSTA RICA)

JUDGMENT OF 16 DECEMBER 2015

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JUDGMENT

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INTERNATIONAL COURT OF JUSTICE

YEAR 2015

16 December 2015

2015
16 December
General List
Nos. 150 and 152CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA
IN THE BORDER AREA

(COSTA RICA v. NICARAGUA)

AND

CONSTRUCTION OF A ROAD IN COSTA RICA
ALONG THE SAN JUAN RIVER

(NICARAGUA v. COSTA RICA)

Jurisdiction of the Court.

* *

*Geographical and historical context and origin of the disputes.**The San Juan River, Lower San Juan and Colorado River — Isla Calero and Isla Portillos — Harbor Head Lagoon — Wetlands of international importance — 1858 Treaty of Limits — Cleveland Award — Alexander Awards — Dredging of the San Juan by Nicaragua — Activities of Nicaragua in the northern part of Isla Portillos: dredging of a channel (caño) and establishment of a military presence — Construction of Route 1856 Juan Rafael Mora Porras (the road) by Costa Rica.*

* *

*Issues in the Costa Rica v. Nicaragua case.**Sovereignty over the disputed territory — Definition of “disputed territory” — Description of boundary in 1858 Treaty, Cleveland and Alexander Awards — Articles II and VI of 1858 Treaty to be read together — Sovereignty over right bank of San Juan River as far as its mouth attributed to Costa Rica — Reference to “first channel met” in first Alexander Award — Satellite and aerial images*

insufficient to prove caño existed prior to dredging in 2010 — Affidavits of Nicaraguan State officials also insufficient — Significance of map evidence and effectivités limited — Effectivités cannot affect title to sovereignty resulting from 1858 Treaty and Cleveland and Alexander Awards — Existence of caño prior to 2010 contradicted by other evidence — Nicaragua's claim would prevent Costa Rica from enjoying territorial sovereignty over the right bank of the San Juan as far as its mouth — Right bank of the caño not part of the boundary — Sovereignty over disputed territory belongs to Costa Rica.

Alleged breaches of Costa Rica's sovereignty — Uncontested that Nicaragua excavated three caños and established a military presence in disputed territory — Costa Rica's territorial sovereignty breached — Obligation to make reparation — No violation of Article IX of 1858 Treaty — No need to consider possible violation of prohibition of threat or use of force — No need to consider whether conduct of Nicaragua constitutes a military occupation.

*

Alleged violations of international environmental law.

Procedural obligations — Obligation to conduct environmental impact assessment concerning activities that risk causing significant transboundary harm — Content of environmental impact assessment depends on specific circumstances — If assessment confirms risk of significant transboundary harm, State planning the activity is required, in conformity with due diligence obligation, to notify and consult with potentially affected State, where necessary to determine appropriate measures to prevent or mitigate risk — Nicaragua's dredging programme did not give rise to risk of significant transboundary harm — Nicaragua not required to carry out transboundary environmental impact assessment — No obligation under general international law to notify and consult since no risk of significant transboundary harm — No conventional obligation to notify and consult in present case — Court concludes that no procedural obligations breached by Nicaragua.

Substantive obligations — Specific obligations concerning San Juan River in 1858 Treaty as interpreted by Cleveland Award — Customary law obligation to exercise due diligence to avoid causing significant transboundary harm — No need to discuss relationship between these obligations because no harm established — No proof that dredging of Lower San Juan harmed Costa Rican wetland — Not shown that dredging programme caused significant reduction in flow of Colorado River — Any diversion of water due to dredging did not seriously impair navigation on Colorado River or otherwise cause harm to Costa Rica — Court concludes that no substantive obligations breached by Nicaragua.

*

Compliance with provisional measures — Nicaragua breached its obligations under Order of 8 March 2011 by excavating two caños and establishing a military presence in disputed territory in 2013 — Breach of obligations under Court's Order of 22 November 2013 not established.

*

Rights of navigation — Claim is admissible — Article VI of the 1858 Treaty — Court's Judgment in Dispute regarding Navigational and Related Rights — No need for the Court to interpret Nicaraguan Decree No. 079-2009 — Five instances of violations of navigational rights raised by Costa Rica — Two of the five instances examined — Court concludes Nicaragua breached Costa Rica's navigational rights pursuant to the 1858 Treaty — Not necessary for Court to consider the other incidents invoked by Costa Rica.

*

Reparation — Requests to order repeal of Decree No. 079-2009 and cessation of dredging activities cannot be granted — Declaration of breach provides adequate satisfaction for non-material injury suffered — No need for guarantees of non-repetition — Costa Rica entitled to compensation for material damage — Parties should engage in negotiation on amount of compensation — Failing agreement within 12 months, Court will determine amount at request of one of the Parties — Award of costs under Article 64 of the Statute not appropriate.

* *

Issues in the Nicaragua v. Costa Rica case.

Procedural obligations.

Alleged breach of obligation to carry out environmental impact assessment — Due diligence obligation requires State to ascertain whether a proposed activity entails risk of significant transboundary harm — Environmental impact assessment required when risk is present — No evidence that Costa Rica determined whether environmental impact assessment was necessary prior to constructing the road — Large scale of road project — Proximity to San Juan River on Nicaraguan territory — Risk of erosion due to deforestation — Possibility of natural disasters in area — Presence of two wetlands of international importance in area — Construction of road carried a risk of significant transboundary harm — No emergency justifying immediate construction of road — Court need not decide whether there is, in international law, an emergency exemption from obligation to carry out environmental impact assessment — Costa Rica under obligation to conduct environmental impact assessment — Obligation requires ex ante evaluation of risk of significant transboundary harm — Environmental Diagnostic Assessment and other studies by Costa Rica were post hoc assessments — Costa Rica has not complied with obligation to carry out environmental impact assessment.

Alleged breach of Article 14 of Convention on Biological Diversity — No violation established.

Alleged breach of obligation to notify and consult — General international law duty to notify and consult does not call for examination because Costa Rica has not carried out environmental impact assessment — 1858 Treaty did not impose obligation on Costa Rica to notify Nicaragua of construction of road — No procedural obligations arose under Ramsar Convention.

*

Substantive obligations.

Alleged breach of obligation to exercise due diligence to prevent causing significant transboundary harm — Modelling and estimates by experts suggest sediment due to construction of road amounts to at most 2 per cent of San Juan River's total load — Actual measurements provided to Court do not indicate that road significantly impacted sediment levels in river — Increase in sediment levels as a result of construction of road did not in and of itself cause significant transboundary harm — No significant harm to river's morphology, to navigation or to Nicaragua's dredging programme established — No proof of significant harm to river's ecosystem or water quality — Arguments concerning other alleged harm fail.

Alleged breaches of treaty obligations — No violation established.

Claim concerning violation of territorial integrity and sovereignty — No violation established.

*

Reparation — Declaration of wrongful conduct in respect of obligation to conduct environmental impact assessment is the appropriate measure of satisfaction — No grounds to order Costa Rica to cease continuing wrongful acts — Restitution and compensation not appropriate remedies in absence of significant harm — No need to appoint expert or committee to evaluate harm — Nicaragua's request to order Costa Rica not to undertake future development without an environmental impact assessment dismissed.

JUDGMENT

Present: President ABRAHAM; Vice-President YUSUF; Judges OWADA, TOMKA, BENNOUNA, CAÑADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN; Judges ad hoc GUILLAUME, DUGARD; Registrar COUVREUR.

In the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, and in the joined case (see paragraph 19 below) concerning *Construction of a Road in Costa Rica along the San Juan River*,

between

the Republic of Costa Rica,

represented by

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

H.E. Mr. Edgar Ugalde Alvarez, Ambassador on Special Mission,
as Agent;

H.E. Mr. Sergio Ugalde, Ambassador of Costa Rica to the Kingdom of the Netherlands, member of the Permanent Court of Arbitration,
as Co-Agent, Counsel and Advocate;

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

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

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

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

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

as Counsel and Advocates;

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

Mr. Ricardo Otárola, Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica,

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

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

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

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

as Assistant Counsel;

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

as Assistant,

and

the Republic of Nicaragua,

represented by

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

as Agent and Counsel;

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

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

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

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

as Counsel and Advocates;

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

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

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

as Counsel;

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

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

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

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

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

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

as Assistant Counsel;

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

Mr. Robin Cleverly, Geographical and Technical Consultant,

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

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

Ms Victoria Leader, Geographical and Technical Consultant,

as Scientific Advisers and Experts,

THE COURT,

composed as above,
after deliberation,

delivers the following Judgment:

1. By an Application filed in the Registry of the Court on 18 November 2010, the Republic of Costa Rica (hereinafter “Costa Rica”) instituted proceedings against the Republic of Nicaragua (hereinafter “Nicaragua”) in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (hereinafter referred to as the “*Costa Rica v. Nicaragua* case”). In that Application, Costa Rica alleges in particular that Nicaragua invaded and occupied Costa Rican territory, and that it dug a channel thereon; it further reproaches Nicaragua with conducting works (notably dredging of the San Juan River) in violation of its international obligations.

2. In its Application, Costa Rica invokes as a basis of the jurisdiction of the Court Article XXXI of the American Treaty on Pacific Settlement adopted at Bogotá on 30 April 1948 (hereinafter the “Pact of Bogotá”). In addition, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 (and amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court.

3. On 18 November 2010, having filed its Application, Costa Rica also submitted a request for the indication of provisional measures, pursuant to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

4. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Nicaragua; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

5. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971 (hereinafter the “Ramsar Convention”), the notification provided for in Article 63, paragraph 1, of the Statute.

6. Since the Court included no judge of the nationality of the Parties upon the Bench, each of them, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, chose a judge *ad hoc* in the case. Costa Rica chose Mr. John Dugard and Nicaragua chose Mr. Gilbert Guillaume.

7. By an Order of 8 March 2011 (hereinafter the “Order of 8 March 2011”), the Court, having heard the Parties, indicated provisional measures addressed to both Parties. The Court also directed each Party to inform it about compliance with the provisional measures. By various communications, the Parties each notified the Court of the measures they had taken with reference to the aforementioned Order and made observations on the compliance by the other Party with the said Order.

8. By an Order of 5 April 2011, the Court fixed 5 December 2011 and 6 August 2012 as the respective time-limits for the filing in the case of a Memo-

rial by Costa Rica and a Counter-Memorial by Nicaragua. The Memorial and the Counter-Memorial were filed within the time-limits thus prescribed.

9. By an Application filed in the Registry on 22 December 2011, Nicaragua instituted proceedings against Costa Rica in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (hereinafter referred to as the “*Nicaragua v. Costa Rica* case”). In that Application, Nicaragua stated that the case related to “violations of Nicaraguan sovereignty and major environmental damages on its territory”, contending, in particular, that Costa Rica was carrying out major road construction works in the border area between the two countries along the San Juan River, in violation of several international obligations and with grave environmental consequences.

10. In its Application, Nicaragua invokes Article XXXI of the Pact of Bogotá as a basis for the jurisdiction of the Court. In addition, Nicaragua seeks to found the jurisdiction of the Court on the aforementioned declarations accepting the jurisdiction of the Court (see paragraph 2 above).

11. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Costa Rica; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

12. Pursuant to the instructions of the Court under Article 43 of its Rules, the Registrar addressed the notifications provided for in Article 63, paragraph 1, of the Statute, to States parties to the Ramsar Convention, to the 1992 Convention on Biological Diversity and to the 1992 Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America.

13. Since the Court included no judge of the nationality of the Parties upon the Bench, each of them, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, chose a judge *ad hoc* in the case. Nicaragua chose Mr. Gilbert Guillaume and Costa Rica chose Mr. Bruno Simma.

14. By an Order of 23 January 2012, the Court fixed 19 December 2012 and 19 December 2013 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Costa Rica. The Memorial and the Counter-Memorial were filed within the time-limits thus prescribed.

15. In the Counter-Memorial it filed in the *Costa Rica v. Nicaragua* case on 6 August 2012, Nicaragua submitted four counter-claims. In its first counter-claim, it requested the Court to declare that “Costa Rica bears responsibility to Nicaragua” for “the impairment and possible destruction of navigation on the San Juan River caused by the construction of [the] road”. In its second counter-claim, it asked the Court to declare that it “has become the sole sovereign over the area formerly occupied by the Bay of San Juan del Norte”. In its third counter-claim, it requested the Court to find that “Nicaragua has a right to free navigation on the Colorado . . . until the conditions of navigability existing at the time the 1858 Treaty [of Limits] was concluded are re-established”. Finally, in its fourth counter-claim, Nicaragua alleged that Costa Rica violated the provisional measures indicated by the Court in its Order of 8 March 2011.

16. At a meeting held by the President with the representatives of the Parties on 19 September 2012, the Parties agreed not to request the Court’s authorization to file a Reply and a Rejoinder in the *Costa Rica v. Nicaragua* case. At the

same meeting, the Co-Agent of Costa Rica raised certain objections to the admissibility of the first three counter-claims contained in the Counter-Memorial of Nicaragua. He confirmed these objections in a letter of the same day.

By letters dated 28 September 2012, the Registrar informed the Parties that the Court had fixed 30 November 2012 and 30 January 2013 as the respective time-limits for the filing of written observations by Costa Rica and Nicaragua on the admissibility of the latter's first three counter-claims. Both Parties filed their observations within the time-limits thus prescribed.

17. By letters dated 19 December 2012, which accompanied its Memorial in the *Nicaragua v. Costa Rica* case, Nicaragua requested the Court to “decide *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures” and to consider whether there was a need to join the proceedings in the *Nicaragua v. Costa Rica* and *Costa Rica v. Nicaragua* cases.

By a letter dated 15 January 2013, the Registrar, acting on the instructions of the President, asked Costa Rica to inform the Court, by 18 February 2013 at the latest, of its views on both questions. Costa Rica communicated its views within the time-limit thus prescribed.

18. By letters dated 11 March 2013, the Registrar informed the Parties that the Court was of the view that the circumstances of the *Nicaragua v. Costa Rica* case, as they presented themselves to it at that time, were not such as to require the exercise of its power under Article 75 of the Rules of Court to indicate provisional measures *proprio motu*.

19. By two separate Orders dated 17 April 2013, the Court joined the proceedings in the *Costa Rica v. Nicaragua* and *Nicaragua v. Costa Rica* cases.

20. By a communication of the same date, Mr. Simma, who had been chosen by Costa Rica to sit as judge *ad hoc* in the *Nicaragua v. Costa Rica* case, informed the Court of his decision to resign from his functions, following the above-mentioned joinder of proceedings. Thereafter, Judges Guillaume and Dugard sat as judges *ad hoc* in the joined cases (see paragraphs 6 and 13 above).

21. By an Order of 18 April 2013, the Court ruled on the admissibility of Nicaragua's counter-claims in the *Costa Rica v. Nicaragua* case. It concluded that there was no need for it to adjudicate on the admissibility of Nicaragua's first counter-claim as such. It found the second and third counter-claims inadmissible as such. The Court also found that there was no need for it to entertain the fourth counter-claim as such, and that the Parties might take up any question relating to the implementation of the provisional measures indicated by the Court in its Order of 8 March 2011 in the further course of the proceedings.

22. On 23 May 2013, Costa Rica, with reference to Article 41 of the Statute and Article 76 of the Rules of Court, filed with the Registry a request for the modification of the Order indicating provisional measures made on 8 March 2011. In its written observations thereon, dated 14 June 2013, Nicaragua asked the Court to reject Costa Rica's request, while in its turn requesting the Court to otherwise modify the Order of 8 March 2011 on the basis of Article 76 of the Rules of Court. Costa Rica communicated to the Court its written observations on Nicaragua's request on 20 June 2013.

23. By an Order of 16 July 2013, the Court found that “the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011”. The Court however reaffirmed the said provisional measures.

24. On 24 September 2013, Costa Rica, with reference to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, filed with the Registry a request for the indication of new provisional measures in the *Costa Rica v. Nicaragua* case.

25. On 11 October 2013, Nicaragua filed with the Registry a request for the indication of provisional measures in the *Nicaragua v. Costa Rica* case. Nicaragua suggested that its request be heard concurrently with Costa Rica’s request for the indication of new provisional measures in the *Costa Rica v. Nicaragua* case, at a single set of oral proceedings. By letter of 14 October 2013, Costa Rica objected to Nicaragua’s suggestion. By letters dated 14 October 2013, the Registrar informed the Parties that the Court had decided that it would consider the two requests separately.

26. By an Order of 22 November 2013 rendered in the *Costa Rica v. Nicaragua* case, the Court, having heard the Parties, reaffirmed the provisional measures indicated in its Order of 8 March 2011 and indicated new provisional measures addressed to both Parties. The Court also directed each Party to inform it, at three-month intervals, as to compliance with the provisional measures. By various communications, each of the Parties notified the Court of the measures they had taken with reference to the aforementioned Order and made observations on the compliance by the other Party with the said Order.

27. By an Order of 13 December 2013 rendered in the *Nicaragua v. Costa Rica* case, the Court, after hearing the Parties, found “that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures”.

28. At a meeting held by the President with the representatives of the Parties on 22 January 2014, Nicaragua requested the Court to authorize a second round of written pleadings in the *Nicaragua v. Costa Rica* case, while Costa Rica objected. By an Order of 3 February 2014, the Court authorized the submission of a Reply by Nicaragua and a Rejoinder by Costa Rica, and fixed 4 August 2014 and 2 February 2015 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Costa Rica were duly filed within the time-limits so prescribed.

29. By letters dated 2 April 2014, the Registrar informed the Parties that the Court, in accordance with Article 54, paragraph 1, of the Rules of Court, had fixed 3 March 2015 as the date for the opening of the oral proceedings in the joined cases.

30. In a letter dated 4 August 2014, which accompanied its Reply in the *Nicaragua v. Costa Rica* case, Nicaragua suggested that the Court appoint “a neutral expert on the basis of Articles 66 and 67 of the Rules”. By letter of 14 August 2014, Costa Rica indicated that it was of the view “that there [was] no basis for the Court to exercise its power to appoint an expert as requested by Nicaragua”.

31. By a letter dated 15 October 2014, Nicaragua requested that the opening of the oral proceedings in the joined cases be postponed until May 2015. On the basis that Costa Rica had stated, in its letter of 14 August 2014 referred to in the previous paragraph, that the evidence submitted by the Parties “w[ould] be sup-

plemented and completed” in Costa Rica’s Rejoinder in the *Nicaragua v. Costa Rica* case, Nicaragua expressed the view that it would be “inadequate and inequitable for [it] to have less than one month to analyze and respond to Costa Rica’s new scientific information and expert reports”. By letter of 20 October 2014, Costa Rica opposed this request, arguing in particular that any delay in the Court hearing and adjudging the *Costa Rica v. Nicaragua* case would prejudice Costa Rica, that Nicaragua had sufficient time to analyse the Rejoinder and formulate its response before the commencement of the hearings, and that Nicaragua’s request was belated. By letters dated 17 November 2014, the Registrar informed the Parties that the Court had decided to postpone the date for the opening of the oral proceedings in the joined cases until 14 April 2015.

32. By letters dated 5 December 2014, referring to the communications mentioned in paragraph 30 above, the Registrar informed the Parties that the Court would find it useful if, during the course of the hearings in the two cases, they could call the experts whose reports were annexed to the written pleadings, in particular Mr. Thorne and Mr. Kondolf. The Registrar also indicated that the Court would be grateful if, by 15 January 2015 at the latest, the Parties would make suggestions regarding the modalities of the examination of those experts. Such suggestions were received from Nicaragua within the time-limit indicated. By a letter dated 20 January 2015, Costa Rica commented on the suggestions of Nicaragua.

33. In a letter dated 2 February 2015, which accompanied its Rejoinder in the *Nicaragua v. Costa Rica* case, Costa Rica raised the possibility of a site visit to the “location of the Road”. By a letter dated 10 February 2015, Nicaragua expressed its willingness to assist to the fullest possible extent in the organization “of such a visit at the location of the road and the San Juan de Nicaragua River”. It also reiterated its proposal that the Court appoint an expert (see paragraph 30 above) to assess the construction of the road, and suggested that the expert be included in the Court’s delegation for any site visit. By a letter dated 11 February 2015, Costa Rica commented on Nicaragua’s letter of 10 February 2015, stating in particular that the appointment of an expert by the Court was unnecessary. By letters dated 25 February 2015, the Registrar informed the Parties that the Court had decided not to carry out a site visit.

34. By letters of the Registrar dated 4 February 2015, the Parties were informed that they should indicate to the Court, by 2 March 2015 at the latest, the names of the experts they intended to call, and communicate the other information required by Article 57 of the Rules of Court. The Parties were also instructed to provide the Court, by 16 March 2015 at the latest, with written statements of these experts (limited to a summary of the expert’s own reports or to observations on other expert reports in the case file), and were informed that these would replace the examination-in-chief. In addition, the Court invited the Parties to come to an agreement as to the allocation of time for the cross-examination and re-examination of experts by 16 March 2015 at the latest.

By the same letters, the Registrar also notified the Parties of the following details regarding the procedure for examining the experts. After having made the solemn declaration required under Article 64 of the Rules of Court, the expert would be asked by the Party calling him to endorse his written statement. The other Party would then have an opportunity for cross-examination on the contents of the expert’s written statement or his earlier reports. Re-examination would thereafter be limited to subjects raised in cross-examination. Finally, the judges would have an opportunity to put questions to the expert.

35. By letters dated 2 March 2015, the Parties indicated the names of the experts they wished to call at the hearings, and provided the other information concerning them required by Article 57 of the Rules of Court (see paragraph 34 above).

36. Under cover of a letter dated 3 March 2015, Costa Rica communicated to the Court a video which it wished to be included in the case file and presented at the hearings. By a letter dated 13 March 2015, Nicaragua stated that it had no objection to Costa Rica's request and presented certain comments on the utility of the video; it also announced that it would produce photographs in response. By letters dated 23 March 2015, the Registrar informed the Parties that the Court had decided to grant Costa Rica's request.

37. By letters dated 16 March 2015, the Parties communicated the written statements of the experts they intended to call at the hearings. Costa Rica also asked the Court to extend to 20 March 2015 the time-limit within which the Parties might transmit an agreement or their respective positions regarding the allocation of time for the cross-examination and re-examination of those experts, which was granted by the Court. However, since the Parties were unable to agree fully on this matter within the time-limit thus extended, the Registrar informed them, by letters of 23 March 2015, of the Court's decision in respect of the maximum time that could be allocated for the examinations. In this connection, the Parties were invited to indicate the order in which they wished to present their experts, and the precise amount of time they wished to reserve for the cross-examination of each of the experts called by the other Party, which they did by letters dated 30 March and 2 April 2015. By letters dated 10 April 2015, the Registrar communicated to the Parties the detailed schedule for the examination of the experts, as adopted by the Court.

38. By letters of 23 March 2015, the Registrar informed the Parties that, in relation to the *Nicaragua v. Costa Rica* case, the Court wished each of them to produce, by 10 April 2015 at the latest, a map showing the San Juan River and the road constructed by Costa Rica, and indicating the precise locations discussed in the key studies referred to in the written statements provided to the Court on 16 March 2015 (see paragraph 37 above). Under cover of letters dated 10 April 2015, Nicaragua and Costa Rica each provided the Court with printed and electronic versions of the maps they had prepared.

39. By a letter dated 23 March 2015, Nicaragua, as announced (see paragraph 36 above), communicated to the Court photographs that it wished to be included in the case file. By a letter dated 31 March 2015, Costa Rica informed the Court that it had no objection to Nicaragua's request. By letters dated 8 April 2015, the Registrar informed the Parties that the Court had decided to grant Nicaragua's request.

40. By a letter dated 13 April 2015, Costa Rica requested that Nicaragua file a copy of the report of Ramsar Advisory Mission No. 72 in relation to Nicaragua's *Refugio de Vida Silvestre Río San Juan* (San Juan River Wildlife Refuge). By a letter dated 16 April 2015, Nicaragua indicated that it was in possession only of a draft report, in Spanish, which it enclosed with its letter. Subsequently, under cover of a letter dated 24 April 2015, Nicaragua transmitted to the Court the comments it had submitted on 30 November 2011 on the draft report of the Ramsar Advisory Mission (original Spanish version and English translation of certain extracts), as well as the reply from the Ramsar Secretariat dated 19 December 2011 (original Spanish version only). The Parties later provided

the Court with English translations of the documents submitted in Spanish by Nicaragua.

41. By a letter dated 21 April 2015, the Registrar informed the Parties that the Court had decided to request, under Article 62 of its Rules, that Nicaragua produce the full text of two documents, excerpts of which were annexed to its Counter-Memorial in the *Costa Rica v. Nicaragua* case. By a letter dated 24 April 2015, Nicaragua communicated to the Court the full text of the original Spanish versions of the documents requested. Certified English translations were transmitted by Nicaragua under cover of a letter dated 15 May 2015.

42. By letter of 28 April 2015, Costa Rica asked for photographs to be included in the *Nicaragua v. Costa Rica* case file. In a letter dated 29 April 2015, Nicaragua stated that it objected to this request, which it considered had been made too late. By letters dated 29 April 2015, the Registrar informed the Parties that the Court had decided not to grant Costa Rica's request.

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43. In accordance with Article 53, paragraph 2, of the Rules of Court, after ascertaining the views of the Parties, the Court decided that copies of the pleadings and documents annexed would be made accessible to the public at the opening of the oral proceedings.

44. Public hearings were held in the joined cases from 14 April 2015 to 1 May 2015. Between 14 and 17 April 2015 and 28 and 29 April 2015, the hearings focused on the *Costa Rica v. Nicaragua* case, and between 20 and 24 April 2015 and 30 April and 1 May 2015 on the *Nicaragua v. Costa Rica* case. The Court heard the oral arguments and replies of:

In the *Costa Rica v. Nicaragua* case,

For Costa Rica: H.E. Mr. Edgar Ugalde Alvarez,
H.E. Mr. Sergio Ugalde,
Mr. Arnoldo Brenes,
Mr. Samuel Wordsworth,
Mr. Marcelo Kohen,
Ms Kate Parlett,
Ms Katherine Del Mar.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Alain Pellet,
Mr. Paul S. Reichler,
Mr. Andrew B. Loewenstein,
Mr. Stephen C. McCaffrey.

In the *Nicaragua v. Costa Rica* case,

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Paul S. Reichler,
Mr. Andrew B. Loewenstein,
Mr. Stephen C. McCaffrey,
Mr. Alain Pellet.

For Costa Rica: H.E. Mr. Edgar Ugalde Alvarez,
Mr. Arnoldo Brenes,

Ms Katherine Del Mar,
Mr. Marcelo Kohen,
Mr. Samuel Wordsworth,
Ms Kate Parlett,
H.E. Mr. Sergio Ugalde.

45. In the *Costa Rica v. Nicaragua* case, Costa Rica called Mr. Thorne as an expert during the public hearing of 14 April 2015 (afternoon). Later, during the public hearing of 17 April 2015 (morning), Nicaragua called the following experts: Mr. van Rhee and Mr. Kondolf. In the *Nicaragua v. Costa Rica* case, Nicaragua called the following experts during the public hearings of 20 April 2015 (morning and afternoon): Mr. Weaver, Mr. Kondolf, Mr. Andrews and Mr. Sheate. Costa Rica called Mr. Cowx and Mr. Thorne as experts during the public hearing of 24 April 2015 (morning). A number of judges put questions to the experts, to which replies were given orally.

46. At the hearings, Members of the Court also put questions to the Parties, to which replies were given orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

* *

47. In its Application filed in the *Costa Rica v. Nicaragua* case, Costa Rica made the following claims:

“For these reasons, and reserving the right to supplement, amplify or amend the present Application, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River.

In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has breached:

- (a) the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;
- (b) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;
- (c) the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;
- (d) the obligation not to damage Costa Rican territory;
- (e) the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;
- (f) the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;
- (g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;

- (h) the obligations under the Ramsar Convention on Wetlands;
- (i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica's territorial integrity under international law."

Costa Rica also requested the Court to "determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to . . . above".

48. In the course of the written proceedings in the *Costa Rica v. Nicaragua* case, the following submissions were presented by the Parties:

On behalf of the Government of Costa Rica,

in the Memorial:

"For these reasons, and reserving the right to supplement, amplify or amend the present submissions:

1. Costa Rica requests the Court to adjudge and declare that, by its conduct, Nicaragua has breached:

- (a) the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards;
- (b) the prohibition of use of force under Article 2 (4) of the United Nations Charter and Articles 1, 19, 21 and 29 of the Charter of the Organization of American States;
- (c) the obligation of Nicaragua under Article IX of the 1858 Treaty of Limits not to use the San Juan to carry out hostile acts;
- (d) the rights of Costa Rican nationals to free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the Cleveland Award and the Court's Judgment of 13 July 2009;
- (e) the obligation not to dredge, divert or alter the course of the San Juan, or conduct any other works on the San Juan, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights in accordance with the Cleveland Award;
- (f) the obligation to consult with Costa Rica about implementing obligations arising from the Ramsar Convention, in particular the obligation to co-ordinate future policies and regulations concerning the conservation of wetlands and their flora and fauna under Article 5 (1) of the Ramsar Convention; and
- (g) the Court's Order for Provisional Measures of 8 March 2011;

and further to adjudge and declare that Nicaragua is:

(h) obliged to cease such breaches and to make reparation therefore.

2. The Court is requested to order, in consequence, that Nicaragua:

- (a) withdraw any presence, including all troops and other personnel (whether civilian, police or security, or volunteers) from that part of Costa Rica known as Isla Portillos, on the right bank of the San Juan, and prevent any return there of any such persons;
- (b) cease all dredging activities on the San Juan in the area between the point of bifurcation of the Colorado River and the San Juan and the outlet of the San Juan in the Caribbean Sea ('the area'), pending:
 - (i) an adequate environmental impact assessment;
 - (ii) notification to Costa Rica of further dredging plans for the area, not less than three months prior to the implementation of such plans;
 - (iii) due consideration of any comments of Costa Rica made within one month of notification;
- (c) not engage in any dredging operations or other works in the area if and to the extent that these may cause significant harm to Costa Rican territory (including the Colorado River) or its environment, or to impair Costa Rica's rights under the Cleveland Award.

3. The Court is also requested to determine, in a separate phase, the reparation and satisfaction to be made by Nicaragua."

On behalf of the Government of Nicaragua,

in the Counter-Memorial:

"For the reasons given herein, the Republic of Nicaragua requests the Court to:

- (1) *dismiss and reject* the requests and submissions of Costa Rica in her pleadings;
- (2) *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; and,

- (iv) in so doing, Nicaragua is entitled as it deems suitable to re-establish the situation that existed at the time the 1858 Treaty was concluded;
- (v) 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.”

49. At the oral proceedings in the joined cases, the following submissions were presented by the Parties in the *Costa Rica v. Nicaragua* case:

On behalf of the Government of Costa Rica,

at the hearing of 28 April 2015:

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

- (1) reject all Nicaraguan claims;
- (2) adjudge and declare that:
 - (a) sovereignty over the ‘disputed territory’, as defined by the Court in its Orders of 8 March 2011 and 22 November 2013, belongs to the Republic of Costa Rica;
 - (b) by occupying and claiming Costa Rican territory, Nicaragua has breached:
 - (i) the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards;
 - (ii) the prohibition of the threat or use of force under Article 2 (4) of the Charter of the United Nations and Article 22 of the Charter of the Organization of American States;
 - (iii) the prohibition to make the territory of other States the object, even temporarily, of military occupation, contrary to Article 21 of the Charter of the Organization of American States; and
 - (iv) the obligation of Nicaragua under Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;
 - (c) by its further conduct, Nicaragua has breached:
 - (i) the obligation to respect Costa Rica’s territory and environment, including its wetland of international importance under the Ramsar Convention ‘Humedal Caribe Noreste’, on Costa Rican territory;
 - (ii) Costa Rica’s perpetual rights of free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the 1888 Cleveland Award and the Court’s Judgment of 13 July 2009;
 - (iii) the obligation to inform and consult with Costa Rica about any dredging, diversion or alteration of the course of the San Juan River, or any other works on the San Juan River that may cause damage to Costa Rican territory (including the Colorado River), its environment, or Costa Rican rights, in accordance with the 1888 Cleveland Award and relevant treaty and customary law;
 - (iv) the obligation to carry out an appropriate transboundary environ-

- mental impact assessment, which takes account of all potential significant adverse impacts on Costa Rican territory;
- (v) the obligation not to dredge, divert or alter the course of the San Juan River, or conduct any other works on the San Juan River, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights under the 1888 Cleveland Award;
 - (vi) the obligations arising from the Orders of the Court indicating provisional measures of 8 March 2011 and 22 November 2013;
 - (vii) the obligation to consult with Costa Rica on the implementation of obligations arising from the Ramsar Convention, in particular the obligation to co-ordinate future policies and regulations concerning the conservation of wetlands and their flora and fauna under Article 5 (1) of the Ramsar Convention; and
 - (viii) the agreement between the Parties, established in the exchange of notes dated 19 and 22 September 2014, concerning navigation on the San Juan River by Costa Rica to close the eastern *caño* constructed by Nicaragua in 2013;
- (d) Nicaragua may not engage in any dredging operations or other works if and to the extent that these may cause damage to Costa Rican territory (including the Colorado River) or its environment, or which may impair Costa Rica's rights under the 1888 Cleveland Award, including its right not to have its territory occupied without its express consent;
- (3) to order, in consequence, that Nicaragua must:
- (a) repeal, by means of its own choosing, those provisions of the Decree No. 079-2009 and the Regulatory Norms annexed thereto of 1 October 2009 which are contrary to Costa Rica's right of free navigation under Article VI of the 1858 Treaty of Limits, the 1888 Cleveland Award, and the Court's Judgment of 13 July 2009;
 - (b) cease all dredging activities on the San Juan River in the vicinity of Delta Costa Rica and in the lower San Juan River, pending:
 - (i) an appropriate transboundary environmental impact assessment, which takes account of all potential significant adverse impacts on Costa Rican territory, carried out by Nicaragua and provided to Costa Rica;
 - (ii) formal written notification to Costa Rica of further dredging plans in the vicinity of Delta Costa Rica and in the lower San Juan River, not less than three months prior to the implementation of any such plans; and
 - (iii) due consideration of any comments made by Costa Rica upon receipt of said notification;
 - (c) make reparation in the form of compensation for the material damage caused to Costa Rica, including but not limited to:
 - (i) damage arising from the construction of artificial *caños* and destruction of trees and vegetation on the 'disputed territory';

- (ii) the cost of the remediation measures carried out by Costa Rica in relation to those damages, including but not limited to those taken to close the eastern *caño* constructed by Nicaragua in 2013, pursuant to paragraph 59 (2) (E) of the Court's Order on provisional measures of 22 November 2013;

the amount of such compensation to be determined in a separate phase of these proceedings;

- (d) provide satisfaction so to achieve full reparation of the injuries caused to Costa Rica in a manner to be determined by the Court;
- (e) provide appropriate assurances and guarantees of non-repetition of Nicaragua's unlawful conduct, in such a form as the Court may order; and
- (f) pay all of the costs and expenses incurred by Costa Rica in requesting and obtaining the Order on provisional measures of 22 November 2013, including, but not limited to, the fees and expenses of Costa Rica's counsel and experts, with interest, on a full indemnity basis."

On behalf of the Government of Nicaragua,
at the hearing of Wednesday 29 April 2015:

"In accordance with Article 60 of the Rules and the reasons given during the written and oral phase of the pleadings the Republic of Nicaragua respectfully requests 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."

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50. In its Application filed in the *Nicaragua v. Costa Rica* case, Nicaragua made the following claims:

“On the basis of the foregoing statement of facts and law, Nicaragua, while reserving the right to supplement, amend or modify this Application, requests the Court to adjudge and declare that Costa Rica has breached:

- (a) its obligation not to violate Nicaragua’s territorial integrity as delimited by the 1858 Treaty of Limits, the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899 and 10 March 1900;
- (b) its obligation not to damage Nicaraguan territory;
- (c) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Areas [Priority Wilderness Areas] in Central America.

Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

- (a) restore the situation to the *status quo ante*;
- (b) pay for all damages caused including the costs added to the dredging of the San Juan River;
- (c) not undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction.

Finally, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

- (a) cease all the constructions underway that affect or may affect the rights of Nicaragua;
- (b) produce and present to Nicaragua an adequate environmental impact assessment with all the details of the works.”

51. In the course of the written proceedings in the *Nicaragua v. Costa Rica* case, the following submissions were presented by the Parties:

On behalf of the Government of Nicaragua,
in the Memorial:

“1. For the reasons given herein, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, Costa Rica has breached:

- (i) its obligation not to violate the integrity of Nicaragua’s territory as delimited by the 1858 Treaty of Limits, the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899 and 10 March 1900;
- (ii) its obligation not to damage Nicaraguan territory;

(iii) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Sites [Priority Wilderness Areas] in Central America.

2. Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

- (i) cease all the constructions underway that affects or may affect the rights of Nicaragua;
- (ii) restore the situation to the *status quo ante*;
- (iii) compensate for all damages caused including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case;
- (iv) not to continue or undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction.

3. The Republic of Nicaragua further requests the Court to adjudge and declare that:

- (i) 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 to remove sedimentation and other barriers to navigation; and,
- (ii) in so doing, Nicaragua is entitled to re-establish the conditions of navigation that existed at the time the 1858 Treaty was concluded;
- (iii) that the violations of the 1858 Treaty and under many rules of international law by Costa Rica, allow Nicaragua to take appropriate countermeasures including the suspension of Costa Rica's right of navigation in the San Juan de Nicaragua River.

4. Finally, Nicaragua requests the Court to order Costa Rica to immediately take the emergency measures recommended by its own experts and further detailed in the Kondolf Report, in order to alleviate or mitigate the continuing damage being caused to the San Juan de Nicaragua River and the surrounding environment.

If Costa Rica does not of itself proceed to take these measures and the Court considers it cannot order that it be done without the full procedure contemplated in Articles 73 *et seq.* of the Rules of Court, the Republic of Nicaragua reserves its right to request provisional measures on the basis of Article 41 of the Statute and the pertinent procedures of Article 73 and ff. of the Rules of Court and to amend and modify these submissions in the light of the further pleadings in this case.”

in the Reply:

“For the reasons given in its Memorial and in this Reply, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, the Republic of Costa Rica has breached:

- (i) its obligation not to violate the integrity of Nicaragua’s territory as delimited by the 1858 Treaty of Limits as interpreted by the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899, and 10 March 1900;
- (ii) its obligation not to damage Nicaraguan territory;
- (iii) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Sites [Priority Wilderness Areas] in Central America.

2. Nicaragua also requests the Court to adjudge and declare that Costa Rica must:

- (i) cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua;
- (ii) inasmuch as possible, restore the situation to the *status quo ante*, in full respect of Nicaragua’s sovereignty over the San Juan de Nicaragua River, including by taking the emergency measures necessary to alleviate or mitigate the continuing harm being caused to the river and the surrounding environment;
- (iii) compensate for all damages caused insofar as they are not made good by restitution, including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case.

3. Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

- (i) not undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction;
- (ii) refrain from using Route 1856 to transport hazardous material as long as it has not given the guarantees that the road complies with the best construction practices and the highest regional and international standards of security for road traffic in similar situations.

4. The Republic of Nicaragua further requests the Court to adjudge and declare that Nicaragua is entitled:

- (i) in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San

Juan River and that these works include the dredging of the San Juan de Nicaragua River to remove sedimentation and other barriers to navigation; and,

- (ii) in so doing, to re-establish the conditions of navigation foreseen in the 1858 Treaty.

5. Finally, if the Court has not already appointed a neutral expert at the time when it adopts its Judgment, Nicaragua requests the Court to appoint such an expert who could advise the Parties in the implementation of the Judgment.”

On behalf of the Government of Costa Rica,

in the Counter-Memorial:

“For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to dismiss all of Nicaragua’s claims in this proceeding.”

in the Rejoinder:

“For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to dismiss all of Nicaragua’s claims in this proceeding.”

52. At the oral proceedings in the joined cases, the following submissions were presented by the Parties in the *Nicaragua v. Costa Rica* case:

On behalf of the Government of Nicaragua,

at the hearing of 30 April 2015:

“1. In accordance with Article 60 of the Rules and the reasons given during the written and oral phase of the pleadings the Republic of Nicaragua respectfully requests the Court to adjudge and declare that, by its conduct, the Republic of Costa Rica has breached:

- (i) its obligation not to violate the integrity of Nicaragua’s territory as delimited by the 1858 Treaty of Limits as interpreted by the Cleveland Award of 1888 and the five Awards of the Umpire E. P. Alexander of 30 September 1897, 20 December 1897, 22 March 1898, 26 July 1899, and 10 March 1900;
- (ii) its obligation not to damage Nicaraguan territory;
- (iii) its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Sites in Central America.

2. Nicaragua also requests the Court to adjudge and declare that Costa Rica must:

- (i) cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua;

- (ii) inasmuch as possible, restore the situation to the *status quo ante*, in full respect of Nicaragua's sovereignty over the San Juan de Nicaragua River, including by taking the emergency measures necessary to alleviate or mitigate the continuing harm being caused to the river and the surrounding environment;
- (iii) compensate for all damages caused insofar as they are not made good by restitution, including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case.

3. Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

- (i) not undertake any future development in the area without an appropriate transboundary environmental impact assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction;
- (ii) refrain from using Route 1856 to transport hazardous material as long as it has not given the guarantees that the road complies with the best construction practices and the highest regional and international standards of security for road traffic in similar situations.

4. The Republic of Nicaragua further requests the Court to adjudge and declare that Nicaragua is entitled:

- (i) in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River and that these works include the dredging of the San Juan de Nicaragua River to remove sedimentation and other barriers to navigation."

On behalf of the Government of Costa Rica,

at the hearing of 1 May 2015: "For the reasons set out in the written and oral pleadings, Costa Rica requests the Court to dismiss all of Nicaragua's claims in this proceeding."

* * *

53. The Court will begin by dealing with the elements common to both cases. It will thus address, in a first part, the question of its jurisdiction, before recalling, in a second part, the geographical and historical context and the origin of the disputes.

The Court will then examine in turn, in two separate parts, the disputed issues in the *Costa Rica v. Nicaragua* case and in the *Nicaragua v. Costa Rica* case.

I. JURISDICTION OF THE COURT

54. With regard to the *Costa Rica v. Nicaragua* case, the Court recalls that Costa Rica invokes, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the declarations by which the Parties have recognized

the compulsory jurisdiction of the Court under paragraphs 2 and 5 of Article 36 of the Statute (see paragraph 2 above). It notes that Nicaragua does not contest its jurisdiction to entertain Costa Rica's claims.

The Court finds that it has jurisdiction over the dispute.

55. With regard to the *Nicaragua v. Costa Rica* case, the Court notes that Nicaragua invokes, for its part, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the above-mentioned declarations of acceptance (see paragraph 2 above). It further observes that Costa Rica does not contest its jurisdiction to entertain Nicaragua's claims.

The Court finds that it has jurisdiction over the dispute.

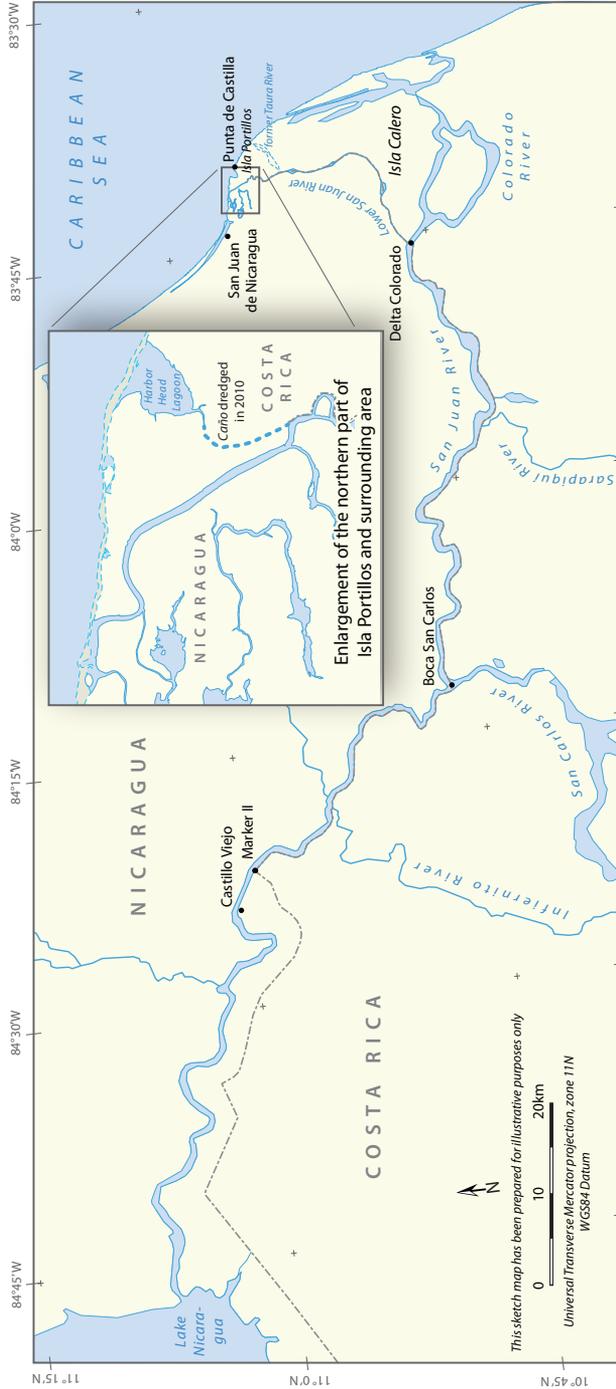
II. GEOGRAPHICAL AND HISTORICAL CONTEXT AND ORIGIN OF THE DISPUTES

56. The San Juan River runs approximately 205 km from Lake Nicaragua to the Caribbean Sea. At a point known as "Delta Colorado" (or "Delta Costa Rica"), the San Juan River divides into two branches: the Lower San Juan is the northerly of these two branches and flows into the Caribbean Sea about 30 km downstream from the delta, near the town of San Juan de Nicaragua, formerly known as San Juan del Norte or Greytown; the Colorado River is the southerly and larger of the two branches and runs entirely within Costa Rica, reaching the Caribbean Sea at Barra de Colorado, about 20 km south-east of the mouth of the Lower San Juan. The Parties are in agreement that the Colorado River currently receives approximately 90 per cent of the water of the San Juan River, with the remaining 10 per cent flowing into the Lower San Juan.

57. The area situated between the Colorado River and the Lower San Juan is broadly referred to as Isla Calero (approximately 150 sq km). Within that area, there is a smaller region known to Costa Rica as Isla Portillos and to Nicaragua as Harbor Head (approximately 17 sq km); it is located north of the former Taura River. In the north of Isla Portillos is a lagoon, called Laguna Los Portillos by Costa Rica and Harbor Head Lagoon by Nicaragua. This lagoon is at present separated from the Caribbean Sea by a sandbar (see sketch-map No. 1 p. 692).

58. Isla Calero is part of the *Humedal Caribe Noreste* (Northeast Caribbean Wetland) which was designated by Costa Rica in 1996 as a wetland of international importance under the Ramsar Convention. The area immediately adjacent to it — including the San Juan River itself and a strip of land 2 km in width abutting the river's left (Nicaraguan) bank — was designated by Nicaragua as a wetland of international importance under the Ramsar Convention in 2001 and is known as the *Refugio de Vida Silvestre Río San Juan* (San Juan River Wildlife Refuge).

Sketch-map No. 1:
Geographical context



59. The present disputes between the Parties are set within a historical context dating back to the 1850s. Following hostilities between the two States in 1857, the Governments of Costa Rica and Nicaragua signed on 15 April 1858 a Treaty of Limits, which was ratified by Costa Rica on 16 April 1858 and by Nicaragua on 26 April 1858 (hereinafter the “1858 Treaty”). The 1858 Treaty fixed the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea. According to Article II of the Treaty (quoted in paragraph 71 below), part of the boundary between the two States runs along the right (Costa Rican) bank of the San Juan River from a point three English miles below Castillo Viejo, a small town in Nicaragua, to “the end of Punta de Castilla, at the mouth of the San Juan” on the Caribbean coast. Article VI of the 1858 Treaty (quoted in paragraph 133 below) established Nicaragua’s *dominium* and *imperium* over the waters of the river, but at the same time affirmed Costa Rica’s right of free navigation on the river for the purposes of commerce.

60. Following challenges by Nicaragua on various occasions to the validity of the 1858 Treaty, Costa Rica and Nicaragua signed another instrument on 24 December 1886, whereby the two States agreed to submit the question of the validity of the 1858 Treaty to the President of the United States, Grover Cleveland, for arbitration. In addition, the Parties agreed that, if the 1858 Treaty were found to be valid, President Cleveland should also decide “upon all the other points of doubtful interpretation which either of the parties may find in the treaty”. On 22 June 1887, Nicaragua communicated to Costa Rica 11 points of doubtful interpretation, which were subsequently submitted to President Cleveland for resolution. The Cleveland Award of 1888 confirmed, in its paragraph 1, the validity of the 1858 Treaty and found, in its paragraph 3 (1), that the boundary line between the two States 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”. The Cleveland Award also settled the other points of doubtful interpretation submitted by Nicaragua, such as the conditions under which Nicaragua may carry out works of improvement on the San Juan River (para. 3 (6), quoted in paragraph 116 below), the conditions under which Costa Rica may prevent Nicaragua from diverting the waters of the San Juan (para. 3 (9), quoted in paragraph 116 below), and the requirement that Nicaragua not make any grants for the purpose of constructing a canal across its territory without first asking for the opinion of Costa Rica (para. 3 (10)) or, “where the construction of the canal will involve an injury to the natural rights of Costa Rica”, obtaining its consent (para. 3 (11)).

61. Subsequent to the Cleveland Award, Costa Rica and Nicaragua agreed in 1896, under the Pacheco-Matus Convention on border demarcation, to establish two national Demarcation Commissions, each com-

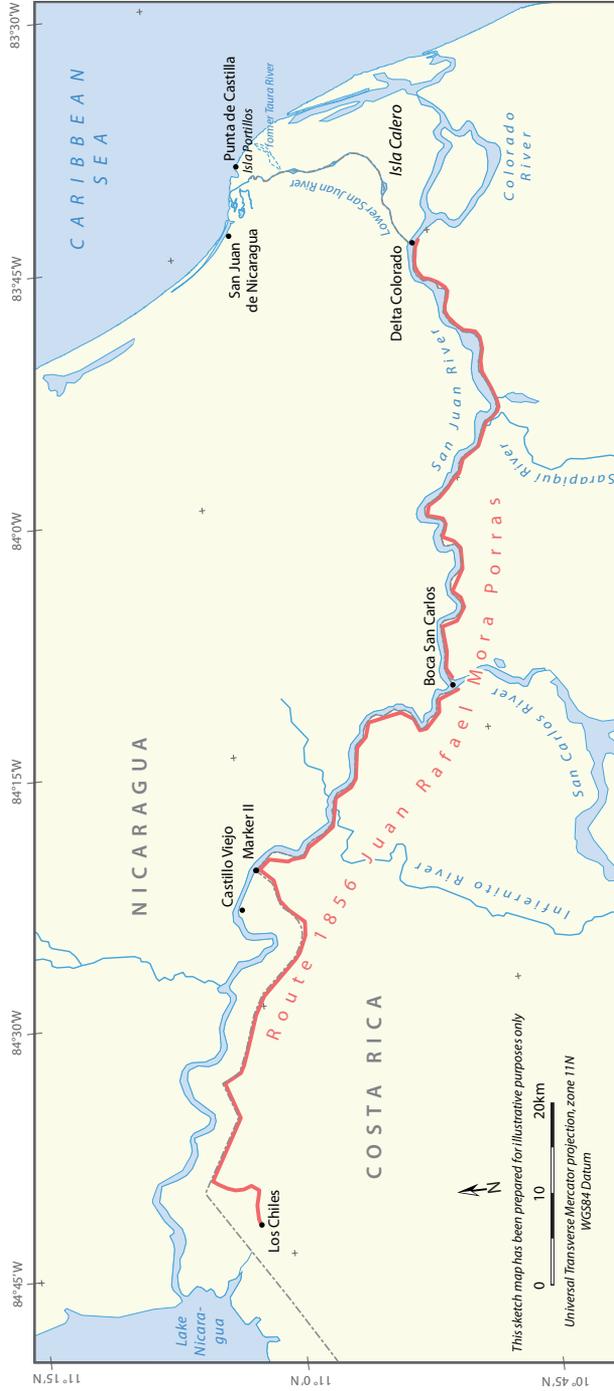
posed of two members (Art. I). The Pacheco-Matus Convention further provided that the Commissions would include an engineer, appointed by the President of the United States of America, who “shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final” (Art. II). United States General Edward Porter Alexander was so appointed. During the demarcation process, which began in 1897 and was concluded in 1900, General Alexander rendered five awards, the first three of which are of particular relevance to the *Costa Rica v. Nicaragua* case (see paragraphs 73-75 below).

62. Starting in the 1980s, some disagreements arose between Costa Rica and Nicaragua concerning the precise scope of Costa Rica’s rights of navigation under the 1858 Treaty. This dispute led Costa Rica to file an Application with the Court instituting proceedings against Nicaragua on 29 September 2005. The Court rendered its Judgment on 13 July 2009, which, *inter alia*, clarified Costa Rica’s navigational rights and the extent of Nicaragua’s power to regulate navigation on the San Juan River (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213).

63. On 18 October 2010, Nicaragua started dredging the San Juan River in order to improve its navigability. It also carried out works in the northern part of Isla Portillos (see sketch-map No. 1 p. 692). In this regard, Costa Rica contends that Nicaragua artificially created a channel (both Parties refer to such channels as “caños”) on Costa Rican territory, in Isla Portillos between the San Juan River and Laguna Los Portillos/Harbor Head Lagoon, whereas Nicaragua argues that it was only clearing an existing *caño* on Nicaraguan territory. Nicaragua also sent some military units and other personnel to that area. On 18 November 2010, Costa Rica filed its Application instituting proceedings in the *Costa Rica v. Nicaragua* case (see paragraph 1 above). Costa Rica also submitted a request for the indication of provisional measures under Article 41 of the Statute (see paragraph 3 above).

64. In December 2010, Costa Rica started works for the construction of Route 1856 Juan Rafael Mora Porras (hereinafter the “road”), which runs in Costa Rican territory along part of its border with Nicaragua. The road has a planned length of 159.7 km, extending from Los Chiles in the west to a point just beyond “Delta Colorado” in the east. For 108.2 km, it follows the course of the San Juan River (see sketch-map No. 2 p. 695). On 21 February 2011, Costa Rica adopted an Executive Decree declaring a state of emergency in the border area, which Costa Rica maintains exempted it from the obligation to conduct an environmental impact assessment before constructing the road. On 22 December 2011, Nicaragua filed its Application instituting proceedings in the *Nicaragua v. Costa Rica* case (see paragraph 9 above), claiming in particular that the construction of the road resulted in significant transboundary harm.

Sketch-map No. 2:
Route 1856 Juan Rafael Mora Porras



III. ISSUES IN THE *COSTA RICA V. NICARAGUA* CASEA. *Sovereignty over the Disputed Territory and Alleged Breaches Thereof*

65. Costa Rica submits that Nicaragua breached

“the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards” (final submissions, para. 2 (b) (i)).

This claim is based on the premise that “[s]overeignty 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” (*ibid.*, para. 2 (a)). In its final submissions Costa Rica requested the Court to make a finding also on the issue of sovereignty over the disputed territory.

66. Costa Rica alleges that Nicaragua violated its territorial sovereignty in the area of Isla Portillos in particular by excavating in 2010 a *caño* with the aim of connecting the San Juan River with the Harbor Head Lagoon and laying claim to Costa Rican territory. According to Costa Rica, this violation of sovereignty was exacerbated by Nicaragua’s establishment of a military presence in the area and by its excavation in 2013 of two other *caños* located near the northern tip of Isla Portillos.

67. The Court notes that although the violations that allegedly took place in 2013 occurred after the Application was made, they concern facts which are of the same nature as those covered in the Application and which the Parties had the opportunity to discuss in their pleadings. These alleged violations may therefore be examined by the Court as part of the merits of the claim. They will later also be considered in relation to Nicaragua’s compliance with the Court’s Order on provisional measures of 8 March 2011.

68. Nicaragua does not contest that it dredged the three *caños*, but maintains that “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” (final submissions, para. (b) (i)). Nicaragua further submits that “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” (*ibid.*, para. (b) (ii)).

69. Since it is uncontested that Nicaragua conducted certain activities in the disputed territory, it is necessary, in order to establish whether there was a breach of Costa Rica’s territorial sovereignty, to determine

which State has sovereignty over that territory. The “disputed territory” was defined by the Court in its Order of 8 March 2011 on provisional measures as “the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon” (*I.C.J. Reports 2011 (I)*, p. 19, para. 55). The *caño* referred to is the one which was dredged by Nicaragua in 2010. Nicaragua did not contest this definition of the “disputed territory”, while Costa Rica expressly endorsed it in its final submissions (para. 2 (a)). The Court will maintain the definition of “disputed territory” given in the 2011 Order. It recalls that its Order of 22 November 2013 indicating provisional measures specified that a Nicaraguan military encampment “located on the beach and close to the line of vegetation” near one of the *caños* dredged in 2013 was “situated in the disputed territory as defined by the Court in its Order of 8 March 2011” (*I.C.J. Reports 2013*, p. 365, para. 46).

70. The above definition of the “disputed territory” does not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon, which lagoon both Parties agree is Nicaraguan, and the mouth of the San Juan River. In their oral arguments the Parties expressed different views on this issue. However, they did not address the question of the precise location of the mouth of the river nor did they provide detailed information concerning the coast. Neither Party requested the Court to define the boundary more precisely with regard to this coast. Accordingly, the Court will refrain from doing so.

71. In their claims over the disputed territory both Parties rely on the 1858 Treaty, the Cleveland Award and the Alexander Awards. According to Article II of the Treaty:

“The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua River, and shall run along the right bank of the said river up to a point three English miles distant from Castillo Viejo . . .” [In the Spanish original: “*La línea divisoria de las dos Repúblicas, partiendo del mar del Norte, comenzará en la extremidad de Punta de Castilla, en la desembocadura del río de San Juan de Nicaragua, y continuará marcándose con la margen derecha del expresado río, hasta un punto distante del Castillo Viejo tres millas inglesas . . .*”]

72. In 1888 President Cleveland found in his Award that:

“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. The ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to

that subject.” (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 209.)

73. When the Commissions on demarcation were established by the Pacheco-Matus Convention, one member, to be designated by the President of the United States of America, was given the power to “resolve any dispute between the Commissions of Costa Rica and Nicaragua arising from the operations” (see paragraph 61 above). According to this Convention, the said person “shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final” (Art. II, *RIAA*, Vol. XXVIII, p. 212). On this basis, General Alexander, who had been duly designated to this position, rendered five awards concerning the border. In his first Award he stated that the boundary line:

“must follow the . . . branch . . . called the Lower San Juan, through its harbor and into the sea.

The natural terminus of that line is the right-hand headland of the harbor mouth.” (*Ibid.*, p. 217.)

He observed that:

“throughout the treaty the river is treated and regarded as an outlet of commerce. This implies that it is to be considered as in average condition of water, in which condition alone it is navigable.” (*Ibid.*, pp. 218-219.)

He then defined the initial part of the boundary starting from the Caribbean Sea in the following terms:

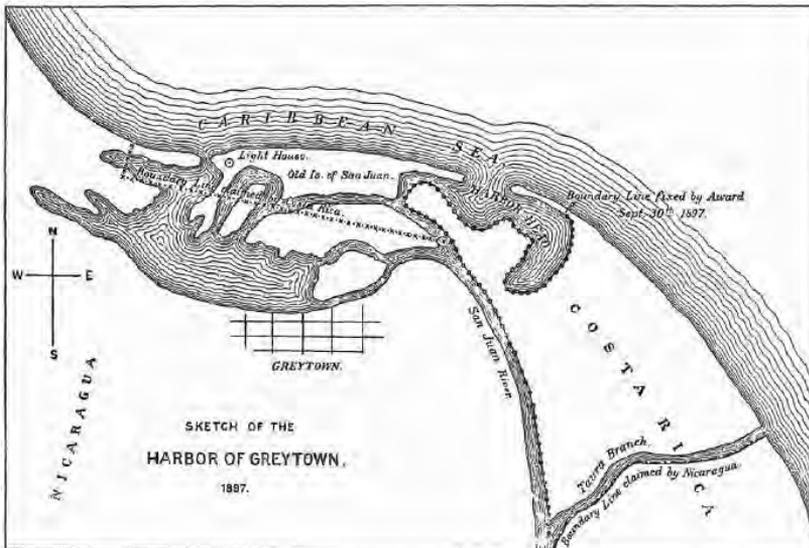
“The exact spot which was the extremity of the headland of Punta de Castillo [on] April 15, 1858, has long been swept over by the Caribbean Sea, and there is too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it from the present headland. It was somewhere to the north-eastward, and probably between 600 and 1,600 feet distant, but it can not now be certainly located. Under these circumstances it best fulfils the demands of the treaty and of President Cleveland’s award to adopt what is practically the headland of today, or the north-western extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon.

I have accordingly made personal inspection of this ground, and declare the initial line of the boundary to run as follows, to wit:

Its direction shall be due north-east and south-west, 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 north-west 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 south-eastward, and shall follow the water's edge around the harbor until it reaches the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty." (*RIAA*, Vol. XXVIII, p. 220.)

A sketch illustrating this initial part of the boundary in the geographic situation prevailing at the time was attached to this first Award (*ibid.*, p. 221). In that sketch, what the Arbitrator considered to be the "first channel" was the branch of the Lower San Juan River which was then flowing into the Harbor Head Lagoon (see sketch-map No. 3 below). The same boundary line was sketched with greater precision in the proceedings of the Commissions on demarcation.



74. The second Alexander Award envisaged the possibility that the banks of the San Juan River would "not only gradually expand or contract but that there [would] be wholesale changes in its channels". The Arbitrator observed that:

"Today's boundary line must necessarily be affected in future by all these gradual or sudden changes. But the impact in each case can only be determined by the circumstances of the case itself, on a case-by-case basis in accordance with such principles of international law as may be applicable.

The proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles." (*RIAA*, Vol. XXVIII, p. 224.)

75. In his third Award, General Alexander noted that “borders delimited by waterways are likely to change when changes occur in the beds of such waterways. In other words, it is the riverbed that affects changes and not the water within, over or below its banks.” (*RIAA*, Vol. XXVIII, p. 229.) He reached the following conclusion:

“Let me sum up briefly and provide a clearer understanding of the entire question in accordance with the principles set out in my first award, to wit, that in the practical interpretation of the 1858 Treaty, the San Juan River must be considered a navigable river. I therefore rule that the exact dividing line between the jurisdictions of the two countries is the right bank of the river, with the water at ordinary stage and navigable by ships and general-purpose boats. At that stage, every portion of the waters of the river is under Nicaraguan jurisdiction. Every portion of land on the right bank is under Costa Rican jurisdiction.” (*Ibid.*, p. 230.)

76. The Court considers that the 1858 Treaty and the awards by President Cleveland and General Alexander lead to the conclusion that Article II of the 1858 Treaty, which places the boundary on the “right bank of the . . . river”, must be interpreted in the context of Article VI (quoted in full at paragraph 133 below), which provides that “the Republic of Costa Rica shall . . . have a perpetual right of free navigation on the . . . waters [of the river] between [its] mouth . . . and a point located three English miles below Castillo Viejo”. As General Alexander observed in demarcating the boundary, the 1858 Treaty regards the river, “in average condition of water”, as an “outlet of commerce” (see paragraph 73 above). In the view of the Court, Articles II and VI, taken together, provide that the right bank of a channel of the river forms the boundary on the assumption that this channel is a navigable “outlet of commerce”. Thus, Costa Rica’s rights of navigation are linked with sovereignty over the right bank, which has clearly been attributed to Costa Rica as far as the mouth of the river.

77. Costa Rica contends that, while no channel of the San Juan River now flows into the Harbor Head Lagoon, there has been no significant shifting of the bed of the main channel of the Lower San Juan River since the Alexander Awards. Costa Rica maintains that the territory on the right bank of that channel as far as the river’s mouth in the Caribbean Sea should be regarded as under Costa Rican sovereignty. According to Costa Rica, no importance should be given to what it considers to be an artificial *caño* which was excavated by Nicaragua in 2010 in order to connect the San Juan River with the Harbor Head Lagoon.

78. Nicaragua argues that, as a result of natural modifications in the geographical configuration of the disputed territory, the “first channel” to which General Alexander referred in his first Award is now a channel

connecting the river, at a point south of the Harbor Head Lagoon, with the southern tip of that lagoon. The channel in question, according to Nicaragua, is the *caño* that it dredged in 2010 only to improve its navigability. Relying on the alleged existence of this *caño* over a number of years and contending that it now marks the boundary, Nicaragua claims sovereignty over the whole of the disputed territory.

79. According to Nicaragua, the existence of the *caño* before 2010 is confirmed by aerial and satellite imagery. In particular, Nicaragua alleges that a satellite picture dating from 1961 shows that a *caño* existed where Nicaragua was dredging in 2010.

80. Costa Rica points out that, especially by reason of the thick vegetation, aerial and satellite images of the disputed territory are not clear, including the satellite picture of 1961. Moreover, Costa Rica produces a satellite image dating from August 2010, which would rule out the existence of a channel in the period between the clearing of vegetation in the location of the *caño* and the dredging of the *caño*. In the oral proceedings, Nicaragua admitted that because of the tree canopy, only an inspection on the ground could provide certainty regarding the *caño*.

81. In the opinion of the Court, an inspection would hardly be useful for reconstructing the situation prevailing before 2010. The Court considers that, given the general lack of clarity of satellite and aerial images and the fact that the channels that may be identified on such images do not correspond to the location of the *caño* dredged in 2010, this evidence is insufficient to prove that a natural channel linked the San Juan River with the Harbor Head Lagoon following the same course as the *caño* that was dredged.

82. In order further to substantiate the view that the *caño* had existed for some time before it was dredged, Nicaragua also supplies three affidavits of Nicaraguan policemen or military agents who refer to a stream linking the San Juan River with the lagoon and assert that it was navigable for part of the year. Some affidavits of other agents mention streams in the area of the lagoon and describe them as navigable by boats to a certain extent, but do not specify their location.

83. The Court recalls that “[i]n determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Judgment*, *I.C.J. Reports 2015 (I)*, p. 78, para. 196). Affidavits will be treated “with caution”, in particular those made by State officials for purposes of litigation (*ibid.*, pp. 78, paras. 196-197, referring to *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment*, *I.C.J. Reports 2007 (II)*, p. 731, para. 244). In the present case, the Court finds that the affidavits of Nicaraguan State officials, which were prepared after the institution of proceedings by Costa Rica, provide little support for Nicaragua’s contention.

84. Nicaragua refers to a map produced in 1949 by the National Geographic Institute of Costa Rica which shows a *caño* in the location of the one dredged in 2010. It acknowledges, however, that the map in question describes the entire disputed territory as being under Costa Rican sovereignty. Nicaragua further invokes a map published in 1971 by the same Institute which shows a boundary close to the line claimed by Nicaragua. However, the Court notes that this evidence is contradicted by several official maps of Nicaragua, in particular a map of 1967 of the Directorate of Cartography and a map, dating from 2003, published by the Nicaraguan Institute of Territorial Studies (INETER, by its Spanish acronym), which depict the disputed area as being under Costa Rica's sovereignty.

85. As the Boundary Commission in the *Eritrean/Ethiopia* case stated, in a passage that was quoted with approval by the Court in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, a map "stands as a statement of geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest" (*Judgment, I.C.J. Reports 2008*, p. 95, para. 271). In the present case, the evidence of maps published by the Parties on the whole gives support to Costa Rica's position, but their significance is limited, given that they are all small-scale maps which are not focused on the details of the disputed territory.

86. Both Parties invoke *effectivités* to corroborate their claims to territorial sovereignty. Costa Rica argues that it had exercised sovereignty over the disputed territory without being challenged by Nicaragua until 2010. Costa Rica recalls that it adopted legislation applying specifically to that area, that it issued permits or titles to use land in the same territory, and that Isla Portillos was included within the area it designated as a wetland of international importance under the Ramsar Convention (*Humedal Caribe Noreste*). Costa Rica notes that, when Nicaragua registered its own wetland of international importance concerning the area (*Refugio de Vida Silvestre Río San Juan*), it only included the Harbor Head Lagoon and did not encompass the disputed territory.

87. Nicaragua for its part contends that it acted as sovereign over the disputed territory. Relying on affidavits by State officials and two police reports, it asserts that at least since the late 1970s the Nicaraguan army, navy and police have all patrolled the area in and around Harbor Head Lagoon, including the *caños* connecting the lagoon with the San Juan River.

88. Costa Rica questions the value of the evidence adduced by Nicaragua to substantiate its claim of having exercised sovereign powers in the disputed territory.

Nicaragua argues that Costa Rica's claimed exercise of sovereignty was merely a limited "paper presence" in the disputed territory not supported by any actual conduct on the ground.

89. The *effectivités* invoked by the Parties, which the Court considers are in any event of limited significance, cannot affect the title to sovereignty resulting from the 1858 Treaty and the Cleveland and Alexander Awards.

90. The Court notes that the existence over a significant span of time of a navigable *caño* in the location claimed by Nicaragua is put into question by the fact that in the bed of the channel there were trees of considerable size and age which had been cleared by Nicaragua in 2010. Moreover, as was noted by Costa Rica's main expert, if the channel had been a distributary of the San Juan River, "sediment would have filled in, or at a minimum partially-filled, the southern part of the lagoon". Furthermore, the fact that, as the Parties' experts agree, the *caño* dredged in 2010 no longer connected the river with the lagoon by mid-summer 2011 casts doubt on the existence over a number of years of a navigable channel following the same course before Nicaragua carried out its dredging activities. This *caño* could hardly have been the navigable outlet of commerce referred to above (see paragraph 76).

91. If Nicaragua's claim were accepted, Costa Rica would be prevented from enjoying territorial sovereignty over the right bank of the San Juan River as far as its mouth, contrary to what is stated in the 1858 Treaty and in the Cleveland Award. Moreover, according to Article VI of the 1858 Treaty (quoted below at paragraph 133), Costa Rica's rights of navigation are over the waters of the river, the right bank of which forms the boundary between the two countries. As the Court noted (see paragraph 76 above), these rights of navigation are linked with sovereignty over the right bank.

92. The Court therefore concludes that the right bank of the *caño* which Nicaragua dredged in 2010 is not part of the boundary between Costa Rica and Nicaragua, and that the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea. Sovereignty over the disputed territory thus belongs to Costa Rica.

93. It is not contested that Nicaragua carried out various activities in the disputed territory since 2010, including excavating three *caños* and establishing a military presence in parts of that territory. These activities were in breach of Costa Rica's territorial sovereignty. Nicaragua is responsible for these breaches and consequently incurs the obligation to make reparation for the damage caused by its unlawful activities (see Section E).

94. Costa Rica submits that "by occupying and claiming Costa Rican territory" Nicaragua also committed other breaches of its obligations.

95. Costa Rica's final submission 2 (b) (iv) asks the Court to adjudge and declare that Nicaragua breached its obligation "not to use the San

Juan River to carry out hostile acts” under Article IX of the 1858 Treaty. This provision reads as follows:

“Under no circumstances, and even in [the] case that the Republics of Costa Rica and Nicaragua should unhappily find themselves in a state of war, neither of them shall be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or in the San Juan River, or the Lake of Nicaragua.” [In the Spanish original: “*Por ningún motivo, ni en caso y estado de guerra, en que por desgracia llegasen á encontrarse las Repúblicas de Nicaragua y Costa Rica, les será permitido ejercer ningún acto de hostilidad entre ellas en el puerto de San Juan del Norte, ni en el río de este nombre y Lago de Nicaragua.*”]

No evidence of hostilities in the San Juan River has been provided. Therefore the submission concerning the breach of Nicaragua’s obligations under Article IX of the Treaty must be rejected.

96. In its final submission 2 (b) (ii), Costa Rica asks the Court to find a breach by Nicaragua of “the prohibition of the threat or use of force under Article 2 (4) of the Charter of the United Nations and Article 22 of the Charter of the Organization of American States”.

97. The relevant conduct of Nicaragua has already been addressed in the context of the Court’s examination of the violation of Costa Rica’s territorial sovereignty. The fact that Nicaragua considered that its activities were taking place on its own territory does not exclude the possibility of characterizing them as an unlawful use of force. This raises the issue of their compatibility with both the United Nations Charter and the Charter of the Organization of American States. However, in the circumstances, given that the unlawful character of these activities has already been established, the Court need not dwell any further on this submission. As in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, the Court finds that, “by the very fact of the present Judgment and of the evacuation” of the disputed territory, the injury suffered by Costa Rica “will in all events have been sufficiently addressed” (*Judgment, I.C.J. Reports 2002*, p. 452, para. 319).

98. In its final submission 2 (b) (iii), Costa Rica requests the Court to find that Nicaragua made the territory of Costa Rica “the object, even temporarily, of military occupation, contrary to Article 21 of the Charter of the Organization of American States”. The first sentence of this provision stipulates: “The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever.”

In order to substantiate this claim, Costa Rica refers to the presence of military personnel of Nicaragua in the disputed territory.

99. The Court has already established that the presence of military personnel of Nicaragua in the disputed territory was unlawful because it violated Costa Rica's territorial sovereignty. The Court does not need to ascertain whether this conduct of Nicaragua constitutes a military occupation in breach of Article 21 of the Charter of the Organization of American States.

B. Alleged Violations of International Environmental Law

100. The Court will now turn to Costa Rica's allegations concerning violations by Nicaragua of its obligations under international environmental law in connection with its dredging activities to improve the navigability of the Lower San Juan River. Costa Rica's environmental claims can be grouped into two broad categories. First, according to Costa Rica, Nicaragua breached the procedural obligations to carry out an appropriate transboundary environmental impact assessment of its dredging works, and to notify, and consult with, Costa Rica regarding those works. Secondly, Costa Rica alleges that Nicaragua breached the substantive environmental obligation not to cause harm to Costa Rica's territory. The Court will consider Costa Rica's allegations in turn.

1. Procedural obligations

(a) The alleged breach of the obligation to carry out an environmental impact assessment

101. The Parties broadly agree on the existence in general international law of an obligation to conduct an environmental impact assessment concerning activities carried out within a State's jurisdiction that risk causing significant harm to other States, particularly in areas or regions of shared environmental conditions.

102. Costa Rica claims that Nicaragua has not complied with that obligation, and must do so in advance of any further dredging. It submits in particular that the analysis carried out in the Environmental Impact Study undertaken by Nicaragua in 2006 does not support the conclusion that the dredging project would cause no harm to the flow of the Colorado River. Moreover, according to Costa Rica, the Environmental Impact Study did not assess the impact of the dredging programme on the wetlands. Costa Rica maintains that the artificial changes to the morphology of the river resulting from Nicaragua's dredging activities risked causing an adverse impact on those wetlands. Costa Rica also argues that a document entitled "Report: Ramsar Advisory Mission No. 72", prepared in April 2011, confirms the existence of a risk of transboundary

harm, shows that Nicaragua's study did not contain an assessment of that risk, and concludes that such an assessment should have been undertaken prior to the implementation of the dredging programme.

103. Nicaragua contends for its part that its 2006 Environmental Impact Study and the related documentation fully addressed the potential transboundary impact of its dredging programme, including its effects on the environment of Costa Rica and the possible reduction in flow of the Colorado River. It points out that this study concluded that the programme posed no risk of significant transboundary harm and would actually have beneficial effects for the San Juan River and the surrounding area. As to the document entitled "Report: Ramsar Advisory Mission No. 72", Nicaragua argues that it was only a draft report, on which Nicaragua commented in a timely manner, but which the Ramsar Secretariat never finalized; accordingly, it should be given no weight. Furthermore, Nicaragua explains that the report's conclusion that there had been no analysis of the impact of the dredging programme on the hydrology of the area was incorrect, as Nicaragua pointed out in the comments it submitted to the Ramsar Secretariat.

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104. As the Court has had occasion to emphasize in its Judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*:

"the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom v. Albania)*, *Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." (*Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101.)

Furthermore, the Court concluded in that case that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource" (*ibid.*, p. 83, para. 204). Although the Court's statement in the *Pulp Mills* case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context. Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of

another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.

Determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case. As the Court held in the *Pulp Mills* case:

“it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment” (*I.C.J. Reports 2010 (I)*, p. 83, para. 205).

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

105. The Court notes that the risk to the wetlands alleged by Costa Rica refers to Nicaragua’s dredging activities as a whole, including the dredging of the 2010 *caño*. The Court recalls that the dredging activities carried out in breach of Costa Rica’s territorial sovereignty have been considered previously. Accordingly, the Court will confine its analysis to ascertaining whether Nicaragua’s dredging activities in the Lower San Juan carried a risk of significant transboundary harm. The principal risk cited by Costa Rica was the potential adverse impact of those dredging activities on the flow of the Colorado River, which could also adversely affect Costa Rica’s wetland. In 2006, Nicaragua conducted a study of the impact that the dredging programme would have on its own environment, which also stated that the programme would not have a significant impact on the flow of the Colorado River. This conclusion was later confirmed by both Parties’ experts. Having examined the evidence in the case file, including the reports submitted and testimony given by experts called by both Parties, the Court finds that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica’s wetland. In light of the absence of risk of significant transboundary harm, Nicaragua was not required to carry out an environmental impact assessment.

(b) *The alleged breach of an obligation to notify and consult*

106. The Parties concur on the existence in general international law of an obligation to notify, and consult with, the potentially affected State in

respect of activities which carry a risk of significant transboundary harm. Costa Rica contends that, in addition to its obligations under general international law, Nicaragua was under a duty to notify and consult with it as a result of treaty obligations binding on the Parties. First, it asserts that Article 3, paragraph 2, and Article 5 of the Ramsar Convention provide for a duty to notify and consult. Secondly, it submits that Articles 13 (*g*) and 33 of the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America establish an obligation to share information related to activities which may be particularly damaging to biological resources.

107. While not contesting the existence of an obligation to notify and consult under general international law, Nicaragua asserts that in the present case such obligation is limited by the 1858 Treaty, as interpreted by the Cleveland Award, which constitutes the *lex specialis* with respect to procedural obligations. For Nicaragua, since the 1858 Treaty contains no duty to notify or consult with respect to dredging or any other “works of improvement”, any such duty in customary or treaty law does not apply to the facts of the case. In any event, Nicaragua asserts that a duty to notify and consult would not be triggered because both countries’ studies have shown that Nicaragua’s dredging programme posed no likelihood of significant transboundary harm. Nicaragua further argues that neither Article 3, paragraph 2, nor Article 5 of the Ramsar Convention is applicable to the facts of the case. With respect to the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America, Nicaragua asserts that it does not set out an obligation to share information relating to activities which may be particularly damaging to biological resources; at most it encourages States to do so.

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108. The Court observes that the fact that the 1858 Treaty may contain limited obligations concerning notification or consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law. In any event, the Court finds that, since Nicaragua was not under an international obligation to carry out an environmental impact assessment in light of the absence of risk of significant transboundary harm (see paragraph 105 above), it was not required to notify, or consult with, Costa Rica.

109. As to the alleged existence of an obligation to notify and consult in treaties binding on the Parties, the Court observes that both Costa Rica

and Nicaragua are parties to the Ramsar Convention and the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America. The Court recalls that Article 3, paragraph 2, of the Ramsar Convention provides that:

“Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List [of wetlands of international importance] has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the [Ramsar Secretariat].”

While this provision contains an obligation to notify, that obligation is limited to notifying the Ramsar Secretariat of changes or likely changes in the “ecological character of any wetland” in the territory of the notifying State. In the present case, the evidence before the Court does not indicate that Nicaragua’s dredging programme has brought about any changes in the ecological character of the wetland, or that it was likely to do so unless it were to be expanded. Thus the Court finds that no obligation to inform the Ramsar Secretariat arose for Nicaragua.

110. The Court further recalls that Article 5 of the Ramsar Convention provides that:

“The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to co-ordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna.”

While this provision contains a general obligation to consult “about implementing obligations arising from the Convention”, it does not create an obligation on Nicaragua to consult with Costa Rica concerning a particular project that it is undertaking, in this case the dredging of the Lower San Juan River. In light of the above, Nicaragua was not required under the Ramsar Convention to notify, or consult with, Costa Rica prior to commencing its dredging project.

111. As to the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America, the Court sees no need to take its enquiry further, as neither of the two provi-

sions invoked by Costa Rica contains a binding obligation to notify or consult.

(c) *Conclusion*

112. In light of the above, the Court concludes that it has not been established that Nicaragua breached any procedural obligations owed to Costa Rica under treaties or the customary international law of the environment. The Court takes note of Nicaragua's commitment, made in the course of the oral proceedings, to carry out a new Environmental Impact Study before any substantial expansion of its current dredging programme. The Court further notes that Nicaragua stated that such a study would include an assessment of the risk of transboundary harm, and that it would notify, and consult with, Costa Rica as part of that process.

2. *Substantive obligations concerning transboundary harm*

113. The Court has already found that Nicaragua is responsible for the harm caused by its activities in breach of Costa Rica's territorial sovereignty. What remains to be examined is whether Nicaragua is responsible for any transboundary harm allegedly caused by its dredging activities which have taken place in areas under Nicaragua's territorial sovereignty, in the Lower San Juan River and on its left bank.

114. Costa Rica submits that Nicaragua has breached "the obligation not to dredge, divert or alter the course of the San Juan River, or conduct any other works on the San Juan River, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights under the 1888 Cleveland Award" (final submissions, para. 2 (c) (v)). According to Costa Rica, the dredging programme executed by Nicaragua in the Lower San Juan River was in breach of Nicaragua's obligations under customary international law and caused harm to Costa Rican lands on the right bank of the river and to the Colorado River.

115. Nicaragua contends that the dredging programme has not caused any harm to Costa Rican territory including the Colorado River. It argues that the execution of the dredging programme has been beneficial to the dredged section of the Lower San Juan River and to the wetlands of international importance lying downstream. Moreover, Nicaragua maintains that, under a special rule stated in the Cleveland Award and applying to the San Juan River, even if damage to Costa Rica's territory resulted from the works to maintain and improve the river, the dredging activities would not be unlawful.

116. Both Parties referred to the passage in the Cleveland Award which reads as follows:

“The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.” (*RIAA*, Vol. XXVIII, p. 210, para. 3 (6); emphasis in the original.)

Both Parties also referred to the following passage in the same Award:

“The Republic of Costa Rica can deny to the Republic of Nicaragua the right of deviating the waters of the River San Juan in case such deviation will result in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same.” (*Ibid.*, para. 3 (9).)

117. According to Nicaragua, the statements in the Cleveland Award quoted above should be understood as implying that Nicaragua is free to undertake any dredging activity, possibly even if it is harmful to Costa Rica. On the other hand, according to Costa Rica, Nicaragua would be under an obligation to pay compensation for any harm caused to Costa Rica, whether the harm was significant or not and whether Nicaragua was or was not diligent in ensuring that the environment of Costa Rica would not be affected; damage caused by “unforeseeable or uncontrollable events” related to dredging activities would also have to be compensated by Nicaragua. Costa Rica also argued that “all of Nicaragua’s rights and obligations under the 1858 Treaty and the 1888 Award must be interpreted in the light of principles for the protection of the environment in force today” and that the Treaty and the Award do not “override the application of environmental obligations under general principles of law and under international treaties” requiring States not to cause significant transboundary harm.

118. As the Court restated in the *Pulp Mills* case, under customary international law, “[a] State is . . . obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State” (*I.C.J. Reports 2010 (I)*, p. 56, para. 101; see also

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), pp. 241-242, para. 29).

In any event, it would be necessary for the Court to address the question of the relationship between the 1858 Treaty as interpreted by the Cleveland Award and the current rule of customary international law with regard to transboundary harm only if Costa Rica were to prove that the dredging programme in the Lower San Juan River produced harm to Costa Rica's territory.

119. Costa Rica has not provided any convincing evidence that sediments dredged from the river were deposited on its right bank. Costa Rica has also not proved that the dredging programme caused harm to its wetland (see paragraph 109 above). With regard to Costa Rica's contention that "the dredging programme has had a significant effect upon the Colorado River", it has already been noted that the Parties agree that at the so-called "Delta Colorado" the Colorado River receives about 90 per cent of the waters flowing through the San Juan River (see paragraph 56 above). Nicaragua estimates that the diversion of water from the Colorado River due to the dredging of the Lower San Juan River affected less than 2 per cent of the waters flowing into the Colorado River. No higher figure has been suggested by Costa Rica. Its main expert observed that "there is no evidence that the dredging programme has significantly affected flows in the Río Colorado". Costa Rica did adduce evidence indicating a significant reduction in flow of the Colorado River between January 2011 and October 2014. However, the Court considers that a causal link between this reduction and Nicaragua's dredging programme has not been established. As Costa Rica admits, other factors may be relevant to the decrease in flow, most notably the relatively small amount of rainfall in the relevant period. In any event, the diversion of water due to the dredging of the Lower San Juan River is far from seriously impairing navigation on the Colorado River, as envisaged in paragraph 3 (9) of the Cleveland Award, or otherwise causing harm to Costa Rica.

120. The Court therefore concludes that the available evidence does not show that Nicaragua breached its obligations by engaging in dredging activities in the Lower San Juan River.

C. Compliance with Provisional Measures

121. In its final submissions Costa Rica contends that Nicaragua has also breached its "obligations arising from the Orders of the Court indicating provisional measures of 8 March 2011 and 22 November 2013" (para. 2 (c) (vi)).

122. Nicaragua, for its part, raised certain issues about Costa Rica's compliance with some of the provisional measures adopted by the Court, but did not request the Court to make a finding on this matter.

123. In its Order on provisional measures of 8 March 2011 the Court indicated that “[e]ach Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security”; the Court also required each Party to “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve” (*I.C.J. Reports 2011 (I)*, p. 27, para. 86).

124. Costa Rica argued that the presence in the disputed territory of large groups of Nicaraguan civilians who were members of an environmental movement constituted a breach of the 2011 Order. Nicaragua denied this. In its Order of 16 July 2013, the Court specified that “the presence of organized groups of Nicaraguan nationals in the disputed area carried[d] the risk of incidents which might aggravate the . . . dispute” (*I.C.J. Reports 2013*, p. 240, para. 37).

125. Costa Rica maintained and Nicaragua later acknowledged that the excavation of the second and third *caños* took place after the 2011 Order had been adopted, that this activity was attributable to Nicaragua and that moreover a military encampment had been installed on the disputed territory as defined by the Court. In the oral hearings Nicaragua also acknowledged that the excavation of the second and third *caños* represented an infringement of its obligations under the 2011 Order.

126. The Court already ascertained these facts in its Order of 22 November 2013 (*ibid.*, pp. 364-365, paras. 45-46). However, that statement was only instrumental in ensuring the protection of the rights of the Parties during the judicial proceedings. The judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures. Thus, contrary to what was argued by Nicaragua, a statement of the existence of a breach to be included in the present Judgment cannot be viewed as “redundant”. Nor can it be said that any responsibility for the breach has ceased: what may have ceased is the breach, not the responsibility arising from the breach.

127. On the basis of the facts that have become uncontested, the Court accordingly finds that Nicaragua breached its obligations under the Order of 8 March 2011 by excavating two *caños* and establishing a military presence in the disputed territory.

128. The Court’s Order of 22 November 2013 required the following measures from Nicaragua: to “refrain from any dredging and other activities in the disputed territory”; to “fill the trench on the beach north of the eastern *caño*”; to “cause the removal from the disputed territory of any personnel, whether civilian, police or security”; to “prevent any such personnel from entering the disputed territory”; and to “cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control” (*ibid.*, p. 369, para. 59). No allegations of subsequent breaches of any of these obligations were made by Costa Rica, which only maintained that some of Nicaragua’s activities after this Order were in breach of its obligation not to aggravate

the dispute, which had been stated in the 2011 Order. The Court does not find that a breach of this obligation has been demonstrated on the basis of the available evidence.

129. The Court thus concludes that Nicaragua acted in breach of its obligations under the 2011 Order by excavating the second and third *caños* and by establishing a military presence in the disputed territory. The Court observes that this finding is independent of the conclusion set out above (see Section A) that the same conduct also constitutes a violation of the territorial sovereignty of Costa Rica.

D. Rights of Navigation

130. In its final submissions Costa Rica also claims that Nicaragua has breached “Costa Rica’s perpetual rights of free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the 1888 Cleveland Award and the Court’s Judgment of 13 July 2009” (final submissions, para. 2 (c) (ii)).

131. Nicaragua contests the admissibility of this submission, which it considers not covered by the Application and as having an object unconnected with that of the “main dispute”. Costa Rica points out that it had already requested in its Application (para. 41 (f)) that the Court adjudge and declare that, “by its conduct, Nicaragua has breached . . . the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals”.

132. The Court observes that, although Costa Rica’s submission could have been understood as related to the “dredging and canalization activities being carried out by Nicaragua on the San Juan River”, to which the same paragraph of the Application also referred, the wording of the submission quoted above did not contain any restriction to that effect. The Court considers that Costa Rica’s final submission concerning rights of navigation is admissible.

133. Article VI of the 1858 Treaty provides that:

“The Republic of Nicaragua shall have exclusive *dominium* and *imperium* over the waters of the San Juan River from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo, [*con objetos de comercio*], whether with Nicaragua or with the interior of Costa Rica by the rivers San Carlos or Sarapiquí or any other waterway starting from the section of the bank of the San Juan established as belonging to that Republic. The vessels of both countries may land indiscriminately on either bank of the section of the river where navigation is common, without paying any taxes, unless agreed by both Governments.” (Translation from the Spanish original as reproduced in *Dispute regarding Naviga-*

tional and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 236, para. 44: “La República de Nicaragua tendrá exclusivamente el dominio y sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico; pero la República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica, por los ríos de San Carlos ó Sarapiquí, ó cualquiera otra vía procedente de la parte que en la ribera del San Juan se establece corresponder á esta República. Las embarcaciones de uno ú otro país podrán indistintamente atracar en las riberas del río en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, á no ser que se establezcan de acuerdo entre ambos Gobiernos.”)

The Cleveland Award contains some references to Costa Rica’s rights of navigation that were quoted above (see paragraph 116). In its Judgment in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the Court noted that:

“two types of private navigation are certainly covered by the right of free navigation pursuant to Article VI of the 1858 Treaty: the navigation of vessels carrying goods intended for commercial transactions; and that of vessels carrying passengers who pay a price other than a token price (or for whom a price is paid) in exchange for the service thus provided” (*I.C.J. Reports 2009, p. 245, para. 73*).

While the express language of Article VI of the 1858 Treaty only considered navigation for purposes of commerce, the Court also observed that:

“it cannot have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area” (*ibid.*, p. 246, para. 79).

In the operative part of the same Judgment, the Court found 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” (*ibid.*, p. 270, para. 156 (1) (f)).

134. Costa Rica includes among the alleged breaches of its rights of navigation the enactment by Nicaragua of Decree No. 079-2009 of 1 October 2009, concerning navigation on the San Juan River. The interpretation of this decree is controversial between the Parties: Costa Rica

considers that the decree is of general application, whereas Nicaragua contends that it applies only to tourist boats. While it is clear that the decree should be consistent with Article VI of the 1858 Treaty as interpreted by the Court, the Court observes that none of the instances of interference with Costa Rica's rights of navigation specifically alleged by Costa Rica relates to the application of Decree No. 079-2009. The Court is therefore not called upon to examine this decree.

135. Costa Rica alleges that breaches of its rights of navigation occurred in five instances. Nicaragua emphasizes the small number of alleged breaches, but does not contest two of those incidents. In the first one, in February 2013, a riparian farmer and his uncle were detained for several hours at a Nicaraguan army post and subjected to humiliating treatment. This incident is set out in an affidavit. In the second incident, in June 2014, a Costa Rican property owner and some members of a local agricultural co-operative were prevented by Nicaraguan agents from navigating the San Juan River. This is supported by five affidavits.

136. The Court finds that Nicaragua did not provide a convincing justification with regard to Article VI of the 1858 Treaty for the conduct of its authorities in these two incidents concerning navigation by inhabitants of the Costa Rican bank of the San Juan River. The Court concludes that the two incidents show that Nicaragua breached Costa Rica's rights of navigation on the San Juan River pursuant to the 1858 Treaty. Given this finding, it is unnecessary for the Court to examine the other incidents invoked by Costa Rica.

E. Reparation

137. Costa Rica requests the Court to order Nicaragua to “repeal, by means of its own choosing, those provisions of the Decree No. 079-2009 and the Regulatory Norms annexed thereto of 1 October 2009 which are contrary to Costa Rica's right of free navigation under Article VI of the 1858 Treaty of Limits, the 1888 Cleveland Award, and the Court's Judgment of 13 July 2009” and to cease all dredging activities in the San Juan River pending the fulfilment of certain conditions (final submissions, para. 3 (a) and (b)).

Costa Rica moreover asks the Court to order Nicaragua to:

“make reparation in the form of compensation for the material damage caused to Costa Rica, including but not limited to: (i) damage arising from the construction of artificial *caños* and destruction of trees and vegetation on the ‘disputed territory’; (ii) the cost of the remediation measures carried out by Costa Rica in relation to those damages . . . ; the amount of such compensation to be determined in a separate phase of these proceedings” (*ibid.*, para. 3 (c)).

The Court is further requested to order Nicaragua to “provide satisfaction so [as] to achieve full reparation of the injuries caused to Costa Rica in a manner to be determined by the Court” (final submissions, para. 3 (d)) and to “provide appropriate assurances and guarantees of non-repetition of Nicaragua’s unlawful conduct, in such a form as the Court may order” (*ibid.*, para. 3 (e)). Costa Rica finally requests an award of costs that will be considered later in the present section.

138. In view of the conclusions reached by the Court in Sections B and D above, the requests made by Costa Rica in its final submissions under paragraph 3 (a) and (b), concerning the repeal of the Decree No. 079-2009 on navigation and the cessation of dredging activities respectively, cannot be granted.

139. The declaration by the Court that Nicaragua breached the territorial sovereignty of Costa Rica by excavating three *caños* and establishing a military presence in the disputed territory provides adequate satisfaction for the non-material injury suffered on this account. The same applies to the declaration of the breach of the obligations under the Court’s Order of 8 March 2011 on provisional measures. Finally, the declaration of the breach of Costa Rica’s rights of navigation in the terms determined above in Section D provides adequate satisfaction for that breach.

140. The request for “appropriate assurances and guarantees of non-repetition” was originally based on Nicaragua’s alleged “bad faith” in the dredging of the 2010 *caño* and later on Nicaragua’s infringement of its obligations under the 2011 Order.

141. As the Court noted in the *Navigational and Related Rights* case, “there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed” and therefore assurances and guarantees of non-repetition will be ordered only “in special circumstances” (*I.C.J. Reports 2009*, p. 267, para. 150). While Nicaragua failed to comply with the obligations under the 2011 Order, it is necessary also to take into account the fact that Nicaragua later complied with the requirements, stated in the Order of 22 November 2013, to “refrain from any dredging and other activities in the disputed territory” and to “cause the removal from the disputed territory of any personnel, whether civilian, police or security” (*I.C.J. Reports 2013*, p. 369, para. 59). It is to be expected that Nicaragua will have the same attitude with regard to the legal situation resulting from the present Judgment, in particular in view of the fact that the question of territorial sovereignty over the disputed territory has now been resolved.

142. Costa Rica is entitled to receive compensation for the material damage caused by those breaches of obligations by Nicaragua that have

been ascertained by the Court. The relevant material damage and the amount of compensation may be assessed by the Court only in separate proceedings. The Court is of the opinion that the Parties should engage in negotiation in order to reach an agreement on these issues. However, if they fail to reach such an agreement within 12 months of the date of the present Judgment, the Court will, at the request of either Party, determine the amount of compensation on the basis of further written pleadings limited to this issue.

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143. Costa Rica also requests the Court to order Nicaragua to :

“pay all of the costs and expenses incurred by Costa Rica in requesting and obtaining the Order on provisional measures of 22 November 2013, including, but not limited to, the fees and expenses of Costa Rica’s counsel and experts, with interest, on a full indemnity basis” (final submissions, para. 3 (*f*)).

The special reason for this request is that the proceedings which led to the Order of 22 November 2013 were allegedly due to the infringements by Nicaragua of its obligations under the Order of 8 March 2011.

144. According to Article 64 of the Statute, “[u]nless otherwise decided by the Court, each party shall bear its own costs”. This Article provides that as a rule, costs are not awarded to any of the parties, but gives the Court the power to order that one of them will pay some or all of the costs. While the breach by Nicaragua of its obligations under the 2011 Order necessitated Costa Rica engaging in new proceedings on provisional measures, the Court finds that, taking into account the overall circumstances of the case, an award of costs to Costa Rica, as the latter requested, would not be appropriate.

IV. ISSUES IN THE *NICARAGUA V. COSTA RICA* CASE

145. The Application filed by Nicaragua on 22 December 2011 (see paragraph 9 above) concerns the alleged breach by Costa Rica of both procedural and substantive obligations in connection with the construction of the road along the San Juan River. The Court will start by considering the alleged breach of procedural obligations; then it will address the alleged breach of substantive obligations.

*A. The Alleged Breach of Procedural Obligations**1. The alleged breach of the obligation to carry out an environmental impact assessment*

146. According to Nicaragua, Costa Rica breached its obligation under general international law to assess the environmental impact of the construction of the road before commencing it, particularly in view of the road's length and location.

147. Costa Rica denies the allegation. It argues that the construction of the road did not create a risk of significant transboundary harm through the discharge of harmful substances into the San Juan River or otherwise into Nicaraguan territory, and that there was no risk that the river would be materially affected by the relatively insignificant quantities of sediment coming from the road.

148. Costa Rica also maintains that it was exempted from the requirement to prepare an environmental impact assessment because of the state of emergency created by Nicaragua's occupation of Isla Portillos (see paragraphs 63-64 above). First, Costa Rica argues that an emergency can exempt a State from the requirement to conduct an environmental impact assessment, either because international law contains a *renvoi* to domestic law on this point, or because it includes an exemption for emergency situations. Secondly, Costa Rica submits that the construction of the road was an appropriate response to the emergency situation because it would facilitate access to the police posts and remote communities located along the right bank of the San Juan River, particularly in light of the real risk of a military confrontation with Nicaragua, which would require Costa Rica to evacuate the area. Thus, Costa Rica claims that it could proceed with its construction works without an environmental impact assessment.

149. In any event, Costa Rica maintains that, even if it was required under international law to conduct an environmental impact assessment in this case, it fulfilled the obligation by carrying out a number of environmental impact studies, including an "Environmental Diagnostic Assessment" in 2013.

150. In reply, Nicaragua argues that there was no *bona fide* emergency. It states that the road is not located near the disputed territory, as defined by the Court's Order of 8 March 2011, and that the emergency was declared several months after the beginning of the construction works. Nicaragua further argues that there is no emergency exemption from the international obligation to carry out an environmental impact assessment. It points out that Costa Rica improperly seeks to rely on a declaration of emergency made under its domestic law to justify its failure to perform its international law obligations.

151. Finally, Nicaragua points out that the environmental impact studies produced by Costa Rica after the bulk of the construction work

had been completed do not constitute an adequate environmental impact assessment. As a consequence, it asks the Court to declare that Costa Rica should not undertake any future development in the area without an appropriate environmental impact assessment.

152. Following the lines of argument put forward by the Parties, the Court will first examine whether Costa Rica was under an obligation to carry out an environmental impact assessment under general international law. If so, the Court will assess whether it was exempted from the said obligation or whether it complied with that obligation by carrying out the Environmental Diagnostic Assessment and other studies.

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153. The Court recalls (see paragraph 104 above) that a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity. Accordingly, in the present case, it fell on Costa Rica, not on Nicaragua, to assess the existence of a risk of significant transboundary harm prior to the construction of the road, on the basis of an objective evaluation of all the relevant circumstances.

154. In the oral proceedings, counsel for Costa Rica stated that a preliminary assessment of the risk posed by the road project was undertaken when the decision to build the road was made. According to Costa Rica, this assessment took into account the nature of the project and its likely impact on the river, and concluded that the road posed no risk of significant harm. In support of this claim, Costa Rica emphasized the modest scale of the works, that the road was clearly not a highway, that some of it was constructed on pre-existing tracks, and that the only possible risk was the contribution of sediment by the road to a river that already carried a heavy sediment load.

The Court observes that to conduct a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm. However, Costa Rica has not adduced any evidence that it actually carried out such a preliminary assessment.

155. In evaluating whether, as of the end of 2010, the construction of the road posed a risk of significant transboundary harm, the Court will have regard to the nature and magnitude of the project and the context in which it was to be carried out.

First, the Court notes that, contrary to Costa Rica's submission, the scale of the road project was substantial. The road, which is nearly 160 km long, runs along the river for 108.2 km (see sketch-map

No. 2 above). Approximately half of that stretch is completely new construction.

Secondly, the Court notes that, because of the planned location of the road along the San Juan River, any harm caused by the road to the surrounding environment could easily affect the river, and therefore Nicaragua's territory. The evidence before the Court shows that approximately half of the stretch of road following the San Juan River is situated within 100 metres of the river bank; for nearly 18 km it is located within 50 metres of the river; and in some stretches it comes within 5 metres of the right bank of the river. The location of the road in such close proximity to the river and the fact that it would often be built on slopes, risked increasing the discharge of sediment into the river. Another relevant factor in assessing the likelihood of sedimentation due to erosion from the road is that almost a quarter of the road was to be built in areas that were previously forested. The possibility of natural disasters in the area caused by adverse events such as hurricanes, tropical storms and earthquakes, which would increase the risk of sediment erosion, must equally be taken into consideration.

Thirdly, the geographic conditions of the river basin where the road was to be situated must be taken into account. The road would pass through a wetland of international importance in Costa Rican territory and be located in close proximity to another protected wetland — the *Refugio de Vida Silvestre Río San Juan* — situated in Nicaraguan territory. The presence of Ramsar protected sites heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive. The principal harm that could arise was the possible large deposition of sediment from the road, with resulting risks to the ecology and water quality of the river, as well as morphological changes.

156. In conclusion, the Court finds that the construction of the road by Costa Rica carried a risk of significant transboundary harm. Therefore, the threshold for triggering the obligation to evaluate the environmental impact of the road project was met.

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157. The Court now turns to the question of whether Costa Rica was exempted from its obligation to evaluate the environmental impact of the road project because of an emergency. First, the Court recalls its holding that “it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case”, having regard to various factors (see paragraph 104 above, quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010 (I)*, p. 83, para. 205). The Court observes that this reference to domestic law does not relate to the question of whether an environmental impact assessment should be undertaken. Thus, the fact that there may be an

emergency exemption under Costa Rican law does not affect Costa Rica's obligation under international law to carry out an environmental impact assessment.

158. Secondly, independently of the question whether or not an emergency could exempt a State from its obligation under international law to carry out an environmental impact assessment, or defer the execution of this obligation until the emergency has ceased, the Court considers that, in the circumstances of this case, Costa Rica has not shown the existence of an emergency that justified constructing the road without undertaking an environmental impact assessment. In fact, completion of the project was going to take, and is indeed taking, several years. In addition, when Costa Rica embarked upon the construction of the road, the situation in the disputed territory was before the Court, which shortly thereafter issued provisional measures. Although Costa Rica maintains that the construction of the road was meant to facilitate the evacuation of the area of Costa Rican territory adjoining the San Juan River, the Court notes that the road provides access to only part of that area and thus could constitute a response to the alleged emergency only to a limited extent. Moreover, Costa Rica has not shown an imminent threat of military confrontation in the regions crossed by the road. Finally, the Court notes that the Executive Decree proclaiming an emergency was issued by Costa Rica on 21 February 2011, after the works on the road had begun.

159. Having thus concluded that, in the circumstances of this case, there was no emergency justifying the immediate construction of the road, the Court does not need to decide whether there is an emergency exemption from the obligation to carry out an environmental impact assessment in cases where there is a risk of significant transboundary harm.

It follows that Costa Rica was under an obligation to conduct an environmental impact assessment prior to commencement of the construction works.

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160. Turning now to the question of whether Costa Rica complied with its obligation to carry out an environmental impact assessment, the Court notes that Costa Rica produced several studies, including an Environmental Management Plan for the road in April 2012, an Environmental Diagnostic Assessment in November 2013, and a follow-up study thereto in January 2015. These studies assessed the adverse effects that had already been caused by the construction of the road on the environment and suggested steps to prevent or reduce them.

161. In its Judgment in the *Pulp Mills* case, the Court held that the obligation to carry out an environmental impact assessment is a continuous one, and that monitoring of the project's effects on the environment

shall be undertaken, where necessary, throughout the life of the project (*I.C.J. Reports 2010 (I)*, pp. 83-84, para. 205). Nevertheless, the obligation to conduct an environmental impact assessment requires an *ex ante* evaluation of the risk of significant transboundary harm, and thus “an environmental impact assessment must be conducted prior to the implementation of a project” (*ibid.*, p. 83, para. 205). In the present case, Costa Rica was under an obligation to carry out such an assessment prior to commencing the construction of the road, to ensure that the design and execution of the project would minimize the risk of significant transboundary harm. In contrast, Costa Rica’s Environmental Diagnostic Assessment and its other studies were *post hoc* assessments of the environmental impact of the stretches of the road that had already been built. These studies did not evaluate the risk of future harm. The Court notes moreover that the Environmental Diagnostic Assessment was carried out approximately three years into the road’s construction.

162. For the foregoing reasons, the Court concludes that Costa Rica has not complied with its obligation under general international law to carry out an environmental impact assessment concerning the construction of the road.

2. *The alleged breach of Article 14 of the Convention on Biological Diversity*

163. Nicaragua submits that Costa Rica was required to carry out an environmental impact assessment by Article 14 of the Convention on Biological Diversity. Costa Rica responds that the provision at issue concerns the introduction of appropriate procedures with respect to projects that are likely to have a significant adverse effect on biological diversity. It claims that it had such procedures in place and that, in any event, they do not apply to the construction of the road, as it was not likely to have a significant adverse effect on biological diversity.

164. The Court recalls that the provision reads, in relevant part:

“Each Contracting Party, as far as possible and as appropriate, shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.”

The Court considers that the provision at issue does not create an obligation to carry out an environmental impact assessment before undertaking an activity that may have significant adverse effects on biological diversity. Therefore, it has not been established that Costa Rica breached Article 14 of the Convention on Biological Diversity by failing to conduct an environmental impact assessment for its road project.

3. *The alleged breach of an obligation to notify and consult*

165. Nicaragua contends that Costa Rica breached its obligation to notify, and consult with, Nicaragua in relation to the construction works. Nicaragua founds the existence of such obligation on three grounds, namely, customary international law, the 1858 Treaty, and the Ramsar Convention. The Court will examine each of Nicaragua's arguments in turn.

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166. In Nicaragua's view, Costa Rica should have notified it of the road project and should have consulted with it, as Costa Rica had every reason to believe that the construction of the road risked causing significant transboundary harm. According to Nicaragua, the alleged emergency did not exempt Costa Rica from this obligation.

167. For Costa Rica, the relevant threshold of "risk of significant adverse impact" was not met in this case. Moreover, Costa Rica claims to have invited Nicaragua to engage in consultations, but Nicaragua did not do so. In any event, according to Costa Rica, Nicaragua is prevented from relying on the obligation to notify since it has itself created the emergency to which Costa Rica had to respond by constructing the road.

168. The Court reiterates its conclusion that, if the environmental impact assessment confirms that there is a risk of significant transboundary harm, a State planning an activity that carries such a risk is required, in order to fulfil its obligation to exercise due diligence in preventing significant transboundary harm, to notify, and consult with, the potentially affected State in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk (see paragraph 104 above). However, the duty to notify and consult does not call for examination by the Court in the present case, since the Court has established that Costa Rica has not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road.

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169. Nicaragua further asserts the existence of an obligation to notify under the 1858 Treaty. In its 2009 Judgment in the *Navigational Rights* case, the Court held that Nicaragua has an obligation to notify Costa Rica of its regulations concerning navigation on the river. According to Nicaragua, since the construction of the road affects Nicaragua's navigational rights, the same reasoning applies *a fortiori* in this case.

170. For Costa Rica, Nicaragua's reference to the 1858 Treaty is misplaced, since the Treaty does not impose on Costa Rica an obligation to

notify Nicaragua if Costa Rica undertakes infrastructure works on its own territory.

171. The Court recalls its finding in the 2009 Judgment that Nicaragua's obligation to notify Costa Rica under the 1858 Treaty arises, amongst other factors, by virtue of Costa Rica's rights of navigation on the river, which is part of Nicaragua's territory (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, pp. 251-252, paras. 94-97). In contrast, the 1858 Treaty does not grant Nicaragua any rights on Costa Rica's territory, where the road is located. Therefore, no obligation to notify Nicaragua with respect to measures undertaken on Costa Rica's territory arises. The Court concludes that the 1858 Treaty did not impose on Costa Rica an obligation to notify Nicaragua of the construction of the road.

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172. Lastly, Nicaragua relies on Article 3, paragraph 2, and on Article 5 of the Ramsar Convention (see paragraphs 109-110 above) as imposing an obligation of notification and consultation upon the Contracting Parties. In the Court's view, Nicaragua has not shown that, by constructing the road, Costa Rica has changed or was likely to change the ecological character of the wetland situated in its territory. Moreover, contrary to Nicaragua's contention, on 28 February 2012 Costa Rica notified the Ramsar Secretariat about the stretch of the road that passes through the *Humedal Caribe Noreste*. Therefore, the Court concludes that Nicaragua has not shown that Costa Rica breached Article 3, paragraph 2, of the Ramsar Convention. As regards Article 5 of the Ramsar Convention, the Court finds that this provision creates no obligation for Costa Rica to consult with Nicaragua concerning a particular project it is undertaking, in this case the construction of the road (see also paragraph 110 above).

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173. In conclusion, the Court finds that Costa Rica failed to comply with its obligation to evaluate the environmental impact of the construction of the road. Costa Rica remains under an obligation to prepare an appropriate environmental impact assessment for any further works on the road or in the area adjoining the San Juan River, should they carry a risk of significant transboundary harm. Costa Rica accepts that it is under such an obligation. There is no reason to suppose that it will not take note of the reasoning and conclusions in this Judgment as it conducts any future development in the area, including further construction works on the road. The Court also notes Nicaragua's commitment, made in the course of the oral proceedings, that it will co-operate with Costa Rica in

assessing the impact of such works on the river. In this connection, the Court considers that, if the circumstances so require, Costa Rica will have to consult in good faith with Nicaragua, which is sovereign over the San Juan River, to determine the appropriate measures to prevent significant transboundary harm or minimize the risk thereof.

B. Alleged Breaches of Substantive Obligations

174. The Court now turns to the examination of the alleged violations by Costa Rica of its substantive obligations under customary international law and the applicable international conventions. In particular, Nicaragua claims that the construction of the road caused damage to the San Juan River, which is under Nicaragua's sovereignty according to the 1858 Treaty. Thus, in Nicaragua's view, Costa Rica breached the obligation under customary international law not to cause significant transboundary harm to Nicaragua, the obligation to respect the territorial integrity of Nicaragua and treaty obligations regarding the protection of the environment.

175. Over the past four years, the Parties have presented to the Court a vast amount of factual and scientific material in support of their respective contentions. They have also submitted numerous reports and studies prepared by experts and consultants commissioned by each of them on questions such as technical standards for road construction; river morphology; sedimentation levels in the San Juan River, their causes and effects; the ecological impact of the construction of the road; and the status of remediation works carried out by Costa Rica. Some of these specialists have also appeared before the Court to give evidence in their capacity as experts pursuant to Articles 57 and 64 of the Rules of Court.

176. It is the duty of the Court, after having given careful consideration to all the evidence in the record, to assess its probative value, to determine which facts must be considered relevant, and to draw conclusions from them as appropriate. In keeping with this practice, the Court will make its own determination of the facts, on the basis of the totality of the evidence presented to it, and it will then apply the relevant rules of international law to those facts which it has found to be established (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 72, para. 168).

1. The alleged breach of the obligation not to cause significant transboundary harm to Nicaragua

177. Nicaragua claims that the construction works resulted in the dumping of large quantities of sediment into the San Juan River, in particular because Costa Rica's disregard of basic engineering principles led to significant erosion. For example, Costa Rica carried out extensive deforestation in areas adjacent to the river and earthmoving activities

that led to the creation of unstable cuts and fills in the river's proximity. Moreover, the road builders left piles of earth exposed to rainfall and failed to construct proper drainage systems and stream crossings so as to avoid erosion. Furthermore, Nicaragua maintains that the stretch of road along the San Juan River is situated too close to the river — nearly half of it was built within 100 metres of the river, and parts of it even within 5 metres of the river bank — or on steep slopes, thereby increasing the delivery of sediment to the river. Nicaragua's main expert opined that erosion is particularly severe in the 41.6 km stretch of the road containing the steepest sections, situated between a point denominated "Marker II" (the western point from which the right bank of the San Juan marks the boundary with Nicaragua) and Boca San Carlos (at the junction of the San Juan and San Carlos Rivers; see sketch-map No. 2 above).

178. According to Nicaragua, the delivery of these large quantities of sediment to the San Juan River caused an increase in sediment concentrations in the river, which are already unnaturally elevated. It argues that this increase, in and of itself, produced harm to the river, as sediment is a pollutant, and that it had a number of adverse effects. First, it brought about changes in the river morphology, as large quantities of the sediment eroded from the road accumulated on the bed of the Lower San Juan, thereby exacerbating the problems for navigation in this stretch of the river and rendering additional dredging necessary to restore the navigability of the channel. Moreover, sediment eroded from the road created large deltas along the Costa Rican bank of the river that obstruct navigation. Secondly, Nicaragua argues that sediment eroded from the road caused harm to the river's water quality and ecosystem. Thirdly, Nicaragua alleges that the construction of the road has had an adverse impact on tourism and the health of the river's riparian communities. In addition, Nicaragua maintains that Costa Rica's continuing failure to comply with road construction standards exposes Nicaragua to future harm, and that Costa Rica has failed to take appropriate remediation measures. Nicaragua further contends that additional risks derive from the possibility of spills of toxic materials into the river, the further development of the Costa Rican bank of the river and the likelihood of natural disasters caused by adverse events such as hurricanes, tropical storms and earthquakes.

179. For its part, Costa Rica argues that the construction of the road has not caused any harm to Nicaragua. According to Costa Rica, erosion is a natural process and sediment is not a pollutant. It contends that Nicaragua has not adduced any evidence of actual harm to the river, let alone significant harm. In addition, Costa Rica argues that the road's sediment contribution is tiny compared to the river's existing sediment load. It also recalls that, since 2012, it has carried out remediation works to mitigate erosion at slopes and watercourse crossings (such as slope-terracing; digging drainage channels; installing cross-drains on the road;

constructing sediment traps; and replacing log bridges with modular bridges), with a view to further reducing the quantity of sediment from the road that reaches the San Juan River.

180. In order to pronounce on Nicaragua's allegations, the Court will first address the Parties' arguments on the contribution of sediment from the road to the river; then it will examine whether the road-derived sediment caused significant harm to Nicaragua.

(a) *The contribution of sediment from the road to the river*

181. The Parties agree that sediment eroded from the road is delivered to the river, but disagree considerably as to the actual volume.

182. Nicaragua argues that the most direct and reliable method to assess the total amount of sediment contributed from the road is to estimate the volume of sediment entering the river from all the sites along the road that are subject to erosion. It submits, based on its main expert's estimates, that the total road-derived sediment reaching the river amounts to approximately 190,000 to 250,000 tonnes per year, including sediment eroded from the access roads that connect the road to inland areas. Nicaragua further submits that the volume of sediment in the river due to the construction of the road would increase by a factor of at least ten during a tropical storm or a hurricane.

183. Costa Rica challenges the estimates of road-derived sediment put forward by Nicaragua. In particular, it argues, relying on its main expert's evidence, that Nicaragua's experts over-estimated the areas subject to erosion, which they could not measure directly because the road is in Costa Rica's territory. It adds that Nicaragua's estimates are inflated by the inclusion of access roads, which do not contribute any appreciable quantities of sediment to the San Juan River. According to Costa Rica, the sediment contribution from the road is approximately 75,000 tonnes per year. In Costa Rica's view, even this figure is a significant over-estimate because it does not take into account the effects of mitigation works recently carried out. Finally, Costa Rica argues that Nicaragua's experts have overstated the risk of unprecedented rainfall and the impact on sediment loads in the river as a result of hurricanes or tropical storms.

184. Costa Rica further points out that the most direct and reliable method for measuring the road's impact on sediment concentrations in the San Juan River would have been for Nicaragua, which is sovereign over the river, to carry out a sampling programme. Yet Nicaragua has not provided measurements of sedimentation and flow levels in the river. The only empirical data before the Court are two reports of the Nicara-

guan Institute of Territorial Studies (INETER), which contain measurements of flow rates and suspended sediment concentrations taken at various locations along the San Juan River in 2011 and 2012. Costa Rica argues that neither set of measurements shows any impact from the road.

185. Nicaragua replies that a sampling programme would not have been of assistance to assess the impact of the road-derived sediment because the baseline sediment load of the San Juan prior to the construction of the road is unknown.

186. The Court notes that it is not contested that sediment eroded from the road is delivered to the river. As regards the total volume of sediment contributed by the road, the Court observes that the evidence before it is based on modelling and estimates by experts appointed by the Parties. The Court further observes that there is considerable disagreement amongst the experts on key data such as the areas subject to erosion and the appropriate erosion rates, which led them to reach different conclusions as to the total amount of sediment contributed by the road. The Court sees no need to go into a detailed examination of the scientific and technical validity of the different estimates put forward by the Parties' experts. Suffice it to note here that the amount of sediment in the river due to the construction of the road represents at most 2 per cent of the river's total load, according to Costa Rica's calculations based on the figures provided by Nicaragua's experts and uncontested by the latter (see paragraphs 182-183 above and 188-191 below). The Court will come back to this point below (see paragraph 194), after considering further arguments by the Parties.

(b) *Whether the road-derived sediment caused significant harm to Nicaragua*

187. The core question before the Court is whether the construction of the road by Costa Rica has caused significant harm to Nicaragua. The Court will begin its analysis by considering whether the fact that the total amount of sediment in the river was increased as a result of the construction of the road, in and of itself, caused significant harm to Nicaragua. The Court will then examine whether such increase in sediment concentrations caused harm in particular to the river's morphology, navigation and Nicaragua's dredging programme; the water quality and the aquatic ecosystem; or whether it caused any other harm that may be significant.

(i) *Alleged harm caused by increased sediment concentrations in the river*

188. Nicaragua contends that the volume (absolute quantity) of sediment eroded from the road, irrespective of its precise amount, polluted the river thereby causing significant harm to Nicaragua. In Nicaragua's

view, the impact of the road's contribution must be considered taking into account the elevated sediment load in the San Juan River which is allegedly due to deforestation and poor land use practices by Costa Rica. An expert for Nicaragua estimated the current sediment load to be approximately 13,700,000 tonnes per year. In this context, Nicaragua submits that there is a maximum load for sediment in the San Juan, and that any additional amount of sediment delivered from the road to the river is necessarily harmful.

189. Costa Rica responds that Nicaragua has not shown that the San Juan River has a maximum sediment capacity that has been exceeded. For Costa Rica, the question before the Court is whether the relative impact of the road-derived sediment on the total load of the San Juan River caused significant harm. Costa Rica claims that it did not. According to Costa Rica, the San Juan River naturally carries a heavy sediment load, which is attributable to the geology of the region, and in particular to the occurrence of earthquakes and volcanic eruptions in the drainage area of the river and its tributaries. The volume of sediment contributed by the road is insignificant in the context of the river's total sediment load (estimated by Costa Rica at 12,678,000 tonnes per year), of which it represents a mere 0.6 per cent at most. The road-derived sediment is also indiscernible considering the high variability in the river's sediment loads deriving from other sources. Costa Rica adds that, even if Nicaragua's figures were to be adopted, the sediment contribution due to the construction of the road would still only represent a small proportion, within the order of 1-2 per cent, of the total load transported by the San Juan. In Costa Rica's view, this amount is too small to have any significant impact.

190. Nicaragua further argues, drawing on the commentary to the International Law Commission's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, that any detrimental impact of the construction of the road on the San Juan River need only be susceptible of being measured to qualify as significant harm. Since the amount of sediment in the river due to the construction of the road is measurable, as shown by the fact that both Nicaragua's and Costa Rica's experts have estimated its amount, Nicaragua claims that it caused significant harm.

191. Costa Rica retorts that Nicaragua has not shown significant harm by factual and objective standards. It also argues that, even lacking an appropriate baseline, Nicaragua could have measured the impact of the construction of the road on the river's sediment concentrations by taking its own measurements upstream and downstream of the construction works. However, Nicaragua failed to do so.

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192. In the Court's view, Nicaragua's submission that any detrimental impact on the river that is susceptible of being measured constitutes significant harm is unfounded. Sediment is naturally present in the river in

large quantities, and Nicaragua has not shown that the river's sediment levels are such that additional sediment eroded from the road passes a sort of critical level in terms of its detrimental effects. Moreover, the Court finds that, contrary to Nicaragua's submissions, the present case does not concern a situation where sediment contributed by the road exceeds maximum allowable limits, which have not been determined for the San Juan River. Thus, the Court is not convinced by Nicaragua's argument that the absolute quantity of sediment in the river due to the construction of the road caused significant harm *per se*.

193. The Court will therefore proceed to consider the relative impact of the road-derived sediment on the current overall sediment load of the San Juan River. In this regard, the Court notes that the total sediment load of the San Juan River has not been established. Indeed, Nicaragua has not provided direct measurements of sediment levels in the river. Costa Rica, based on its main expert's report, estimated the river's total sediment load to be approximately 12,678,000 tonnes per year using measurements from the Colorado River. Nicaragua has not provided a comparable figure, although its expert stated that the current total sediment load of the San Juan River is roughly 13,700,000 tonnes per year.

194. On the basis of the evidence before it, and taking into account the estimates provided by the experts of the amount of sediment in the river due to the construction of the road and of the total sediment load of the San Juan River, the Court observes that the road is contributing at most 2 per cent of the river's total load. It considers that significant harm cannot be inferred therefrom, particularly taking into account the high natural variability in the river's sediment loads.

195. In any event, in the Court's view, the only measurements that are before it, namely, those contained in the INETER reports from 2011 and 2012, do not support Nicaragua's claim that sediment eroded from the road has had a significant impact on sediment concentrations in the river. A comparison of the measurements taken in 2011, when most of the road had not yet been built, and in 2012, when construction works were under way, shows that sediment levels in the river are variable, and that tributaries (particularly the San Carlos and Sarapiquí Rivers) are major sources of sediment for the San Juan. However, the data do not indicate a significant impact on sediment levels from the construction of the road. Moreover, the measurements taken at El Castillo and upstream of Boca San Carlos, which are representative of the steepest stretch of the road, show no significant impact.

196. In light of the above, the Court concludes that Nicaragua has not established that the fact that sediment concentrations in the river increased as a result of the construction of the road in and of itself caused significant transboundary harm.

(ii) *Alleged harm to the river's morphology, to navigation and to Nicaragua's dredging programme*

197. The Court will now examine whether the sediment contributed by the road, which the Court has noted corresponds to at most 2 per cent of the river's average total load, caused any other significant harm. Nicaragua's primary argument on the harm caused by the construction of the road concerns the impact of the resulting sediment on the morphology of the river, and particularly on the Lower San Juan.

198. The Parties broadly agree that, on the assumption that at "Delta Colorado" 10 per cent of the waters of the San Juan River flow into the Lower San Juan, approximately 16 per cent of the suspended sediments and 20 per cent of the coarse load in the San Juan River would flow into the Lower San Juan. They also concur that, unlike the much larger Colorado River, the Lower San Juan has no unfilled capacity to transport sediment. Thus, coarse sediment deposits on the bed of the Lower San Juan. The Parties' experts further agree that sediment that settles on the riverbed does not spread evenly, but tends to accumulate in shoals and sandbars that may obstruct navigation, especially in the dry season. They disagree, however, on whether and to what extent the finer suspended sediments are also deposited on the riverbed and, more broadly, on the effects of the construction of the road on sediment deposition in the Lower San Juan.

199. According to Nicaragua's expert, all of the coarse sediment and 60 per cent of the fine sediment contributed by the road to the Lower San Juan settle on the riverbed. To maintain the navigability of the river, Nicaragua is thus required to dredge the fine and coarse sediment that accumulates in the Lower San Juan. In Nicaragua's view, in a river that is already overloaded with sediment such as the Lower San Juan, any addition of sediment coming from the road causes significant harm to Nicaragua because it increases its dredging burden. Furthermore, the accumulation of road-derived sediment reduces the flow of fresh water to the wetlands downstream, which depend on it for their ecological balance.

200. Nicaragua also argues that sediment eroded from the road created "huge" deltas along the river's channel that obstruct navigation, thereby causing significant harm to Nicaragua.

201. Costa Rica responds, relying on the evidence of its main expert, that the aggradation of the Lower San Juan is an inevitable natural phenomenon that is unrelated to the construction of the road. For Costa Rica, Nicaragua's experts also dramatically overestimate the amount of road-derived sediment that is deposited in the Lower San Juan. First, in Costa Rica's view, only coarse sediment accumulates on the riverbed, whereas most of the fine sediment is washed into the Caribbean Sea. Secondly, Costa Rica argues that there is no evidence that coarse sediment

from the road has actually reached the Lower San Juan. Sediment deposition is not a linear process; in particular, sediment tends to accumulate in stretches of the river called “response reaches” and may stay there for years before it is transported further down the channel. Moreover, Costa Rica points out that the Parties’ estimates are based on a number of untested assumptions, including estimates of the split of flow and sediment loads between the Colorado River and the Lower San Juan at “Delta Colorado”. Costa Rica further argues that Nicaragua’s case on harm rests on the mistaken assumption that sediment accumulating on the bed of the Lower San Juan will necessarily need to be dredged.

202. As to the deltas along the Costa Rican bank of the river, Costa Rica argues that Nicaragua has not shown that they were created as a result of the construction of the road. For example, satellite imagery demonstrates that at least two of these deltas pre-date the road. Costa Rica further points out that similar deltas exist on the Nicaraguan bank of the river. In any event, their impact on the morphology of the river and on navigation is insignificant because of their small size relative to the width of the river.

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203. The Court notes that Nicaragua has produced no direct evidence of changes in the morphology of the Lower San Juan or of a deterioration of its navigability since the construction of the road began. Nicaragua’s case once again rests on modelling and estimates by its experts, which have not been substantiated by empirical data. The Court observes in this regard that there are considerable uncertainties concerning the volume of sediment eroded from the road that has allegedly reached the Lower San Juan and deposited on its bed. For example, Nicaragua has not adduced scientific evidence on the division of flow and sediment loads at “Delta Colorado”, but based its estimates on a report of the Costa Rican Institute of Electricity, which is in turn based on measurements taken only in the Colorado River.

204. The Court further considers that the expert evidence before it establishes that the accumulation of sediment is a long-standing natural feature of the Lower San Juan, and that sediment delivery along the San Juan is not a linear process. The road-derived sediment is one of a number of factors that may have an impact on the aggradation of the Lower San Juan. The Court therefore considers that the evidence adduced by Nicaragua does not prove that any morphological changes in the Lower San Juan have been caused by the construction of the road in particular.

205. As to Nicaragua’s claim that the construction of the road has had a significant adverse impact on its dredging burden, the Court notes that

Nicaragua has adduced no evidence of an increase in its dredging activities due to the construction of the road. In this connection, the Court also recalls that Nicaragua initiated its dredging programme before the construction of the road started (see paragraphs 63-64 above). In any event, the Court recalls its conclusion that the construction of the road has caused an increase in sediment concentrations in the river corresponding to at most 2 per cent (see paragraph 194 above). The Court observes that there is no evidence that sediment due to the construction of the road is more likely to settle on the riverbed than sediment from other sources. Thus, sediment coming from the road would correspond to at most 2 per cent of the sediment dredged by Nicaragua in the Lower San Juan. The Court is therefore not convinced that the road-derived sediment led to a significant increase in the bed level of the Lower San Juan or in Nicaragua's dredging burden.

206. Finally, the Court turns to Nicaragua's claim that the sediment deltas along the Costa Rican bank of the river have caused significant harm to the river's morphology and to navigation. In the Court's view, the photographic evidence adduced by Nicaragua indicates that there are deltas on the Costa Rican bank of the river to which the construction of the road is contributing sediment. The Court observes that Nicaragua submitted that in the steepest stretch of the road there are eight "huge" deltas but was not able to specify the total number of deltas allegedly created as a consequence of the construction of the road. The Court further notes that satellite images in the record show that at least two of these deltas pre-date the road. In any event, the Court considers that Nicaragua has not presented sufficient evidence to prove that these deltas, which only occupy the edge of the river's channel on the Costa Rican bank, have had a significant adverse impact on the channel's morphology or on navigation.

207. For the foregoing reasons, the Court concludes that Nicaragua has not shown that sediment contributed by the road has caused significant harm to the morphology and navigability of the San Juan River and the Lower San Juan, nor that such sediment significantly increased Nicaragua's dredging burden.

(iii) Alleged harm to water quality and the aquatic ecosystem

208. The Court will now consider Nicaragua's contention concerning harm to water quality and the aquatic ecosystem. In its written pleadings, Nicaragua alleged that the increased sediment concentrations in the river as a result of the construction of the road caused significant harm to fish species, many of which belong to families that are vulnerable to elevated levels of sediments, to macro-invertebrates and to algal communities in the river. Furthermore, according to Nicaragua, the road's sediment

caused a deterioration in the water quality of the river. To prove harm to aquatic organisms and water quality, Nicaragua relied *inter alia* on an expert report based on sampling at 16 deltas in the river, which concluded that both species richness and abundance of macro-invertebrates were significantly lower on the south bank than on the north bank.

209. During the course of the oral proceedings, Nicaragua's case shifted from its prior claim of actual harm to the river's ecosystem to a claim based on the risk of harm. The Parties now agree that there have been no studies of the fish species in the San Juan River to determine whether they are vulnerable to elevated levels of sediment. However, Nicaragua claims that Costa Rica's Environmental Diagnostic Assessment and the follow-up study carried out in January 2015 by the Tropical Science Centre (hereinafter "CCT", by its Spanish acronym) show that the road is harming macro-invertebrates and water quality in the tributaries that flow into the San Juan River. The CCT measured water quality in Costa Rican tributaries upstream and downstream of the road and recorded a lower water quality downstream of the road. For Nicaragua, this demonstrates a risk of harm to the river itself due to the cumulative impact of those tributaries.

210. For Costa Rica, Nicaragua's case on the impact on fish species fails due to the lack of evidence of actual harm. Relying on one of its experts, Costa Rica argues that it is very likely that species living in the river are adapted to conditions of high and variable sediment loads and are highly tolerant of such conditions. As to macro-invertebrates and water quality, Costa Rica submits that the CCT study shows no significant impact. In any event, its results are based on sampling on small tributary streams in Costa Rica, and cannot be transposed to the much larger San Juan River. Costa Rica further argues that the expert report adduced by Nicaragua does not provide sufficient support for Nicaragua's claim that the construction of the road has had an adverse impact on macro-invertebrates living in deltas along the south bank of the river.

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211. The Court observes that Nicaragua has not presented any evidence of actual harm to fish in the San Juan River, nor has it identified with precision which species of fish have allegedly been harmed by the construction of the road.

212. In the Court's view, the Environmental Diagnostic Assessment relied upon by Nicaragua only shows that the construction of the road

has had a localized impact on macro-invertebrate communities and water quality in small Costa Rican streams draining into the San Juan River. However, the Court is not persuaded that the results of the Environmental Diagnostic Assessment and the follow-up study can be transposed to the San Juan River, which has an average width of nearly 300 metres. As regards the expert report submitted by Nicaragua, the Court finds it difficult to attribute any differences in macro-invertebrate richness and abundance between the north and the south banks of the river to the construction of the road alone, as opposed to other factors such as the size of the catchment area and the nutrient levels therein.

213. On the basis of the foregoing considerations, the Court finds that Nicaragua has not proved that the construction of the road caused significant harm to the river's ecosystem and water quality.

(iv) Other alleged harm

214. Nicaragua also alleges that the construction of the road has had an adverse impact on the health of the communities along the river, which is dependent upon the health of the river itself. Furthermore, in Nicaragua's view, the road significantly affected the area's tourism potential as it has a negative visual impact on the natural landscape. Finally, Nicaragua argues that, in addition to the transboundary harm that the road has already caused, it poses a significant risk of future transboundary harm. According to Nicaragua, additional risks derive from the possibility of spills of toxic materials into the river whenever hazardous substances are transported on the road, and from any further development of the right bank of the river, such as increased agricultural and commercial activities.

215. Costa Rica responds that Nicaragua did not adduce any evidence of actual impact on tourism or on the health of riparian communities. Moreover, it did not explain the legal basis of its claims. Furthermore, Costa Rica contends that Nicaragua's arguments on the risk of toxic spills in the river are based entirely on speculation: Costa Rica's 1995 Regulations for the Ground Transportation of Hazardous Material provide that hazardous substances can only be transported on authorized roads, and Route 1856 is not one of them.

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216. The Court finds that Nicaragua did not substantiate its contentions regarding harm to tourism and health. The Court further observes that Nicaragua's arguments concerning the risk of toxic spills into the river and of further development of the Costa Rican bank of the river are speculative and fail to show any harm. Therefore, these arguments fail.

(c) *Conclusion*

217. In light of the above, the Court concludes that Nicaragua has not proved that the construction of the road caused it significant transboundary harm. Therefore, Nicaragua's claim that Costa Rica breached its substantive obligations under customary international law concerning transboundary harm must be dismissed.

2. *Alleged breaches of treaty obligations*

218. Nicaragua further argues that Costa Rica violated substantive obligations contained in several universal and regional instruments. First, it contends that Costa Rica breached Article 3, paragraph 1, of the Ramsar Convention. Secondly, it argues that Costa Rica acted contrary to the object and purpose of the 1990 Agreement over the Border Protected Areas between Nicaragua and Costa Rica ("SI-A-PAZ Agreement"). Thirdly, Nicaragua alleges that, by its activities, Costa Rica violated Articles 3 and 8 of the Convention on Biological Diversity. Fourthly, it claims that Costa Rica violated several provisions of the Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness Areas in Central America. Fifthly, it alleges violations of the Central American Convention for the Protection of the Environment and the Tegucigalpa Protocol to the Charter of the Organization of Central American States. Finally, Nicaragua contends that Costa Rica breached Article 3 of the Regional Agreement on the Transboundary Movement of Hazardous Wastes, on the ground that it did not adopt and implement the precautionary approach to pollution problems provided for in that instrument.

219. In response to these allegations, Costa Rica argues at the outset that, since Nicaragua failed to prove that the construction of the road caused any significant transboundary harm, its contentions must fail. Costa Rica further points out that the construction of the road does not touch upon protected Nicaraguan wetlands falling within the Ramsar Convention. Moreover, it states that Nicaragua has identified no provision of the SI-A-PAZ Agreement that was allegedly breached. Costa Rica further maintains that the Central American Convention for the Protection of the Environment and the Tegucigalpa Protocol are of no relevance to the present dispute and that there is no factual basis for Nicaragua's contentions regarding the Regional Agreement on the Transboundary Movement of Hazardous Wastes.

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220. The Court notes that both Nicaragua and Costa Rica are parties to the instruments invoked by Nicaragua. Irrespective of the question of the binding character of some of the provisions at issue, the Court

observes that, in relation to these instruments, Nicaragua simply makes assertions about Costa Rica's alleged violations and does not explain how the "objectives" of the instruments or provisions invoked would have been breached, especially in the absence of proof of significant harm to the environment (see paragraph 217 above). The Court therefore considers that Nicaragua failed to show that Costa Rica infringed the above-mentioned instruments.

3. *The obligation to respect Nicaragua's territorial integrity and sovereignty over the San Juan River*

221. Nicaragua further alleges that the deltas created by sediment eroded from the road are "physical invasions, incursions by Costa Rica into Nicaragua's sovereign territory . . . through the agency of sediment" and that their presence constitutes "trespass" into Nicaragua's territory. Moreover, Nicaragua maintains that the dumping of sediments, soil, uprooted vegetation and felled trees into the river by Costa Rica poses a serious threat to the exercise of Nicaragua's right of navigation on the San Juan, which is based on its sovereignty over the river. Nicaragua therefore claims that, by its conduct and activities, Costa Rica violated Nicaragua's territorial integrity and sovereignty over the San Juan River, as established by the 1858 Treaty.

222. Costa Rica argues that undertaking road infrastructure works entirely within its territory does not infringe the boundary delimited by the 1858 Treaty or violate Nicaragua's sovereignty, nor does it affect Nicaragua's right to navigate the San Juan River. Furthermore, Costa Rica maintains that the 1858 Treaty has no bearing on this case, as it does not regulate the issues that are at stake here.

223. The Court considers that, whether or not sediment deltas are created as a consequence of the construction of the road, Nicaragua's theory to support its claim of a violation of its territorial integrity via sediment is unconvincing. There is no evidence that Costa Rica exercised any authority on Nicaragua's territory or carried out any activity therein. Moreover, for the reasons already expressed in paragraphs 203 to 207 above, Nicaragua has not shown that the construction of the road impaired its right of navigation on the San Juan River. Therefore, Nicaragua's claim concerning the violation of its territorial integrity and sovereignty must be dismissed.

C. Reparation

224. Nicaragua requests the Court to adjudge and declare that, by its conduct, Costa Rica has breached its obligation not to violate Nicaragua's territorial integrity; its obligation not to damage Nicaraguan terri-

tory; and its obligations under general international law and the relevant environmental treaties (final submissions, para. 1; see paragraph 52 above).

In the light of its reasoning above, the Court's declaration that Costa Rica violated its obligation to conduct an environmental impact assessment is the appropriate measure of satisfaction for Nicaragua.

225. Secondly, Nicaragua asks the Court to order that Costa Rica "[c]ease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua" (*ibid.*, para. 2 (i)).

The Court considers that Costa Rica's failure to conduct an environmental impact assessment does not at present adversely affect the rights of Nicaragua nor is it likely further to affect them. Consequently, there are no grounds to grant the remedy requested.

226. Thirdly, Nicaragua requests the Court to order Costa Rica to restore to the extent possible the situation that existed before the road was constructed, and to provide compensation for the damage caused insofar as it is not made good by restitution (*ibid.*, para. 2 (ii) and (iii)). The Court recalls that restitution and compensation are forms of reparation for material injury. The Court notes that, although Costa Rica did not comply with the obligation to conduct an environmental impact assessment, it has not been established that the construction of the road caused significant harm to Nicaragua or was in breach of other substantive obligations under international law. As such, restoring the original condition of the area where the road is located would not constitute an appropriate remedy for Costa Rica's breach of its obligation to carry out an environmental impact assessment (see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010 (I)*, p. 103, para. 271). For the same reasons, the Court declines to grant Nicaragua's claim for compensation.

In view of Nicaragua's failure to prove that significant harm was caused, the Court does not need to consider the appointment of an expert or committee to evaluate the extent of harm and the chain of causation, as Nicaragua suggests.

227. The Court further considers that Nicaragua's request to order Costa Rica not to undertake any future development in the border area without an appropriate environmental impact assessment (final submissions, para. 3 (i)) must be rejected. As the Court stated in paragraph 173 above, Costa Rica's obligation to conduct an environmental impact assessment only applies to activities carrying a risk of significant trans-boundary harm, and there is no reason to suppose that Costa Rica will not comply with its obligations under international law, as outlined in this Judgment, as it conducts any future activities in the area, including further construction works on the road.

228. To conclude, the Court notes that Costa Rica has begun mitigation works in order to reduce the adverse effects of the construction of the road on the environment. It expects that Costa Rica will continue to pursue these efforts in keeping with its due diligence obligation to monitor the effects of the project on the environment. It further reiterates the value of ongoing co-operation between the Parties in the performance of their respective obligations in connection with the San Juan River.

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229. For these reasons,

THE COURT,

(1) By fourteen votes to two,

Finds that Costa Rica has sovereignty over the “disputed territory”, as defined by the Court in paragraphs 69-70 of the present Judgment;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cañado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson; *Judge ad hoc* Dugard;

AGAINST: *Judge* Gevorgian; *Judge ad hoc* Guillaume;

(2) Unanimously,

Finds that, by excavating three *caños* and establishing a military presence on Costa Rican territory, Nicaragua has violated the territorial sovereignty of Costa Rica;

(3) Unanimously,

Finds that, by excavating two *caños* in 2013 and establishing a military presence in the disputed territory, Nicaragua has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 8 March 2011;

(4) Unanimously,

Finds that, for the reasons given in paragraphs 135-136 of the present Judgment, Nicaragua has breached Costa Rica’s rights of navigation on the San Juan River pursuant to the 1858 Treaty of Limits;

(5) (a) Unanimously,

Finds that Nicaragua has the obligation to compensate Costa Rica for material damages caused by Nicaragua’s unlawful activities on Costa Rican territory;

(b) Unanimously,

Decides that, failing agreement between the Parties on this matter within 12 months from the date of this Judgment, the question of compensation due to Costa Rica will, at the request of one of the Parties, be settled by the Court, and reserves for this purpose the subsequent procedure in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*;

(c) By twelve votes to four,

Rejects Costa Rica's request that Nicaragua be ordered to pay costs incurred in the proceedings;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Bennouna, Cañado Trindade, Xue, Donoghue, Gaja, Bhandari, Robinson, Gevorgian; *Judge ad hoc* Guillaume;

AGAINST: *Judges* Tomka, Greenwood, Sebutinde; *Judge ad hoc* Dugard;

(6) Unanimously,

Finds that Costa Rica has violated its obligation under general international law by failing to carry out an environmental impact assessment concerning the construction of Route 1856;

(7) By thirteen votes to three,

Rejects all other submissions made by the Parties.

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cañado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Gevorgian; *Judge ad hoc* Guillaume;

AGAINST: *Judges* Bhandari, Robinson; *Judge ad hoc* Dugard.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this sixteenth day of December, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President YUSUF appends a declaration to the Judgment of the Court; Judge OWADA appends a separate opinion to the Judgment of the Court; Judges TOMKA, GREENWOOD, SEBUTINDE and Judge *ad hoc*

DUGARD append a joint declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge DONOGHUE appends a separate opinion to the Judgment of the Court; Judge BHANDARI appends a separate opinion to the Judgment of the Court; Judge ROBINSON appends a separate opinion to the Judgment of the Court; Judge GEVORGIAN appends a declaration to the Judgment of the Court; Judge *ad hoc* GUILLAUME appends a declaration to the Judgment of the Court; Judge *ad hoc* DUGARD appends a separate opinion to the Judgment of the Court.

(Initialed) R.A.

(Initialed) Ph.C.