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International Court  
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de Justice

THE HAGUE

LA HAYE

YEAR 2015

*Public sitting*

*held on Tuesday 21 April 2015, at 10 a.m., at the Peace Palace,*

*President Abraham presiding,*

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

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VERBATIM RECORD

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ANNÉE 2015

*Audience publique*

*tenue le mardi 21 avril 2015, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Abraham, président,*

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

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COMPTE RENDU

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

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

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Le PRESIDENT: Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit ce matin pour entendre la fin du premier tour de plaidoiries du Nicaragua. Je donne la parole à M. Reichler.

Mr. REICHLER:

**THE EVIDENCE: PART TWO**

**THE HARM TO NICARAGUA**

1. Mr. President, Members of the Court, I wish you another good morning. My role today is to present the evidence that Costa Rica's construction of the road has caused significant harm to Nicaragua.

2. I will focus on the harm caused to Nicaragua by virtue of the accumulation of sediment from the road in the Lower San Juan River. That is where *the* sediment build-up, in the form of shoals, sandbars and levees, already impedes navigation and diminishes the flow of fresh water to the wetlands downstream, especially during the dry season. In the Lower San Juan, the road-derived sediment materially and measurably exacerbates these problems. After I conclude, Mr. Loewenstein will discuss harm to the ecological balance and aquatic species of the San Juan River, upper and lower branches, caused by the delivery of sediment from the road into the river. Because Costa Rica did not conduct an environmental impact assessment prior to commencing work on this major construction project, as it was internationally obligated to do, these and other significant harms, and foreseeable risks of harm, were never properly evaluated, and still have not been evaluated, including the potential harms to the river from the agricultural, commercial and human development of the area, that, as Professor Sheate explained yesterday<sup>1</sup>, will inevitably follow completion and operation of the road. The harms and risks for Nicaragua, resulting from Costa Rica's breach of its international obligations in regard to EIA, will be addressed by Professor McCaffrey.

3. I now turn to the significant harm that Nicaragua has suffered, and is continuing to suffer, from the accumulation of road-derived sediment in the Lower San Juan.

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<sup>1</sup>CR 2015/9, pp. 45-46 (Sheate).

4. Nicaragua's case in regard to sediment deposit in the Lower San Juan River is based on eight propositions, all of which are either agreed by the Parties or supported by evidence that is now beyond dispute.

5. Proposition 1. The construction of the road has caused massive amounts of sediment to be delivered to the San Juan River, upstream from the bifurcation between the Colorado River and the Lower San Juan. Costa Rica calculates that the road deposits 75,000 tons of sediment annually<sup>2</sup>; Nicaragua, as explained yesterday by Professor Kondolf, and as supported in the summary report of Professor Weaver, puts the figure between 190,000 and 250,000 tons<sup>3</sup>. Nicaragua stands by the conclusions of its experts, as explained by Professor Kondolf yesterday.

6. Proposition 2. The sediment from the road is transported downstream by the current to the bifurcation, where Dr. Kondolf, Dr. Andrews and ICE, Costa Rica's agency, agree that 10 per cent of the river's water, and a larger proportion of its sediment, enter the Lower San Juan<sup>4</sup>. This is based on the most recent calculations undertaken and provided by ICE and accepted by Nicaragua's experts.

7. Proposition 3. Of the sediment entering the Lower San Juan, approximately 20 per cent is coarse and 80 per cent is fine. The breakdown is also based on the most recent information provided by Costa Rica and accepted by Nicaragua<sup>5</sup>. According to Dr. Andrews, all of the coarse sediment and 60 per cent of the fine sediment accumulate in the Lower San Juan<sup>6</sup>.

8. Proposition 4. Most of that sediment accumulates at, and enlarges, the shoals and sandbars in the Lower San Juan, which already inhibit navigation, especially in the dry season

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<sup>2</sup>Rejoinder of Costa Rica (RCR), para. 2.61.

<sup>3</sup>CR 2015/9, pp. 13-14 (Kondolf); Weaver Summary Report, 15 Mar. 2015, para. 52.

<sup>4</sup>CR 2015/9, pp. 19-20 (Kondolf) and p. 27 (Andrews); Instituto Costarricense de Electricidad (ICE), "Second Report on Hydrology and Sediments for the Costa Rican River Basins draining to the San Juan River," Dec. 2014, RCR, Vol. III, Ann. 5 (hereinafter "ICE 2014 Report"), pp. 30-31, figs. 6.6-6.7.

<sup>5</sup>CR 2015/9, pp. 26-27 (Andrews); ICE 2014 Report, p. 53.

<sup>6</sup>CR 2015/9, pp. 26, 30 (Andrews); Andrews Summary Report, 15 Mar. 2015, paras. 26, 33.

when they render the river unnavigable, according to Professor Thorne. This is also agreed by Professors van Rhee and Andrews<sup>7</sup>.

9. Proposition 5. The accumulation of sediment at these shoals and sandbars lowers the river's depth, and its capacity to transport sediments downstream which, in turn, results in even higher amounts of sediment reaching the Lower San Juan and accumulating at these locations. As Professor van Rhee explained, and Costa Rica's expert accepts, the process is a perpetual one, with the rate of accumulation constantly increasing as the shoals and sandbars increase in size and the transport capacity of the river, as a consequence, diminishes steadily<sup>8</sup>.

10. Proposition 6. The accumulation of sediment at the shoals and sandbars in the Lower San Juan makes dredging an absolute necessity in order to maintain navigability, even by small boats with drafts of a mere 1 m, and dredging is equally necessary to maintain a sufficient supply of fresh water to the wetlands downstream. Professors van Rhee and Thorne agree on this, as well<sup>9</sup>.

11. Proposition 7. For these reasons, Nicaragua has been dredging this section of the river since 2011. Despite this, sediment has continued to accumulate faster than Nicaragua has been able to dredge it out. The best Nicaragua has been able to do, despite its maximum effort with the limited resources available, is to slow the rate of accumulation. As a result, what it has accomplished by its dredging is not to increase the flow of the Lower San Juan, but to reduce the rate by which the flow is decreasing. Again, this is agreed by the experts of both Parties<sup>10</sup>.

12. Proposition 8. Since Nicaragua is already required to dredge the Lower San Juan, it follows that any addition of sediment to the river, such as that supplied by Costa Rica's road, adds to the amount of sediment that accumulates, especially at shoals and sandbars, and consequently adds to the amount of sediment that Nicaragua must dredge out of those places. But, since sediment is already accumulating at these locations faster than Nicaragua is able to dredge it, this is

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<sup>7</sup>Van Rhee Summary Report, 15 Mar. 2015, paras. 4-6; CR 2015/3, p. 25 (Thorne); Thorne, "Report: Assessment of the physical impact of works carried out by Nicaragua since October 2010 on the geomorphology, hydrology and sediment dynamics of the San Juan River and the environmental impacts on Costa Rican territory", Oct. 2011; Memorial of Costa Rica (MCR) in *Certain Activities* case, App. 1 (hereinafter "Thorne (2011)"), p. II-27; CR 2015/9, pp. 31-32 (Andrews).

<sup>8</sup>Van Rhee Summary Report, 15 Mar. 2015, para. 4; Thorne (2011), pp. II-27-28.

<sup>9</sup>*Ibid.*, paras. 6-11; Thorne (2011), p. II-28.

<sup>10</sup>CR 2015/6, pp. 33-36 (Van Rhee); CR 2015/3, p. 43 (Thorne).

not only a case of Nicaragua's dredging burden being increased, but, to the extent Nicaragua lacks capacity to dredge more than it is currently dredging, the result is that the additional sediment derived from the road is not dredged from the river but steadily accumulates at, and enlarges, the existing obstacles to navigation, and reduces the flow of fresh water beyond them to the wetlands downstream.

13. In Nicaragua's view, the harm caused by enlargement of these obstacles to navigation and to the downstream flow which, as mentioned, continually expands geometrically because every enlargement of a sandbar or shoal increases the future accumulation of sediment at these sites, and thus their further enlargement and obstructiveness, is necessarily significant. Anything that exacerbates the existing obstacles to navigation, or that causes even more of a reduction in flow, is self-evidently significant.

14. Mr. President, for Costa Rica, this is a numbers game. So let's look at the numbers. Let us assume, for this purpose, that the sediment delivered to the San Juan River by Costa Rica's road is at the low end of the Kondolf/Weaver calculation: 190,000 tons annually. It is accepted by both Parties that 20 per cent of the coarse sediment and 16 per cent of the fine sediment is transported past the bifurcation to the Lower San Juan<sup>11</sup>. Of that sediment load, all of the coarse sediment, and 60 per cent of the fine sediment accumulates there<sup>12</sup>. That is 7,600 tons of coarse sediment<sup>13</sup>, and 14,592 tons of fine sediment<sup>14</sup>, per year, or a total of 22,192 tons that accumulate in the Lower San Juan annually.

15. In 2014, the evidence shows that Nicaragua dredged from the Lower San Juan approximately 260,000 tons of sediment<sup>15</sup>. The contribution from the road represents therefore approximately 8.5 per cent of the amount of sediment Nicaragua has been required, and able, to

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<sup>11</sup>CR 2015/9, pp. 19-20 (Kondolf) & p. 27 (Andrews); ICE 2014 Report, pp. 30-31, figs 6.6 (b) & 6.7 (b).

<sup>12</sup>CR 2015/9, pp. 26, 30 (Andrews); Andrews Summary Report, 15 March 2015, paras. 26, 33.

<sup>13</sup>20 per cent of 190,000 tons = 38,000 tons of coarse sediment reaching the River from the road annually; 20 per cent of that, 7,600 tons, would be the amount that continues to the Lower San Juan and accumulates each year.

<sup>14</sup>80 per cent of 190,000 tons = 152,000 tons of fine sediment reaching the River from the road annually; 16 per cent of that, 24,320 tons, would be the amount that continues to the Lower San Juan, 60 per cent of which (14,592 tons) accumulates each year.

<sup>15</sup>EPN 2014 Annual Report, p. 20, Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015 (reporting 158,109.78 m<sup>3</sup> of sediment dredged in 2014, which converts to some 264,043 tons).

dredge in the past year. As Dr. Andrews testified yesterday, this is a “large amount of material”<sup>16</sup>. And it means an additional 8.5 per cent increase, not just once, but every year — building on itself, like compound interest.

16. Is the road’s contribution of 22,192 tons, and higher, annually to the Lower San Juan, already plagued by major obstacles to navigation, “significant”? That is the question for the Court to decide. How should the Court decide this question? What is significant, in this context?

17. The last three words, Mr. President, are key, in Nicaragua’s view: “in this context”. As Dr. Kondolf explained yesterday, and as should be obvious even without the authority of an expert, what is significant depends on the context<sup>17</sup>. This, of course, is well recognized in international environmental law and practice, as Professor McCaffrey will elaborate later this morning. In particular, the significance of an impact frequently does not equate with the magnitude of the stimulus. It depends as well, and sometimes mainly, on the sensitivity of the receiving environment. This is the point Dr. Kondolf made in one of his responses to Mr. Wordsworth: “It is important . . . not to confuse magnitude with significance.”<sup>18</sup> As applied to this case, Dr. Kondolf testified as follows in response to Mr. Wordsworth’s question “[W]hat are the significant harms?” “Dr. Kondolf: . . . Nicaragua has a dredging programme which both Professors Thorne and van Rhee have indicated is barely keeping up with the excess sedimentation . . . So, any further sediment delivered to the river and deposited in the Lower Rio San Juan adds to that dredging burden.”<sup>19</sup>

18. And this is how Professor Kondolf put it in response to a question from Judge Greenwood: “I think the principle is simply that there is so much sediment coming into that part of the river that, to the extent you add to that sediment, you are adding to the impact and the burden to dredge.”<sup>20</sup> I think it may be useful for me to recall for the Court that Professor Kondolf is experienced in assessing environmental impacts on fluvial geomorphology and human-river

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<sup>16</sup>CR 2015/9, 20 April 2015, p. 31 (Andrews).

<sup>17</sup>CR 2015/8, pp. 42-43 (Kondolf).

<sup>18</sup>*Ibid.*, p. 42 (Kondolf).

<sup>19</sup>*Ibid.*, p. 43.

<sup>20</sup>CR 2015/9, p. 18 (Kondolf).

interactions, and he served on the Environmental Advisory Board to the US Army Corps of Engineers<sup>21</sup>.

19. Judge Greenwood asked another very interesting, and I would say, important question. Referring to Nicaragua's dredging programme, he asked: "If taking 200,000 cubic metres of sediment out of the Lower San Juan has an insignificant environmental impact, why does putting 200,000 cubic metres of sediment *in* to the Upper Rio San Juan have a serious environmental impact?"<sup>22</sup> The answer, Nicaragua, suggests, is *context*. It is not simply a comparison of how much is being taken out, and how much is being put in. The fact that the numbers may approximate one another only addresses magnitude, not necessarily impact. As Nicaragua showed last week, the dredging of the Lower San Juan causes no adverse environmental impacts; it does not materially affect the flow of Costa Rica's Colorado River, as Costa Rica has alleged; and it does not harm the wetlands downstream. To the contrary, both Professor van Rhee and Professor Thorne have stated that the dredging is helpful to those wetlands, and that more dredging by Nicaragua would be even more helpful to them<sup>23</sup>. In his answer to Judge Owada's question last week, Professor Thorne said about Nicaragua's dredging programme that: "if you are going to do any good to the river environmentally, you need to do much more than that . . ."<sup>24</sup>.

20. By contrast, putting sediment *into* the river *does* have an adverse impact. Not primarily in the *Upper* San Juan River, as Judge Greenwood asked, but in the *Lower* San Juan, where a significant amount of the sediment deposited in the Upper San Juan is transported. When it gets to the Lower San Juan, as Nicaragua's experts and Professor Thorne have stated, it accumulates, enlarges the existing shoals and sandbars that obstruct navigation, and causes the already-low flow of the river to diminish further, both adding to Nicaragua's dredging burden and hastening the drying up of the river. Professor Kondolf answered Judge Greenwood's question thusly: "[B]ecause there is already too much sediment, there is already a problem, so you are simply adding to that."<sup>25</sup> In regard to the environmental impact of Nicaragua's *dredging*, he answered:

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<sup>21</sup>Kondolf Summary Report for *Certain Activities* case, 16 March 2015, para. 1.

<sup>22</sup>CR 2015/9, p. 19 (Greenwood).

<sup>23</sup>Van Rhee Summary Report, 15 March 2015, paras. 10-11.

<sup>24</sup>CR 2015/3, p. 43 (Thorne).

<sup>25</sup>CR 2015/9, p. 19 (Kondolf).

“The dredging seems not to be creating a permanent change now because it keeps filling in so it is not changing significantly the character of the river there.”<sup>26</sup>

21. Mr. President, Nicaragua views the cross-examination of Dr. Andrews as especially instructive on this point. Dr. Andrews, you will recall, served as a hydrologist for the United States Geological Survey for 34 years. He held overall responsibility for the agency’s water resources, geomorphology and sediment transport programmes<sup>27</sup>. His cross-examination yesterday established at least two things in particular. First, that Costa Rica’s entire approach now is to equate significance of impact with the percentage contributed by the road to the overall sediment load in the river. Second, that Costa Rica’s approach is wrong. “Mr. Wordsworth: But we are still talking, relatively speaking, about a very small percentage, aren’t we, compared to the total percentage? Mr. Andrews: It is still a large amount of material . . . Mr. Wordsworth: Yes, I don’t think we should be debating the question of actual material.”<sup>28</sup> Why not, Mr. President? It is the “actual material” that accumulates in the Lower San Juan River and enlarges the obstructions to navigation, not a mere statistic.

22. “Mr. Wordsworth: The question is whether it leads to significant impact. The question that I am putting to you is: given that, on your evidence, only between 0.5 per cent to 2 per cent of the amount that is actually being dredged by Nicaragua comes from the road, can that be regarded as significant?”<sup>29</sup> Before getting to Dr. Andrews’s answer, it is worth noting that Mr. Wordsworth’s question is based on an incorrect assumption. As previously shown, in 2014, the amount of sediment that came from the road was approximately 8.5 per cent of the amount dredged by Nicaragua. Now for Dr. Andrews’s answer:

“[T]he assumption in your question that it is spread evenly, and it is not spread evenly, it is disproportionately deposited in the channel around bars, river bars, sandbars, that are relatively shallow and have low flow. It cannot be transported anymore, it gets deposited there, and that is exactly where the navigational obstructions occur.”<sup>30</sup>

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<sup>26</sup>CR 2015/9, p. 19 (Kondolf).

<sup>27</sup>Andrews Summary Report, 15 March 2015, paras. 1-2.

<sup>28</sup>CR 2015/9, p. 31.

<sup>29</sup>CR 2015/9, p. 31 (Wordsworth).

<sup>30</sup>CR 2015/9, p. 31 (Andrews).



23. Then Mr. Wordsworth asked Dr. Andrews if he could point to any evidence that the sediment that, *quoting Mr. Wordsworth*, “comes from the road . . . is spread out along the sandbars”<sup>31</sup>. Mr. President, I am sure my good friend Mr. Wordsworth knows where to find this evidence without Dr. Andrews’s assistance. It was provided by Costa Rica’s own expert, Professor Thorne. In his report of October 2011, annexed to Costa Rica’s Counter-Memorial, Professor Thorne stated that when the sediment from upstream reaches the Lower San Juan it is “deposited in and along the (mainly meandering) channel in the form of shoals, islands, point bars and natural levees”<sup>32</sup>. And that is Professor Thorne’s testimony.

24. In *his* testimony yesterday, Dr. Andrews addressed the significance of this critical evidence:

“In talking about, or considering, obstructions to navigation, it does not mean that through a reach of a few kilometres and such that every metre would be, you would be unable to navigate your boat. All you need is an obstruction every few hundred yards, or so, and it makes it, or you would only need one, in the entire 2 or 3 km reach. If you cannot get your boat through that one stretch, you cannot get it through.”<sup>33</sup>

25. And that. Mr. President, is why Nicaragua is right about significant harm. It is undisputed, at least between the Parties’ experts, that the sediment carried to the Lower San Juan, including the sediment from the road, is “deposited in and along the . . . channel in the form of shoals, sandbars, point bars and natural levees”<sup>34</sup>, which obstruct navigation. In 2014, as I said, the road contributed 22,192 tons of sediment mainly to the enlargement of these obstructions. Counsel to Costa Rica advise you not to debate “the question of actual material”<sup>35</sup>, and we say the reason they don’t want to debate this is because they have no answer to it. It is, as Dr. Andrews described it, “a large amount of material”<sup>36</sup>, and its impact is significant for the reasons explained by

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<sup>31</sup>CR 2015/9, p. 31 (Andrews).

<sup>32</sup>Thorne (2011), p. II-27.

<sup>33</sup>CR 2015/9, pp. 32-33 (Andrews).

<sup>34</sup>Thorne (2011), p. II-27.

<sup>35</sup>CR 2015/9, p. 31 (Wordsworth).

<sup>36</sup>CR 2015/9, p. 31 (Andrews).

Drs. Andrews<sup>37</sup> and Kondolf<sup>38</sup>, and which should be self-evident. It adds more than 22,000 tons annually mainly to the obstructions to navigation. And it has to be dredged out by Nicaragua.

26. Mr. President, Costa Rica avoids the “actual material” — those 22,000 tons contributed by the road to the shoals and sandbars in the Lower San Juan annually — in favour of a false paradigm, or, more accurately, two false paradigms. At the hearings on provisional measures, in November 2013, Costa Rica told you that the sediment from the road spread out evenly across the entire river bottom, hence its impact on the depth of the river was no more than the width of a few grains of sand<sup>39</sup>. We know now, especially from their own expert, Professor Thorne, that this is not the case. Still less would it be appropriate to assume that the sediment contributed by the road disperses evenly across the bed of the much longer *Upper San Juan River*, alongside that 108 km of the road that are close to the bank, especially since Nicaragua’s claim of significant harm, in terms of obstruction to navigation and reduction of flow, applies principally to the *Lower San Juan*, which is less than a third as long.

27. So Costa Rica has come up with a second paradigm, equally false. Given that the overall sediment load of the river is very high, they emphasize that the percentage — the percentage — contributed by the road is very small<sup>40</sup>. Again, they prefer not to discuss the “actual material”, because, as Dr. Andrews said, it is “a large amount”<sup>41</sup>. We say, it is the amount of sediment that determines its impact, in the context of an environment that, because of its already high sediment load, is especially sensitive to additional quantities of sediment. Significance is not strictly a numbers, or a percentages, game, as Costa Rica would have it. Magnitude alone is relevant, but it is not determinative of significance. A very large stimulus can have a negligible impact in an environment that is capable of accommodating the stimulus. We have an example here: the much larger and more powerful Colorado River is not obstructed by sediment accumulation, and therefore is unaffected by the sediment it receives from the road. Dr. Andrews says that the

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<sup>37</sup>CR 2015/9, pp. 30-33 (Andrews).

<sup>38</sup>CR 2015/8, pp. 42-43 (Kondolf).

<sup>39</sup>CR 2013/29, p. 10, para. 10 (Ugalde) and p. 28, para. 14 (Wordsworth); CR 2013/31, p. 18, para. 6 (Wordsworth) and p. 22, para. 22 (c) (Wordsworth).

<sup>40</sup>E.g., RCR, paras. 1.4, 2.10, 2.80, 2.117 (b).

<sup>41</sup>CR 2015/9, p. 31 (Andrews).

stimulus received by the Lower San Juan is a “large amount of material”<sup>42</sup>. But even a small stimulus can be significant in an environment that is incapable of accommodating it. In this regard, it is worth recalling Professor Thorne’s statement that the Lower San Juan River is “unable to accommodate” the sediment load it receives from upstream<sup>43</sup>. In this environment, the “large amount of [actual] material” contributed by the road to the Lower San Juan must therefore be significant.

28. This is not an unusual situation. To the contrary, it is how environmental regulatory agencies around the world assess significance of impact. Many States and international bodies regulate rivers with high levels of pollution, including sediments. They are not in the practice of allowing more sediments to be contributed because the river is already in such a bad way that it can’t do any significant harm to make it worse. To the contrary, riverine environmental régimes commonly set maximum allowable limits on the pollutants, including sediments, that the watercourse may permissibly contain at any given time. Once those limits are reached, *any* additions above them, even in small amounts, are considered significant and are prohibited.

29. In the United States, for example, under our Clean Water Act, state-level environmental authorities identify rivers threatened by cumulative water pollution, calculate a maximum daily load of pollutants that the river can sustain, and then prohibit discharges above the maximum load amount<sup>44</sup>. The United States EPA has specifically identified sediment pollution as an appropriate subject of a total maximum daily load<sup>45</sup>.

30. In the European Union, the Water Framework Directive takes a similar approach, as member States are obligated to review river basins within their territory for adequate progress toward “good water status”<sup>46</sup>. Follow-up directives have identified 45 different pollutants and established for each an “environmental quality standard”, which is the level of concentration of a given pollutant that must not be exceeded. Member States calibrate their permitting and other

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<sup>42</sup>CR 2015/9, p. 31 (Andrews).

<sup>43</sup>Thorne (2011), p. II-27.

<sup>44</sup>33 USC para. 1313 (*d*) (1).

<sup>45</sup>United States Environmental Protection Agency (EPA), “Protocol for Developing Sediment TMDLs”, Oct. 1999, p. 2-1, available at <http://www.epa.gov/owow/tmdl/sediment/pdf/sediment.pdf> (last accessed 21 April 2015).

<sup>46</sup>Water Framework Directive, 2000/60/EC.

requirements around these standards, prohibiting the addition of *any* pollutants above a certain level even in very polluted bodies of water<sup>47</sup>.

31. Mr. President, since I spend much of my life advocating on behalf of small States, some of which are located in what used to be called the Third World, I am very pleased to hear Judge Bhandari's interest in whether any Latin American States have similar environmental policies. The answer is that they do. Because of time-limits, I will cite just one example, but it is an important one, and one that the Court may recall. In the *Pulp Mills* case, Argentina and Uruguay had formed a bi-national commission to control pollution in their shared watercourse, the Uruguay River, which constituted the boundary between the two States. CARU, as the commission was known by its Spanish acronym, regulated a long list of pollutants. How? By setting maximum allowable concentration levels. Once the level was reached for a given pollutant, neither State was permitted to discharge, or license the discharge, of any additional quantity of that pollutant into the river<sup>48</sup>.

32. Of particular interest, especially in the context of this case, is the treatment of phosphorous. CARU did not regulate it because the parties could not agree on an allowable limit. But Uruguayan law imposed a maximum allowable limit on phosphorous discharge<sup>49</sup>. If the limit was reached, Uruguay forbade new discharges, in any amount, unless it was offset by reducing the level of phosphorous in the river in the same or a greater amount than was being added<sup>50</sup>.

33. The evidence in that case showed that more than 19,000 tons of phosphorous were emitted into the river each year from all sources. The annual emission of phosphorous by the pulp mill licensed by Uruguay was a mere 15 tons, that is, less than 0.1 per cent of the total annual phosphorous load<sup>51</sup>. Nevertheless, the emission was still prohibited under Uruguayan law. As a consequence, Uruguay licensed the mill on the strict condition that it take action elsewhere along

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<sup>47</sup>Directive 2013/39/EU; Directive 2008/105/EC.

<sup>48</sup>*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 94, para. 242.

<sup>49</sup>*Ibid.*, p. 95, para. 245.

<sup>50</sup>*Ibid.*

<sup>51</sup>*Ibid.*, p. 94, para. 240.

the river to reduce other discharges of phosphorous by an amount equal to or greater than the 15 tons it would be contributing<sup>52</sup>. And that is what the mill operators did.

34. The Court upheld Uruguay's licensing of the mill in these circumstances, citing what it called Uruguay's "compensation" for the mill's discharge of phosphorous into the river. Even though "the amount of total phosphorus discharge into the river that may be attributed to the . . . mill is insignificant in proportionate terms as compared to the overall total phosphorus in the river from other sources", by itself it still would have violated the applicable water quality standard<sup>53</sup>. But there was no violation of Uruguay's international obligations, according to the Court, "taking into account the action being taken by Uruguay by way of compensation"<sup>54</sup>. And that is an interesting point for present purposes. Uruguay avoided liability by compensating for the additional phosphorous it allowed to be deposited in the river by removing an equal or greater amount of the substance and thereby preventing any net addition — even one as low as 0.1 per cent — to the total phosphorous load.

35. In this case, Mr. President, there is no compensation, no offset, provided by Costa Rica for its discharge of sediment into Nicaragua's river.

36. That river, especially in its lower reaches, after the bifurcation, is like the Uruguay River except that: (1) it is not a shared river but belongs exclusively to Nicaragua; and (2) it is overloaded with sediment rather than phosphorous. Costa Rica acknowledges that the river's sediment load already exceeds its maximum conveyance capacity, and that it is drying up. Costa Rica's expert agrees that the river requires constant dredging by Nicaragua, even to allow small boats to pass. Costa Rica nevertheless argues that the harm caused by the road is insignificant. Insignificant to whom? Not to Nicaragua, which has to dredge out the large amount of material Costa Rica puts in.

37. As explained by Professor Andrews: "[W]hether or not sediment from the Road is a large or small percentage of the overall total load does not alter the fact that, because the existing

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<sup>52</sup>*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 96, para. 246.

<sup>53</sup>*Ibid.*, para. 247.

<sup>54</sup>*Ibid.*, para. 247.

load is high, any additional sediment contributed by the Road will lead to deposition and require additional dredging.”<sup>55</sup>

38. In its Order of 13 December 2013 denying Nicaragua’s request for provisional measures, the Court considered that

“Nicaragua has not established in the current proceedings that the ongoing construction works led to a substantial increase in the sediment load in the river. It notes that Nicaragua did not contest the statement of Costa Rica’s expert, Professor Thorne, that, even according to . . . Professor Kondolf, the construction activities are only contributing 1 to 2 per cent of the total sediment load . . . and 2 to 3 per cent in the lower San Juan River.”

The Court at that time considered this “too small a proportion to have a significant impact on the river *in the immediate future*”<sup>56</sup>. It thus concluded that: “Nicaragua has not shown that there is any real and imminent risk of irreparable prejudice to the rights it invokes”<sup>57</sup>.

39. This of course was not a finding on the merits. Indeed, as is always the case on provisional measures, it was without prejudgment of the merits. The Court had already determined, in an earlier paragraph in its Order, that construction of the road had been suspended by Costa Rica, and that Costa Rica had given assurances that it would not be resumed before late 2014 or early 2015, so it found that there was no urgency to Nicaragua’s request for a cessation of construction activities<sup>58</sup>. It was in this context that the Court also found that, absent ongoing construction activity and given the small proportion of sediment contributed by the road to the overall amount that is already in the river, there would be no significant impact on Nicaragua’s rights “in the immediate future”.

40. Mr. President, if you will kindly forgive the cliché, a lot of water has passed under the bridge since December 2013. The hearings on provisional measures were held less than a month before Costa Rica filed its Counter-Memorial. It therefore had a mass of evidence at its disposal, including expert reports, which Nicaragua had not yet seen, and had literally overnight to respond to. It was not until August 2014, when Nicaragua filed its Reply, that it was fully able to answer

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<sup>55</sup>Andrews Summary Report, 15 Mar. 2015, para. 4.

<sup>56</sup>*Construction of a Road along the San Juan River (Nicaragua v. Costa Rica)*, Order of 13 December 2013, I.C.J. Reports 2013, p. 407, para. 34; emphasis added.

<sup>57</sup>*Ibid.*, para. 35.

<sup>58</sup>*Ibid.*, para. 33.

Costa Rica, and demonstrated with evidence of its own, including Dr. Andrews's first report, that the impact of road-related sediment on the Lower San Juan was significant.

41. In his first report, Dr. Andrews, to be conservative in his estimates of sediment accumulation in the Lower San Juan, relied on measurements taken by ICE, the Costa Rican Government agency, in 2013. In 2014, ICE produced new measurements, which indicated a substantially higher accumulation of road-derived sediment in the Lower San Juan. Dr. Andrews recalculated his estimates of impact based on ICE's updated calculations<sup>59</sup>. Interestingly, Mr. Wordsworth, during cross-examination, insisted on questioning Dr. Andrews about the lower estimates in his earlier report, based on ICE's earlier and lower measurements<sup>60</sup>, which, as Dr. Andrews explained, were superseded by his estimates based on ICE's more recent 2014 report<sup>61</sup>. Why not question Dr. Andrews about his more recent evidence, based on ICE's updated calculations? Here again, Costa Rica is playing with the numbers, or in this case, the percentages.

42. In sum, Mr. President, it is a false paradigm to measure the impact of the road by means of the proportion of sediment it contributes to an already overly-sedimented river. It is the context that determines the significance of the impact. Magnitude is indeed important, and the magnitude, we say, is "large" here, according to Nicaragua's experts, including Dr. Andrews, if one looks at the "actual material" — which Costa Rica asks you not to do. But magnitude must also be considered in the context of the sensitivity of the receiving environment. In this case, that environment is the Lower San Juan River, and it is already, in Professor Thorne's words, "unable to accommodate" its sediment load. How then, can the addition of the "large" amount of "actual material" *not* be significant? In Nicaragua's view, when the river cannot even accommodate its existing sediment load, any measurable addition is necessarily significant, as is the harm it causes, in the context of an environment that Costa Rica itself accepts as especially sensitive.

43. Mr. President, Members of the Court, this concludes my presentation. I thank you again for your patient attention, and I ask that you call my colleague, Mr. Loewenstein, to the podium.

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<sup>59</sup>CR 2015/9, p. 27 (Andrews).

<sup>60</sup>*Ibid.*, p. 29 (Wordsworth).

<sup>61</sup>*Ibid.*, pp. 27, 29 (Andrews).

Le PRESIDENT : Merci, Monsieur Reichler. Je donne maintenant la parole à Monsieur Lowenstein.

Mr. LOEWENSTEIN:

### ECOLOGICAL IMPACTS AND RISK ASSESSMENT

1. Mr. President, Members of the Court, good morning. I will continue Nicaragua's presentation on the harmful impacts of Route 1856. I will first show that Costa Rica has placed the ecology of the San Juan River — a Nicaraguan Ramsar site — at risk. I will then show that Costa Rica has chosen not to assess the risks that the road poses to this wetland of international importance, and address the consequences for Nicaragua of that decision.

#### Ecological harm to the San Juan River

2. I begin with ecological impacts. The harmful effects of sediment are not limited to the formation of shoals, sandbars and other types of accumulations. Sediment can also adversely impact a watercourse's aquatic organisms. Costa Rica's expert, Professor Thorne, lists many such harms. A few of them are:

- “loss of aquatic vegetation;
- reduced primary productivity;
- loss of periphyton [with] consequent impact on the food chain;
- loss or reduction of macroinvertebrate populations;
- clogging and *damaging the* gills of fish; and
- alteration of the balance of fish species.”<sup>62</sup>

3. Costa Rica's own environmental diagnostic assessment, or EDA, of November 2013 and its January 2015 follow-up, demonstrate that the San Juan's ecological health has been placed at risk by sediment from the road. These studies were prepared at the request of the Costa Rican Ministry of Foreign Affairs for use in this proceeding<sup>63</sup> and authored by scientists affiliated with

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<sup>62</sup>Thorne Summary Report for *Certain Activities* case, Mar. 2015, p. 15, para. 5.8.

<sup>63</sup>Centro Científico Tropical (CCT), Follow-up and Monitoring Study Route 1856 Project-EDA Ecological Component, Jan. 15; Rejoinder of Costa Rica (RCR), Ann. 14, p. 10. (“The Ministry of Foreign Affairs and Worship of the Government of Costa Rica commissioned the services of the Tropical Science Center (‘TSC’) to carry out the EDA . . .”)



Costa Rica's Tropical Science Center<sup>64</sup>. They agree that "high levels of sedimentation in aquatic bodies" is one of the "main problems that lead[s] to the loss of aquatic diversity"<sup>65</sup>. To determine whether the road is causing these effects, the study sampled ten Costa Rican tributaries of the San Juan at locations very close to where they flow into the river. The EDA explains that in each tributary "two sampling points were located, one upstream" of where Route 1856 crosses the tributary, where there was "no direct influence" from the road, and "another one downstream" of that tributary, where the road did have "direct influence"<sup>66</sup>.

4. The Tropical Science Center collected macroinvertebrates at the upstream and downstream sampling sites. These were chosen because they are "bio-indicators" of water quality<sup>67</sup>. This is standard; the European Water Framework Directive, for instance, requires that macroinvertebrates be used for that purpose<sup>68</sup>. In addition, macroinvertebrates are important in their own right as a critical link in the food chain<sup>69</sup>. The macroinvertebrates were analysed to determine their abundance, that is, the number of individual organisms collected at each location, and their richness, that is, the number of taxa present at each location<sup>70</sup>.

5. The results were reported in the 2013 EDA. The road's impact on aquatic life is clear from the data it presents. Five of the ten sites had both fewer organisms, and fewer species, downstream of the road than upstream<sup>71</sup>.

6. The EDA interpreted these data to evaluate the road's impact on water quality. It used a Costa Rican index that defines six categories of water quality, ranging from "excellent" to "extremely polluted". Based on the collected data, the Tropical Science Center categorized water quality both upstream and downstream of the road. Five of the ten sites had *lower* water quality downstream of the road than upstream. The EDA reports: "At sites 1, 3, 5, 6 and 9, the quality

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<sup>64</sup>Centro Científico Tropical (CCT), Follow-up and Monitoring Study Route 1856 Project-EDA Ecological Component, Jan. 15; RCR, Ann. 14, p. 2.

<sup>65</sup>Counter-Memorial of Costa Rica (CMCR), Ann. 10, EDA, p. 111.

<sup>66</sup>CMCR, Ann. 10, EDA, p. 89.

<sup>67</sup>*Ibid.*, p. 87.

<sup>68</sup>Reply of Nicaragua (RN), Ann. 4, Ríos Report, sections 1 (*b*) and 4 (*c*), citing D.O.C.E., 2000.

<sup>69</sup>CMCR, Ann. 10, EDA, p. 109.

<sup>70</sup>*Ibid.*, p. 17.

<sup>71</sup>*Ibid.*, p. 242.

went down in the downstream sites (with influence of the route) with a moderate to bad classification and from bad to very bad in comparison to control sites found upstream . . .”<sup>72</sup>

7. In regard to the sites in the stretch between the Río Infiernito and the mouth of the San Carlos, which it “classified as impacted” from the road due to active sedimentation processes, the EDA observed that, “the quality of water was influenced by the works conducted in the Route, as were the richness and abundance of the communities”<sup>73</sup>. The study accepted that this demonstrated that the road poses a risk. It concluded that the “deterioration of the quality of the habitat” and the “decrease in richness of taxa” could be attributable to what it called “activities and processes conducted during and after the construction of the Route, such as the movement of earth, tree cutting, erosion and sedimentation”<sup>74</sup>.

8. The 2013 EDA set out 27 recommendations that, it said, should be included in a programme for “prevention, mitigation and improvement of environmental conditions in the area of the path of Route 1856”<sup>75</sup>. These included recommendations to:

- “[C]lean up all accumulated sediments to allow the free path of water through natural drainage systems;
- Improve the drainage structures and landfills to avoid alterations to wetlands;
- Continue with civil works for the protection of slope surfaces through the application of geo-textiles and the improvement of slope angles and drainage systems; and
- Consolidate civil works to stabilize slopes as soon as possible, especially those considered unstable, to avoid sedimentation of aquatic environments.”

9. One year later, the Tropical Science Center carried out a follow-up study<sup>76</sup>. Among its stated objectives was to evaluate the “effectiveness” of the EDA’s “environmental

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<sup>72</sup>CMCR, Ann. 10, EDA, p. 99.

<sup>73</sup>CMCR, Ann. 10, EDA, p. 100.

<sup>74</sup>CMCR, Ann. 10, EDA, p. 100.

<sup>75</sup>CMCR, Ann. 10, EDA, p. 161.

<sup>76</sup>Centro Científico Tropical (CCT), Follow-up and Monitoring Study Route 1856 Project-EDA Ecological Component, Jan. 15; RCR, Ann. 14.

recommendations”<sup>77</sup>. The results are reported in the EDA Follow-up, which was annexed to the Rejoinder.

10. Were the recommendations effective? As the Court heard yesterday from Mr. Reichler, Costa Rica did not meaningfully remediate the Road. So it will come as no surprise that the answer is: No. In fact, the ecological impacts became more widespread. While in 2013, five of the 10 tributaries had lower macroinvertebrate abundance and richness downstream of the Road than upstream<sup>78</sup>, by 2014, the number of tributaries showing these adverse impacts had risen to seven<sup>79</sup>. In some locations, the decline in richness between the upstream and downstream sampling sites was dramatic. As may be seen in tab 7 of the judge’s folder, at Site 6, the number of taxa declined from 20 to 9. The decline at Site 2 was from 18 taxa to 9. At Site 10, the number fell from 7 to 3. At site 9, it went from 12 to just 2. The EDA Follow-up accepted that this documented risk. The study concluded that Route 1856 “might be causing a decrease at the downstream points”<sup>80</sup>.

11. The same negative trend is evident in how the Tropical Science Center interpreted these data in regard to water quality. This can be seen at tab 8. Whereas in 2013 there had been a decline in water quality between upstream and downstream of the Road at five sampling sites<sup>81</sup>, in 2014, the number rose to nine of the 10<sup>82</sup>. Site 6, for instance, which had only “moderate pollution” upstream of the Road, became “very polluted” downstream. The water quality at Site 9 went from “polluted” upstream to “extremely polluted” downstream. The authors of the EDA Follow-up considered Road-derived sediment to present a risk; they concluded that the “localized decrease[s] in the quality of water” were “especially due to sedimentation processes”<sup>83</sup>.

12. These Road-induced impacts demonstrate why sediment conveyed to the San Juan by its Costa Rican tributaries is a serious concern. The EDA Follow-up characterizes every sampled

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<sup>77</sup>Centro Científico Tropical (CCT), Follow-up and Monitoring Study Route 1856 Project-EDA Ecological Component, Jan. 15; RCR, Ann. 14, p. 12.

<sup>78</sup>CMCR, Ann. 10, EDA, p. 242.

<sup>79</sup>Centro Científico Tropical (CCT), Follow-up and Monitoring Study Route 1856 Project-EDA Ecological Component, Jan. 15; RCR, Ann. 14, p. 49.

<sup>80</sup>*Ibid.*, p. 80.

<sup>81</sup>CMCR, Ann. 10, EDA, pp. 99-100.

<sup>82</sup>Centro Científico Tropical (CCT), Follow-up and Monitoring Study Route 1856 Project-EDA Ecological Component, Jan. 15; RCR, Ann. 14, pp. 98-99.

<sup>83</sup>*Ibid.*, p. 80.

tributary entering the San Juan, save one, as having water quality that is “polluted”, “very polluted”, or “extremely polluted”. Of these, only one is “polluted”, five are “very polluted”, and three are “extremely polluted”. In nearly all of them, the water quality is worse downstream of the Road than upstream. The tributary with the best water quality — with “best” being very much a relative term — had “moderate pollution,” and even then, its water quality was barely above the threshold for being “polluted”.

13. In any event, the central point is that, even according to the Costa Rican studies that were prepared for this proceeding, the data demonstrate that aquatic life and water quality in the tributaries leading into the San Juan are being adversely impacted by sediment from the Road, and that the impacts are getting worse. If nothing else, this demonstrates that there is a risk of harm to the San Juan, a conclusion that is reinforced by the sampling in the San Juan itself, where macroinvertebrates and periphyton were found to be more abundant and diverse on the non-impacted north side of the river than on the impacted, south bank<sup>84</sup>.

14. To be sure, the EDA asserts that the water quality impacts it detects are not transposable to the San Juan. But the risk to the San Juan cannot be assumed away. These tributaries flow directly into the San Juan, and the marked decrease in water quality is measured just before they debouche into the River. The seriousness of the risk is underscored by the potential for cumulative impacts of sediment pollution entering the San Juan via its many Road-impacted tributaries. Although Costa Rica sampled only 10 tributaries, the scientists who authored the EDA accept there are 30 more tributaries that were *not* sampled<sup>85</sup>. Even this understates the risk of cumulative impacts because Dr. Mende, Costa Rica’s expert on stream-crossings, reports there are no fewer than 127 tributaries, each capable of conveying Road-derived sediment directly into the San Juan<sup>86</sup>.

### **The Need for EIA**

15. Mr. President, I turn now to Costa Rica’s failure to carry out a prior environmental impact assessment and the consequences for Nicaragua of that choice.

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<sup>84</sup>Blanca Ríos Touma, “Ecological Impacts of the Route 1856 on the San Juan River, Nicaragua”, July 2014, p. 16; NR, Vol.II, Ann. 4.

<sup>85</sup>CMCR, Ann. 10, EDA, p. 69.

<sup>86</sup>Andreas Mende, “Inventory of Slopes and Water Courses related to the Border Road No 1856 between Mojón II and Delta Costa Rica”: Second Report, Dec. 2014, p. 29; RCR, Vol. II, Ann. 3.

16. I can be brief because the relevant facts are largely undisputed. Costa Rica accepts that it did not perform an EIA prior to commencing construction of Route 1856. Although Costa Rica has at times suggested an EIA might not have been required, that argument has been overtaken by the report of its EIA expert, Professor Neil Craik, which Costa Rica annexed to the Rejoinder. Professor Craik states that “under Costa Rican law, in the absence of an emergency, a road of this kind would have been subject to an EIA”<sup>87</sup>.

17. Professor McCaffery will address the inapplicability of the emergency exception. For now, the point is that Costa Rica’s expert on EIA accepts that the construction of Route 1856 would ordinarily have required a prior risk assessment. In other words, it presented by definition a risk of significant harm. It follows that there is also a risk of significant harm to Nicaragua, which is just metres ~~away~~ from the construction site and hydrologically connected to it. These risks required assessment. The fact that the immediately adjacent part of Nicaragua is a Ramsar site confirms EIA was needed. Professor Sheate explained in his summary report: “It seems inconceivable that an EIA would not normally be required, taking into consideration the various factors that need to be considered in deciding whether significant environmental effects are likely.”<sup>88</sup>

18. Mr. President, among the consequences of Costa Rica’s failure to carry out an EIA prior to constructing Route 1856 is that Costa Rica cannot now tell whether the Road is harming the River. Professor Thorne is candid about this. He states: “it is currently impossible for any scientific study to demonstrate the possibility of there being adverse ecological impacts on the Rio San Juan due to construction of the Road”<sup>89</sup>. Professor Thorne explains why. He says:

“This is because to do so would require the establishment of threshold levels for tolerance, morbidity and mortality of key species in the River with regard to sediment and sedimentation, a process that has not been undertaken to date and which would take several years to complete.”<sup>90</sup>

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<sup>87</sup>Professor Neil Craik, “The Requirement to Perform a Prior Environmental Impact Assessment”, Jan. 2015, para 4.7; RCR, Vol. II, Ann.1.

<sup>88</sup>Sheate, Summary Report, 15 March 2015, para. 11.

<sup>89</sup>Thorne, “Assessment of the Impact of the Construction of the Border road in Costa Rica on the San Juan River”, Dec. 2013, CMCR, App. A, p. 108, para. 10.20.

<sup>90</sup>Thorne, “Assessment of the Impact of the Construction of the Border road in Costa Rica on the San Juan River”, December 2013, CMCR, App. A, p. 108, para. 10.20.

19. Nicaragua agrees. Professor Thorne has identified the precise problem. Prior to construction of the road, Costa Rica made no attempt, as Professor Thorne puts it, to establish the “threshold levels for tolerance, morbidity and mortality of key species in the River with regard to sediment and sedimentation”<sup>91</sup>. The consequence is that Costa Rica cannot determine whether, as Professor Thorne also puts it, there are “adverse ecological impacts on the Río San Juan due to construction of the Road”<sup>92</sup>. Nicaragua would also add that because no *ex ante* assessment was undertaken, Costa Rica foreclosed the possibility of designing the project so as to avoid or minimize the risk of crossing these thresholds, or of developing mitigation strategies that would achieve the same result after the road had been built.

20. The same point applies with respect to detecting adverse impacts to the San Juan’s fish populations. Costa Rica’s expert on fish — Professor Ian Cowx — accepts there are families of fish found in the San Juan, species of which are vulnerable to elevated levels of sediments. He also accepts that there are no data on whether the particular species in the San Juan are vulnerable. This caused Professor Thorne to acknowledge that “no data are available for the Río San Juan in the reach adjacent to the Road”<sup>93</sup>, and to summarize Professor Cowx’s opinion as being that “it would require intense research using specialist equipment over a protracted period to identify the species-specific adaptations of the fish living in the River”<sup>94</sup>. In other words, Costa Rica cannot determine whether the road is adversely impacting fish in the San Juan because it is not known whether the fish in the relevant part of the river are sensitive to sediment, and if so, at what levels. Put simply, EIA is needed.

21. Costa Rica’s EDA, which was prepared three years after the start of construction, does not remedy the failure to carry out a prior EIA. Dr. Sheate explains:

“As a post-construction exercise, [the EDA] can only seek to identify and recommend ways to mitigate and remediate impacts after the event. An EIA, by contrast, seeks to identify possible impacts before they have occurred. An EIA would also have led to carefully considered answers to questions such as: What design

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<sup>91</sup>Thorne, “Assessment of the Impact of the Construction of the Border road in Costa Rica on the San Juan River”, Dec. 2013, CMCR, App. A, p. 108, para. 10.20.

<sup>92</sup>*Ibid.*

<sup>93</sup>Thorne, “Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River: Reply report”, Feb. 2015, RCR, App. A, p. 112, para. 6.17.

<sup>94</sup>*Ibid.*, para. 6.10.

standard is the Road to be built to? Where is the spoil and debris as a result of the construction to be disposed of and how can the environmental effects of these activities be avoided or minimized through the design or location of the Road. These and similar issues are not addressed in the EDA, which is therefore not a substitute for EIA, nor in any way equivalent.”<sup>95</sup>

22. One of the reasons why Costa Rica’s EDA is not an EIA is expressed by the authors of the EDA itself. Here is what they say in the study’s conclusions concerning aquatic biology:

“In order to be able to evaluate with greater certainty if the construction . . . of the Route [1856] created a level of sedimentation that could generate an effect on the aquatic fauna of the San Juan River, and the tributary streams of the study area, it is first necessary to determine and validate the thresholds of sedimentation that could affect the species found in these rivers, due to the fact that there exists no information for the aquatic organisms in the study area.”<sup>96</sup>

23. The EDA’s authors then state:

“It would also be necessary to determine and validate the thresholds of mortality and morbidity for the species found in those rivers, as well as the . . . tolerance to sedimentation, to better evaluate if the construction of Route 1856 has an effect on the aquatic fauna of the San Juan River. This is due to the fact that there is no information on the aquatic organisms of the study area.”<sup>97</sup>

24. In other words, according to the EDA’s own authors, the EDA could *not* determine whether sediment from the road is harming aquatic organisms in the San Juan because, as they put it, “there is no information on the aquatic organisms of the study area”<sup>98</sup>. The information they found wanting is what would have been obtained during an EIA, had one been carried out.

25. In short, the consequence for Nicaragua, of Costa Rica’s failure to carry out an EIA, is that Costa Rica cannot determine whether Route 1856 is having impact to Nicaragua, including its Ramsar site; cannot design the road’s much-needed mitigation in a way that gives assurance that such impacts will be minimized or avoided; and cannot plan the road’s completion so that it is built, and used, in a manner that does not cause further harm to Nicaragua.

26. Mr. President, this concludes my presentation. Thank you for your kind attention. I ask that you call Nicaragua’s next speaker, Professor McCaffrey, to the podium.

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<sup>95</sup>Sheate Summary Report, March 2015, para. 43.

<sup>96</sup>CMCR, Ann. 10, EDA, p. 158.

<sup>97</sup>*Ibid.*, p. 158.

<sup>98</sup>*Ibid.*, p. 11.

Le PRESIDENT : Merci, Monsieur Loewenstein. Je vais demander au professeur McCaffrey de venir à la barre et de commencer sa plaidoirie que je serai sans doute obligé d'interrompre un peu plus tard, à un moment opportun, pour faire une pause. Mais, Monsieur le professeur McCaffrey, veuillez commencer maintenant votre plaidoirie, s'il vous plaît.

Mr. McCAFFREY : Merci, Monsieur le président.

#### **COSTA RICA'S BREACHES OF ITS ENVIRONMENTAL OBLIGATIONS**

1. Mr. President, distinguished Members of the Court, my task this morning is to establish that Costa Rica's conduct in constructing Route 1856, which I will often refer to simply as the "road", breaches environmental obligations owed to Nicaragua.

2. My presentation will address the following points: first, Costa Rica's invocation of an emergency under its national law does not excuse its violations of international law; second, Costa Rica breached its obligation to prepare, in advance, an environmental impact assessment concerning its road project; third, Costa Rica breached its obligation to notify Nicaragua prior to beginning construction of the road project; fourth, the way in which Costa Rica constructed the road resulted in breaches of Costa Rica's obligation not to cause significant transboundary harm to Nicaragua; and fifth, Costa Rica breached treaties to which both States are parties due to the manner in which the road was, and is still being, constructed.

3. Mr. President, as a preliminary matter, the Court heard me explain last week that, in the view of Nicaragua, many of the environmental obligations invoked by Costa Rica in the *Certain Activities* case did not apply there because of the *lex specialis* governing the Parties' relations in respect of the San Juan River. How can I then, it might be wondered, turn around and invoke many of those same obligations against Costa Rica in this case?

4. Mr. President, the answer is simple and straightforward. This case, unlike *Certain Activities*, does not involve claims by Costa Rica concerning Nicaragua's dredging of the San Juan River, cleaning *caños*, or anything of the sort, all of which were dealt with by President Cleveland in his 1888 Award. Instead, it involves, as you have heard yesterday and this morning, the breathtakingly careless construction of a road, much of which is perched above the San Juan River, resulting in massive quantities of sediment and debris being washed into the river, and hence into



Nicaraguan sovereign territory. Certainly the 1858 Treaty is relevant, precisely because it establishes that the river is Nicaragua's sovereign territory. But neither the treaty nor the arbitral awards conflict in any way with the environmental obligations applicable to Costa Rica in respect of its road project.

5. Mr. President, reading between the lines of Costa Rica's written pleadings, Nicaragua's neighbour seems to view the problem of sediment and debris delivery into the river dismissively as a mere "invasion by dirt", in sharp contrast to a military invasion or the like. But however much Costa Rica may belittle the situation — and it is easy for it to do so because it is not on the receiving end of the mess that it has created — it poses real problems for, and thus causes real and significant harm to, Nicaragua, as my colleagues have shown most recently this morning. It therefore falls outside the coverage of the *lex specialis* and squarely within the applicable principles of international environmental law.

**1. Costa Rica's invocation of an emergency under its national law does not excuse its violations of international law**

6. Mr. President, first to Costa Rica's invocation of an emergency and its lack of effect in excusing Costa Rica's breaches.

7. On 21 February 2011, the Costa Rican Government issued an Executive Decree entitled "To Declare that the Situation brought about by the Violation of Costa Rican Sovereignty by Nicaragua constitutes a State of Emergency"<sup>99</sup>. This declaration provided the legal basis under Costa Rican domestic law for the construction of the road without complying with the normal requirements of its own domestic law. The Costa Rican government also attempted to use the declaration to excuse Costa Rica's violations of international law resulting from the construction of the road. I will discuss later the obvious question the title of this decree raises, namely, how was Nicaragua's cleaning of the *caño* with hand tools related to the construction of a road that ended far from the *caño* and the disputed territory.

8. At the outset, Mr. President, let me assure the Court that Nicaragua of course recognizes that international law must make allowances for situations in which genuine emergencies actually

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<sup>99</sup>Memorial of Nicaragua (MN), Ann. 11.

prevent States from complying with their international obligations. These situations do arise occasionally of course and international law must effect a balance between recognizing that the affected State is overwhelmed and should be excused temporarily from complying with its otherwise applicable obligations — between that consideration and the injury suffered by the State or States to which the obligation is owed. International law has generally dealt with such situations through the law of State Responsibility and, in particular, circumstances precluding wrongfulness.

9. The ILC emphasizes in the commentaries to its Articles on State Responsibility that, as you noted in the *Gabčíkovo-Nagymaros Project* case<sup>100</sup>, circumstances precluding wrongfulness “do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists”<sup>101</sup>. Thus, in the present case, even if Costa Rica could successfully make out a defence based on a circumstance precluding wrongfulness — which it has not attempted to do, and in Nicaragua’s view, it could not do — Costa Rica’s obligations would only be suspended for so long as the circumstance subsisted.

10. In this case, the “circumstance”, and I put that word in quotation marks, is the purported emergency. The question for Costa Rica would be, is there any circumstance precluding wrongfulness for emergencies declared by a government? Do such emergencies suspend the international obligations of the State declaring them?

11. The answer, Mr. President, to the first question is “no”. There is no circumstance precluding wrongfulness entitled “emergency”. But perhaps a State’s declaration of an emergency could fit into one of the circumstances that *are* recognized. So, Mr. President, let me briefly review the most likely candidates.

12. First, *self-defence*<sup>102</sup>. This is a circumstance that precludes the wrongfulness of a State’s use of force where the strict requirements of Article 51 of the United Nations Charter are met. This circumstance is thus not applicable to Costa Rica’s attempt to exempt itself from the EIA requirement and its other obligations owed to Nicaragua.

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<sup>100</sup>*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 39, para. 48.

<sup>101</sup>Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 71, para. 2 (commentary on Chap. V, Circumstances Precluding Wrongfulness); annexed to General Assembly resolution 56/83 of 12 Dec. 2001 (hereinafter “State Responsibility articles”).

<sup>102</sup>State Responsibility articles, Art. 21.

13. Second, *countermeasures* in respect of an internationally wrongful act<sup>103</sup>. It may be tempting at first blush to find this circumstance applicable in light of Costa Rica's statements that the pell-mell construction of the road was a response to Nicaragua's purported "invasion" of its territory in the disputed area. The ILC's commentary explains that "the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury"<sup>104</sup>. As the chapter of the ILC's Articles on countermeasures makes clear, two important prerequisites for lawful countermeasure are thus, first, "the existence of an internationally wrongful act which injured the State taking the countermeasure"<sup>105</sup>, and second, that "the countermeasure[s] be taken . . . in order to induce [the responsible] State to comply with its obligations of cessation and reparation"<sup>106</sup>.

14. Neither of these prerequisites is met in the present case. First, it will not be settled whether Nicaragua has committed an internationally wrongful act by cleaning the *caño* until the Court renders its Judgment in the joined cases. And second, Costa Rica's construction of the road has absolutely nothing to do with an effort by that State to induce Nicaragua to comply with its obligations of cessation and reparation — to say nothing of the fact that it will only be clear if Nicaragua has such obligations when, again, the Court renders its Judgment in the joined cases. So much, then, for precluding the wrongfulness of Costa Rica's breaches on the ground that its conduct constituted a countermeasure.

15. A *third* possible circumstance precluding wrongfulness that may be applicable in this case is *necessity, état de nécessité* in French. In view of the significant possibility of abuse of this defence, the Commission and the State practice that its draft reflects are quite cautious about its availability, concluding that: "On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions . . ."<sup>107</sup> Indeed, the Commission's commentary states that "necessity will only rarely be

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<sup>103</sup>State Responsibility articles, Art. 22.

<sup>104</sup>*Ibid.*, p. 75.

<sup>105</sup>*Ibid.*, p. 130.

<sup>106</sup>*Ibid.*

<sup>107</sup>*Ibid.*, p. 83, para. 14.

available to excuse non-performance of an obligation and . . . it is subject to strict limitations to safeguard against possible abuse”<sup>108</sup>.

16. But there being no circumstance precluding wrongfulness for an “emergency” per se, necessity would seem to be the circumstance that is closest to what Costa Rica is claiming as a ground for exempting itself from its international obligations. Costa Rica, however, vehemently insists that it “has not invoked [necessity] and it is not incumbent upon it to do so”<sup>109</sup>. Costa Rica has perhaps avoided invoking necessity because it was well aware of the exacting requirements for doing so, requirements it knew it could not hope to meet.

17. The Commission’s commentary does observe that necessity has been invoked to “preserv[e] the very existence of the State and its people in time of public emergency . . .” “But”, the commentary states, “stringent conditions are imposed before any such plea is allowed”<sup>110</sup>. As Nicaragua has noted<sup>111</sup>, the ILC indicates that to successfully invoke necessity to preclude the wrongfulness of its conduct in constructing the road, Costa Rica would have to establish that invoking an “emergency” “is the only way for a State to safeguard an essential interest against a grave and imminent peril . . .”<sup>112</sup>. This Costa Rica has not even attempted to do and, in fact, could not do.

18. Mr. President, as I have already noted, there is no separate circumstance precluding wrongfulness for emergencies, presumably because this would simply be too broad a category. Nicaragua does not believe that any of the circumstances recognized by the ILC is applicable in this case. Instead, as indicated in its written pleadings, Nicaragua believes the rushed, unplanned and environmentally disastrous construction of the road along the San Juan River was a misguided reaction, perhaps for domestic political purposes, to Nicaragua’s modest dredging and *caño*-cleaning projects, which took place far from the terminus of the 140-km-long road at the Colorado River. I will return to the genuineness of the purported “emergency” in a moment.

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<sup>108</sup>State Responsibility articles, p. 80, para. 2.

<sup>109</sup>Counter-Memorial of Costa Rica (CMCR), p. 113, para. 5.15.

<sup>110</sup>State Responsibility articles, p. 83, para. 14.

<sup>111</sup>Reply of Nicaragua (RN), p. 183, para. 6.10.

<sup>112</sup>State Responsibility articles, Art. 25, para. 1 (a).

19. Rather than invoking a state of necessity, Costa Rica says that its “domestic legislation does not require the conduct of an environmental impact assessment in an emergency situation, while international law comprises a *renvoi* to domestic law”<sup>113</sup>. Three comments on this statement, Mr. President: First, apparently, once Costa Rica has declared an emergency, its domestic legislation — though not, interestingly, its law on environmental impact assessment — waives not only the environmental impact assessment process, but virtually everything else, as well. Second, whatever Costa Rica’s, or any State’s, domestic law says cannot override its obligations under international law — a point to which I will return in a moment. And third, related to this, what does Costa Rica mean when it says “international law comprises a *renvoi* to domestic law”? I will deal with this latter question when I address Costa Rica’s failure to conduct an EIA in relation to its road project.

20. Significantly, Mr. President, Costa Rica has not so much as attempted to fit its emergency declaration within one of the circumstances precluding wrongfulness recognized by international law. Instead, it takes the position that it is solely within its discretion to declare an emergency under its domestic law. This is, of course, not problematic, in itself. But then Costa Rica goes further, and says this discretionary declaration of emergency under its domestic law also relieves it from its relevant obligations under international law. This is what is a problem for Nicaragua.

21. Perhaps most strikingly, [slide 1 on] on 13 December 2011 then-President Chinchilla of Costa Rica declared, in response to Nicaragua’s repeated requests for information about the road project, that Costa Rica — and this is on your screens now — had “issued an emergency decree due to national necessity and it is on that basis that we have developed the projects. We are not taking even one step back.”<sup>114</sup> She stated that therefore, Costa Rica has “no reason to offer explanations to the Government of Nicaragua”<sup>115</sup>.

22. It is this position of Costa Rica, not the emergency decree itself, that Nicaragua believes is clearly unjustifiable under international law, Mr. President. [Slide 1 off] It flies in the face of

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<sup>113</sup>CMCR, p. 113, para. 5.15.

<sup>114</sup>*El País*, Costa Rica “Chinchilla defends highway criticized by Nicaragua, rejects dialogue”, 14 Dec. 2011, MN, Vol. II, Ann. 24.

<sup>115</sup>*Ibid.*

the principle reflected, *inter alia*, in Article 27 of the Vienna Convention on the Law of Treaties.

[Slide 2 on] Article 27 provides:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”<sup>116</sup>

Article 46 deals with “Provisions of internal law regarding competence to conclude treaties”, which is not at issue here. [Slide 2 off: slide 3 on] The same principle is reflected more generally in Article 32 of the State Responsibility Articles, entitled “Irrelevance of internal law”<sup>117</sup>. It reads as follows, and is now on the screen:

“The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.”<sup>118</sup> [Slide 3 off]

23. Mr. President, these two Articles, when combined with Costa Rica’s wilfully not having invoked necessity or any other circumstance precluding wrongfulness, leave precious little room for Costa Rica to escape from its obligations toward Nicaragua that arise from the shoddy construction of the road and its consequences. The Costa Rican Government may have succeeded in insulating itself from responsibility under Costa Rican internal law, but it has failed to do so under international law.

24. Mr. President, it remains for me to deal very briefly, in the interest of time, with other matters arising from Costa Rica’s emergency declaration, if you wish me to continue? Thank you.

25. First, Costa Rica has failed to provide any evidence that anything about the situation, except for President Chinchilla’s declaration itself, indicated there was an emergency requiring Costa Rica to construct the border road.

26. If there had been a bona fide emergency requiring a transit route along the river, one would have expected Costa Rica to have constructed at least a rudimentary, but drivable, route to and from the *caño* and the disputed territory. The actual road, (*a*) is not, even now, drivable, some four and a half years after construction on it began, and (*b*) stops well short of the disputed area, at or before the delta, where the Río Colorado branches off from the San Juan proper. Even if it were drivable it would not allow personnel to travel to the area in dispute. In addition, there have been

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<sup>116</sup>Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations, *Treaty Series (UNTS)*, 331, Art. 27.

<sup>117</sup>State Responsibility Articles, Art. 32, p. 94.

<sup>118</sup>*Ibid.*

long periods in which virtually no construction activity on the road was taking place, apparently for budgetary reasons, indicating that it was not a governmental priority. This is not the way governments normally deal with emergencies.

27. In addition, the relationship between the road project and the emergency declaration is objectively doubtful based on the evidence. Construction of the road began *before* the emergency declaration was issued. Construction began in December 2010; the President did not issue her emergency decree until 21 February 2011. Justification of the road project on grounds of an emergency thus seems to have been an afterthought.

28. Finally, Costa Rica, taking it at its own word, initiated construction of the road in December 2010, in response to Nicaragua's *caño*-cleaning activities in October of that year. This was after Costa Rica had requested provisional measures from this Court when it filed the *Certain Activities* case in November of the same year. Thus, Costa Rica took matters into its own hands by initiating construction of the road after it had requested that the Court grant it provisional measures concerning the same situation invoked by it to justify construction of the road. President Chinchilla issued her emergency decree after hearings had been held on Costa Rica's provisional measures request and, as Nicaragua's Agent noted, one day before the Court issued its preliminary measures Order. This Court disapproved of such unilateral self-help measures being taken after a dispute has been submitted to it in the *United States Diplomatic and Consular Staff in Tehran* case<sup>119</sup>. Yet this seems to have been Costa Rica's *modus operandi*.

29. But, Mr. President, even if there had been a bona fide emergency, and even if Costa's response of constructing the road was appropriate, *quad non*, Costa Rica remained under obligations of prior notification, environmental impact assessment, and prevention of significant harm to Nicaragua since, as I have discussed, its compliance with these obligations would not have been excused. It is to these obligations that I would like to turn next, perhaps after a break, Mr. President? Thank you.

Le PRESIDENT : Oui, merci, Monsieur le professeur. En effet, c'est le moment approprié de faire une pause de 15 minutes. La Cour va donc à présent se retirer. L'audience est suspendue.

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<sup>119</sup>*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, I.C.J. Reports 1980, p. 3.

*L'audience est suspendue de 11 h 35 à 11 h 55*

Le PRESIDENT : Veuillez vous asseoir. Monsieur le professeur, je vous rends la parole pour la suite de votre plaidoirie.

Mr. McCAFFREY : Merci, Monsieur le président.

**2. Costa Rica breached its obligation to prepare, in advance, an Environmental Impact Assessment concerning its Road project**

30. Mr. President, Members of the Court, I will turn next to environmental impact assessment. Both Parties accept that there is an obligation under general international law to prepare a transboundary environmental impact assessment, or EIA, as this Court found in the *Pulp Mills* case<sup>120</sup>. But Costa Rica makes three claims in support of its contention that it was under no obligation to conduct an environmental impact assessment of its Road project. First, it says an emergency under domestic law is an exception to the international obligation to prepare an EIA. Second, it observes that “the 1858 Treaty does not regulate road infrastructure works on Costa Rican territory”<sup>121</sup>. And third, it points out that the construction work was “conducted exclusively within Costa Rica’s territory”<sup>122</sup>. I will deal with these contentions in turn.

31. First, Costa Rica argues that its emergency declaration under domestic law exempts it from the obligation to conduct a transboundary EIA<sup>123</sup>. (Parenthetically, Mr. President, Costa Rica says the emergency declaration exempts it from EIA requirements under its domestic law, as well, but as we heard from Professor Sheate yesterday<sup>124</sup>, there is no exemption under the Costa Rican EIA law for emergencies.) Costa Rica arrives at its remarkable conclusion about the effect of its domestic emergency regulation on its international obligations essentially by arguing that this Court in your *Pulp Mills* Judgment *didn’t* say a domestic emergency declaration *wasn’t* an exception, therefore it must *be* an exception<sup>125</sup>. Specifically, Costa Rica says in its Rejoinder, “No

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<sup>120</sup>*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 83, para. 204.

<sup>121</sup>Counter-Memorial of Costa Rica (CMCR), para. 4.4.

<sup>122</sup>*Ibid.*

<sup>123</sup>Rejoinder of Costa Rica (RCR), pp. 95-101.

<sup>124</sup>CR 2015/9, p. 38 (Sheate).

<sup>125</sup>*Ibid.*, p. 95.



inference against the determination of an emergency situation under domestic law as an exception to the obligation to conduct an EIA can be made from paragraph 205 of the Court's Judgment in the *Pulp Mills* case.”<sup>126</sup> That is the paragraph in which you stated the transboundary EIA requirement. It supposedly follows from this that an emergency declared under domestic law *is* an exception to the transboundary EIA requirement under general international law found by the Court. Well, Mr. President, one can only admire Costa Rica's breathtaking logical gymnastics.

32. Costa Rica proceeds to cite a number of sources, from Antarctica to Espoo, from Kyiv to Canada, recognizing emergency exemptions. And this is all well and good. The problem for Costa Rica, a problem that it doesn't confront, is that as shown by Professor Sheate, all of these exemptions are part of carefully crafted EIA régimes, whether on the domestic or on the international plane, that are designed to ensure that projects likely to have significant environmental effects are assessed before the authorization is given to proceed with them. The assessment is then to be taken into account in the decision-making process relating to the proposed project<sup>127</sup>. Even given these safeguards, according to Professor Sheate, emergency exemptions “are rarely used, and for good reason, since otherwise it would be too easy to circumvent the purpose of EIA . . .”<sup>128</sup>. Quite so, in the present case.

33. Professor Kohen made much of Professor Sheate's recognition that many, if not most, prominent EIA régimes contain some sort of carefully regulated emergency exemption. But that does not help Costa Rica. First, Costa Rican law does not contain such an exemption. Second, these régimes cautiously limit the exemption to the immediate situation, provided that the exemption is lifted as soon as the situation permits, and often provide for some substitute assessment process, often running concurrently with the project. Not so with Costa Rica's emergency decree or Costa Rica's conduct following its declaration of an emergency. And third, Costa Rica does not establish that the domestic law régimes it cites exempt the State in question from its EIA obligations under international law. Yet this is precisely what Costa Rica needs to establish.

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<sup>126</sup>CR 2015/9, p. 38 (Sheate), para. 3.32.

<sup>127</sup>William R. Sheate, Summary Report, 15 March 2015, p. 11, para. 31.

<sup>128</sup>*Ibid.*

34. Professor Sheate's Summary Report cites an example of a real emergency, one that was absolutely devastating to the natural and human environment. It is a particularly interesting illustration, because despite the massive scale of the event and its effects, an EIA was prepared at the same time as remedial work was being undertaken. This was the eruption of the Mt. St. Helens volcano in the US state of Washington, now depicted on the screen and at tab 12 of your folders. [Slide 4 on] As Professor Sheate explains, the eruption, which killed 57 people:

“caused major flooding, river sedimentation, and adverse effects on fish and wildlife as well as on human settlements. The US Army Corps of Engineers—the lead federal agency to respond—invoked the ‘special arrangements’ provision of [National Environmental Policy Act] regulations, under which they were allowed to proceed immediately with certain river dredging and other emergency work while *at the same time* conducting an accelerated EIA process.”<sup>129</sup>

35. Professor Sheate observes that this example illustrates the fact that:

“There are inevitably occasions when it is simply impossible to undertake EIA because of the need to put in place action or infrastructure to save lives or prevent the immediate destruction of the environment. But in recognition of the value of EIA, such an exemption is limited to dealing with the immediate urgency, and as soon as possible, an alternative assessment process should be undertaken.”<sup>130</sup> [Slide 4 off]

36. If an EIA can be prepared while dealing with a disaster of these proportions, Mr. President, surely Costa Rica could have prepared one for its Road project.

37. Mr. President, I turn now to the second and third justifications offered by Costa Rica for not preparing a transboundary EIA. The Court will recall that these were that “the 1858 Treaty does not regulate road infrastructure works on Costa Rican territory”<sup>131</sup>, and that the construction work was “conducted exclusively within Costa Rica’s territory”<sup>132</sup>. These are truisms, but advance the ball not an inch toward justifying Costa Rica’s failure to prepare a transboundary EIA.

38. The silent but obvious implication of these propositions, Mr. President, is that Costa Rica believes it can do whatever it wants within its territory, without any regard whatsoever for transboundary consequences. One would have thought that this idea went out with the resounding rejection of the Harmon Doctrine of absolute territorial sovereignty of 1895<sup>133</sup>.

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<sup>129</sup>William R. Sheate, Summary Report, 15 March 2015, p. 11, para. 32; emphasis added.

<sup>130</sup>*Ibid.*, pp. 11-12.

<sup>131</sup>CMCR, para. 4.4.

<sup>132</sup>*Ibid.*

<sup>133</sup>21 Op. Att’y Gen. 274 (1895). See RN, pp. 155-157.

39. In fact, the proposition for which Costa Rica contends has long since ceased to hold water, and Nicaragua has placed before the Court<sup>134</sup>, if there was any need to do so, decisions from 1928 to 2013 confirming this, from the *Island of Palmas* award<sup>135</sup> and the *Corfu Channel* case<sup>136</sup> to the *Trail Smelter*<sup>137</sup> and *Kishenganga*<sup>138</sup> awards.

40. But of course even if we look only at Costa Rica's conduct with respect to its own territory, we see blatant violations of multilateral treaty obligations it has undertaken, that are expressed in such agreements as the Biological Diversity and Ramsar Conventions<sup>139</sup>. As to the latter, an agreement much prized by Costa Rica in the *Certain Activities* case and to which I will return briefly later, several listed Ramsar wetlands of international importance in Costa Rica lie in the vicinity of the Road project and have undoubtedly been affected by it, as discussed in Professor Sheate's report<sup>140</sup>.

41. As I mentioned earlier, Mr. President, Costa Rica contends that it is under no obligation to prepare an EIA for its road projects because its "domestic legislation does not require the conduct of an environmental impact assessment in an emergency situation" — Costa Rica has evidently not read its own EIA law — "while international law comprises a *renvoi* to domestic law"<sup>141</sup>. Nicaragua has shown this argument to be confused and entirely without merit. I will reprise this explanation briefly.

42. First, as a matter of general principle, one must question whether Costa Rica has thought this remarkable proposition through. If it were indeed the case that international law leaves entirely to domestic law the question whether or not to prepare an environmental impact assessment, how should this Court's finding in the *Pulp Mills* case concerning the obligation under general

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<sup>134</sup> See, e.g., RN, pp. 152-153.

<sup>135</sup> Arbitral Award, 4 April 1928, *Island of Palmas (Netherlands v. United States of America)*, United Nations, *Reports of International Arbitration Awards (UNRIAA)*, Vol. II, p. 839.

<sup>136</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, *I.C.J. Reports 1949*, p. 22.

<sup>137</sup> Arbitral Award, 11 March 1941, *Trail Smelter Arbitration (United States of America v. Canada)*, *UNRIAA*, Vol. III, p. 1965.

<sup>138</sup> Partial Award, 18 February 2013, *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1392](http://www.pca-cpa.org/showpage.asp?pag_id=1392).

<sup>139</sup> See William R. Sheate, "Comments on the Lack of EIA for the San Juan Border Road in Costa Rica", July 2014, Section 5; RN, Vol. II, Annex 5.

<sup>140</sup> *Ibid.*

<sup>141</sup> CMCR, p. 113, para. 5.15.

international law to prepare an EIA be understood? [Slide 5 on] I have now on the screen and at tab 13 is your passage from the *Pulp Mills* case<sup>142</sup> that is by now very well-known and, in the interest of time, I will not read it out. You do find a requirement under general international law to prepare a transboundary environmental impact assessment.

43. Try as I might, Mr. President, I cannot find anything in that statement by your Court that says anything about a “*renvoi* to domestic law”. [Slide 5 off] What you *did* say in that case was the following: [slide 6 on] “it is the view of the Court [this is at tab 14] 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”<sup>143</sup>. I will stop there again for reasons of time, but the full quote is in your judges’ folder.

44. Thus, Mr. President, it is the *content* of an EIA that is determined by the domestic law of the State in which the project is undertaken, not the question whether an EIA should be undertaken at all. The latter question is governed by international law, as you made crystal clear in the first passage from your *Pulp Mills* Judgment that I showed on your screens a moment ago.

45. In addition, you made clear that “an environmental impact assessment must be conducted *prior* to the implementation of a project”, and that even after “operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken”. Thus you required that an EIA must be undertaken *ex ante* and that the project must be monitored throughout its life. Costa Rica does not dispute that it failed to meet the former requirement; it has provided little evidence to indicate that it is diligently complying with the latter. [Slide 6 off]

46. Yet Costa Rica tries, Houdini-like, to escape the obligation to prepare an EIA on yet another ground, which it deploys in respect of other obligations as well. Unfortunately for Costa Rica, it is no Houdini; this attempt, too, is unavailing.

47. Costa Rica’s argument is in essence that while it accepts the obligations under the Biodiversity Convention and what it characterizes as “three central obligations: . . . to conduct an environmental impact assessment . . .; [to provide] notification; and . . . to [avoid] caus[ing] . . .

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<sup>142</sup>*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 83, para. 204.

<sup>143</sup>*Ibid.*, pp. 83-84, para. 205; emphasis added.

transboundary harm”<sup>144</sup>, they do not apply in this case. Why? Because, according to Costa Rica, the “threshold” for their application is not met. That threshold is stated by Costa Rica to be a “risk of significant adverse impact”<sup>145</sup>. Costa Rica says the quantities of sediment and debris washed into the San Juan from the road project are not “significant” in comparison with the river’s already heavy sediment load, and therefore the threshold for these obligations to be triggered is not met. But that threshold, Mr. President, is in fact met by virtue of the road meeting the requirements under Costa Rica’s own EIA law for a full environmental impact study, a category A road with “high potential environmental impact”. By definition, even according to Costa Rican law, this project poses a risk of environmental harm and therefore a risk of transboundary harm given that Nicaragua is only metres away.

48. Mr. President, in light of the testimony we heard yesterday from Professors Kondolf and Andrews, and the presentations of my colleagues Mr. Loewenstein and Mr. Reichler, this contention can be dealt with in short order. In a word, Costa Rica confuses magnitude with significance, and fails to consider the context of the challenges facing Nicaragua in respect of the Lower San Juan.

49. By the calculations of Professor Thorne, Costa Rica’s own expert, the road is responsible for adding 75,000 tons of sediment to the San Juan River, Nicaragua’s territory, each year<sup>146</sup>. *75,000 tons*. Dr. Andrews told us that would form a column of sediment filling the Great Hall and projecting upward the length of a football field. And Nicaragua’s calculations indicate that the quantity is much larger. But even taking Costa Rica’s figures, and bearing in mind that Nicaragua’s dredging programme is unable to keep up with the transported sediment in the Lower San Juan<sup>147</sup>, this means that Nicaragua will have to work harder, will have to devote more human, capital and financial resources, to a dredging programme that is already struggling. This is why the Court should find that Costa Rica should at least have been aware of the possibility that there was what you called a “risk that the proposed industrial activity may have a significant adverse impact

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<sup>144</sup>CMCR, p. 109, para. 5.6.

<sup>145</sup>*Ibid.*, p. 195, para. 6.30.

<sup>146</sup>Written Statement of Colin Thorne, March 2015, p. 6, para. 3.2.

<sup>147</sup>See generally Cornelis van Rhee, Written Statement, 15 March 2015.

in a transboundary context”. And why the Court should also find that this risk continues today, and will continue until the problem is corrected, if that is in fact possible. This underscores the importance of Costa Rica’s undertaking what this Court called “continuous monitoring of [the project’s] effects on the environment”.

50. Mr. President, one additional point before turning to Costa Rica’s breach of the obligation to notify. As Nicaragua has stated in its pleadings and as Professor Sheate makes clear, if the Court finds that the preparation of even a summary transboundary EIA was not possible due to a bona fide emergency situation, State practice indicates that Costa Rica should at least have assessed the environmental impact of the road while construction was underway and provided all relevant information to Nicaragua. For the reasons given by my colleague Mr. Loewenstein, Costa Rica’s “Environmental Diagnostic Assessment” (EDA) does not satisfy this requirement and Professor Sheate testified yesterday that Costa Rica’s EDA is in no way equivalent to an EIA.

### **3. Costa Rica breached its obligation to notify Nicaragua prior to beginning construction of the Road project**

51. Mr. President, turning to the obligation to notify, I have already noted that there is no disagreement between the Parties as to the existence of the obligation and Costa Rica does not dispute the existence of it. It says rather, as already indicated, that the obligation has not been triggered for it because the threshold of “significance” has not been met. On this, Mr. President, I can be brief.

52. Once again, Costa Rica confuses magnitude with significance, as explained by my colleague Mr. Reichler. Nicaragua has demonstrated significant harm and a risk of significant harm to itself, in terms of burdens on human, material and financial resources, and to the river and its aquatic environment. Costa Rica therefore had an obligation to notify Nicaragua of its road project, which it failed to do.

### **4. Costa Rica breached its obligation not to cause significant transboundary harm to Nicaragua**

53. I turn next, Mr. President, to Costa Rica’s breach of its obligation not to cause significant transboundary harm to Nicaragua. As before, Costa Rica accepts this obligation, contesting only its violation of it. Now that we know that the risk posed by the road project has materialized, in the

form of at least 75,000 tons of sediment annually, which amounts to 325,000 tons over the more than four years since construction began — and I would remind the Court that this is Costa Rica’s estimate, which Nicaragua believes to be quite conservative — Nicaragua is of the view that this is significant, causes Nicaragua significant harm, and poses what you called “a risk that the proposed industrial activity” — in this case, an actual one — “may have a significant adverse impact in a transboundary context” in the future, as well. My colleague Mr. Reichler has amply demonstrated that Costa Rica’s road project causes significant harm to the Lower San Juan, by adding to the sediment deposits already obstructing navigation and diminishing the flow of fresh water to the wetlands downstream that depend on it for their ecological balance. And I would recall that this is especially true in view of the inability of Nicaragua’s dredges to keep up with the rate of sediment deposition in the first place, as noted by my colleague Paul Reichler earlier.

54. As with the obligations of environmental impact assessment and prior notification, Costa Rica admits that the road is responsible for contributing what Nicaragua considers to be massive quantities of sediment to the river. It simply says, once again, that these quantities pale into insignificance when compared with the river’s already very heavy sediment load. Nicaragua would have two responses to these contentions.

55. First, they are wide of the mark, since the issue is not magnitude, but significance in context. My colleague Mr. Reichler has shown that the additional quantities of sediment and debris that Costa Rica’s road project contributes to the river are, in fact, significant in context, when measured not against the river’s total sediment load, but against the additional impediments to navigation and harm to aquatic ecosystems, including wetlands, they cause, and against the additional resources Nicaragua must expend in order to try to deal with these additional sediment loads.

56. Second, as demonstrated in Nicaragua’s Reply<sup>148</sup>, Costa Rica, which admits to being responsible for the vast majority of the sediment load carried by the San Juan, much of which is due to poor land-use practices countenanced by the Costa Rican Government<sup>149</sup>, should not be heard to contend that it should not be responsible for the additional 75,000 tons a year it says the

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<sup>148</sup>RN, e.g., pp. 69-70.

<sup>149</sup>*Ibid.*

road project is responsible for because it is such a small percentage of sediment in comparison to that which it already contributes. Nicaragua trusts that the Court will see the inequities of this argument of Costa Rica and not allow it to diminish the significance of the quantities of sediment contributed to the river by the road project in this way.

57. For these reasons, Mr. President, Nicaragua submits that by contributing — by its own measure — 75,000 tons of sediment annually to the San Juan River, Nicaragua’s sovereign territory, Costa Rica has breached its obligation not to cause significant harm to Nicaragua.

**5. Costa Rica breached treaties to which both States are parties due to the manner in which the Road was, and is being, constructed.**

58. Mr. President, I turn now, and finally — and also briefly — to Costa Rica’s breaches of treaties to which both States are parties due to the manner in which the road was, and is being, constructed.

59. The treaties in question are the Convention on Biological Diversity, the Ramsar Convention, the Central American Convention for the Protection of the Environment and other Regional Instruments, and the bilateral Agreement on Border Protected Areas, known as the “SI-A-PAZ” agreement. Costa Rica is dismissive of these agreements when they are asserted against it, having embraced them warmly in asserting them against Nicaragua in *Certain Activities*. Once again, rather than defending its compliance with the letter and spirit of the agreements, Costa Rica seeks refuge in the “significant harm” requirement, even as to multilateral agreements that my colleague Professor Pellet has shown to apply to breaches wholly within Costa Rica’s territory, namely, the Biodiversity and Ramsar Conventions. Nicaragua continues to maintain that the manner in which Costa Rica has constructed, and continues to construct and manage the road, violate these agreements. The contentions of Costa Rica that it has not breached the agreements stand in striking contrast to the conclusion of the University of Costa Rica’s Environmental Law experts regarding construction of the road, referred to by colleague Paul Reichler yesterday, that “Practically there is not a single one of our environmental laws that wasn’t violated.”<sup>150</sup>

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<sup>150</sup>CR 2015/8, p. 21 (Reichler).



60. Mr. President, Members of the Court, that concludes my presentation. Thank you for your kind and patient attention. I would be grateful, Mr. President, if you would now call my colleague Professor Pellet to the podium.

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

M. PELLET : Merci, Monsieur le président. Comme l'a dit récemment dans une affaire *récente* un de mes anciens et éminents collègues, mon équipe m'a donné beaucoup à faire mais m'a laissé peu de temps pour le faire. Alors plutôt que de bâcler ma présentation et essayer de couper un peu au hasard, je m'arrêterai quand l'heure fatidique sera venue et, si nécessaire, je reprendrai les arguments que je n'aurai pu avancer aujourd'hui durant le second tour.

#### REMÈDES

1. Monsieur le président, Mesdames et Messieurs les juges, le Costa Rica a construit (fort mal) une route le long du San Juan. Celle-ci s'étire sur quelque 160 kilomètres, dont 108 au plus près du fleuve.

2. Le Costa Rica se donne beaucoup de mal pour établir qu'il a le droit de construire les routes qu'il veut sur son territoire et il martèle que : «Costa Rica's sovereign right to develop its own territory and to construct roads anywhere in its territory must be fully respected.»<sup>151</sup> Nous ne le contestons pas. Du moment que la route n'empiète pas sur le territoire d'un Etat voisin et ne lui cause pas de préjudice (je laisse la question du qualificatif pour plus tard), dans ces conditions il peut construire les routes les plus invraisemblables, dangereuses et inutiles qu'il désire — c'est en principe une affaire entre l'Etat et sa population ou les usagers de ces voies. Mais le droit international apporte une limite juridique à l'exercice de cette indiscutable compétence — celle-là même dont nos amis de l'autre côté de la barre se sont prévalus avec emphase dans le cadre de l'autre affaire, relative à *Certaines activités*<sup>152</sup> ; l'utilisation de son territoire par l'Etat doit être non dommageable : «l'Etat est tenu de mettre en œuvre tous les moyens à sa disposition pour éviter que les activités qui se déroulent sur son territoire, ou sur tout espace relevant de sa juridiction, ne

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<sup>151</sup> DCR, p. 140, par. 8 c) ; voir aussi : CMCR, p. 107, par. 5.3. ; p. 1, par. 1.2, p. 6, par. 1.11, p. 9, par. 1.16, p. 18, par. 1.34, p. 96, par. 4.4, p. 96, par. 4.9 et DCR, p. 5, par. 1.12, p. 71, par. 2.108 et p. 140, par. 8 c).

<sup>152</sup> Voir notamment MCR, p. 115-123, par. 5.1-5.32, ou CR 2015/3, p. 45-48, par. 3-11 (Parlett).

causent un préjudice sensible à l'environnement d'un autre Etat»<sup>153</sup>. Comme nous l'avons dit la semaine dernière<sup>154</sup>, et comme le professeur McCaffrey l'a répété tout à l'heure, nous sommes en plein accord tant avec le principe qu'avec les conséquences qui en sont tirées dans le droit international contemporain ; je pourrais reprendre à mon compte presque mot pour mot la présentation que Mme Parlett en a faite mardi dernier<sup>155</sup> : tout Etat a l'obligation de notifier à l'avance à l'Etat ou aux autres Etats possiblement affectés les activités menées sur son territoire comportant un risque significatif de dommage transfrontière. Dans ce cas, il doit mener une étude d'impact environnemental (EIE).

3. Monsieur le président,

- le projet d'une route longeant sur 108 kilomètres un «territoire liquide» étranger comportait-il un risque significatif de dommage transfrontière ? Réponse : évidemment oui ;
- le Costa Rica a-t-il notifié son projet au Nicaragua ? Réponse : non ;
- le Costa Rica a-t-il effectué une EIE ? Réponse : non.

4. Mes collègues ont excellemment établi le bien-fondé des trois réponses laconiques que je viens de donner et je ne pourrais rien y ajouter d'utile. Cela montre à suffisance que la responsabilité du Costa Rica est engagée : la construction de la route 1856 est sans aucun doute attribuable au Costa Rica (qui ne prétend pas le contraire) et elle viole plusieurs des obligations internationales de cet Etat<sup>156</sup>. En outre, comme le professeur McCaffrey — de nouveau lui — l'a montré, le Costa Rica ne peut se prévaloir de circonstances excluant l'illicéité, ce qui confirme que la responsabilité du Costa Rica est engagée. Dès lors, on doit s'interroger sur les conséquences de son ou de ses faits internationalement illicites<sup>157</sup>.

5. Je ne vous apprendrai rien, Monsieur le président, en rappelant que, dans la conception moderne, «*post-Ago*», dominante aujourd'hui, le dommage ne joue pas de rôle dans l'engagement

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<sup>153</sup> *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, C.I.J. Recueil 2010 (I), p. 55-56, par. 101.

<sup>154</sup> Voir CR 2015/6, p. 36-40, par. 30-36 (Pellet) et CR 2015/8, p. 30, par. 25 et p. 34-35, par. 34 (McCaffrey).

<sup>155</sup> CR 2015/3, p. 45-48, par. 3-11 (Parlett).

<sup>156</sup> Cf. les articles 1<sup>er</sup> et 2 des Articles de la CDI sur la responsabilité de l'Etat pour fait internationalement illicite annexés à la résolution 56/83 de l'Assemblée générale des Nations Unies en date du 12 décembre 2001.

<sup>157</sup> Cf. l'article 28 des Articles de la CDI sur la responsabilité de l'Etat pour fait internationalement illicite (Conséquences juridiques d'un fait internationalement illicite).

de la responsabilité<sup>158</sup>. En revanche, il tient le rôle principal lorsqu'on en vient au «Contenu de la responsabilité», codifié par la deuxième partie des Articles de la Commission du droit international de 2001 sur la responsabilité internationale de l'Etat pour fait internationalement illicite. D'où l'importance des longues présentations que nous avons consacrées à établir l'existence et l'étendue des dommages causés au fleuve San Juan par la construction de la route, ses malfaçons et sa détérioration, à quoi s'ajoute l'absence de consultation et de production d'une EIE. Ce sont les conséquences à tirer de la responsabilité du Costa Rica ainsi établie que je vais présenter pour terminer notre premier tour de plaidoiries. Encore une fois, peut-être seulement certaines de ces conséquences.

6. Monsieur le président, il y a toujours un certain artifice, dans les affaires de responsabilité, à plaider la réparation ou, plus largement les «remèdes». Comme il se doit, l'Etat requérant *essaie* de vous convaincre que la Partie défenderesse doit se plier à l'ensemble des obligations découlant de l'engagement de sa responsabilité, telles que les codifient les articles 28 à 39 des Articles de la CDI ; et le défendeur expliquera que, puisqu'il n'a commis aucun manquement, la question ne se pose pas...

7. A cet égard, notre affaire — ou plutôt nos affaires puisque vous les avez jointes pour, ensuite, quasiment les disjoindre — sont singulières. Dans la première, celle que vous avez intitulée *Certaines activités menées par le Nicaragua dans la région frontalière*, le Nicaragua est défendeur ; il est requérant dans la seconde, relative à la *Construction d'une route au Costa Rica le long du fleuve San Juan*. Je me suis donc employé à montrer, vendredi dernier, que les activités qui sont reprochées au Nicaragua dans la première n'appellent aucun «remède» puisqu'elles ne sont pas internationalement illicites et n'entraînent donc pas sa responsabilité — alors qu'au contraire il m'appartient de vous convaincre aujourd'hui qu'il est en droit de vous demander d'ordonner les remèdes d'usage du fait de la responsabilité du Costa Rica dans la seconde.

8. A ce stade, Monsieur le président, cette responsabilité du Costa Rica est bien établie : il a sans aucun doute commis un ou plusieurs faits internationalement illicites — il a violé nombre

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<sup>158</sup> Cf. les articles 1<sup>er</sup> et 2 des Articles de la CDI sur la responsabilité de l'Etat.

d'obligations lui appartenant en droit international, et il est évident aussi que ce ou ces faits ont causé un grave préjudice au Nicaragua.

9. Il appartient à la Cour d'en tirer les conséquences et à moi d'expliquer qu'elles pourraient être ces conséquences en détaillant les conclusions du Nicaragua. Ces conclusions sont relativement complexes car la situation créée par la construction illicite de la route 1856 est elle-même difficile et appelle des réponses adaptées. J'essaierai de justifier chacune de ces conclusions séparément — pas forcément dans l'ordre dans lequel elles se présentent dans notre réplique — mais de manière synthétique. Pour la commodité des juges et de la Partie costa-ricienne, le texte écrit de ma plaidoirie comporte, pour chacune de ces conclusions, les références aux principaux passages des écritures des Parties susceptibles d'éclairer ces éléments.

**[Projection n° 1 : Cessation des faits internationalement illicites de caractère continu commis par le Costa Rica et exécution des obligations violées]**

**1. La cessation de la violation et la reprise des obligations violées<sup>159</sup>**

10. Monsieur le président, comme l'écrit la Commission du droit international dans son commentaire de l'article 30 des Articles de 2001, «[l]a cessation du comportement en violation d'une obligation internationale est la première condition à remplir pour éliminer les conséquences du comportement illicite»<sup>160</sup>. La cessation s'impose essentiellement, même si pas exclusivement, lorsque la violation est continue et, dans ce cas, elle doit conduire à la reprise de l'exécution de l'obligation violée<sup>161</sup>.

11. Mis à part les arguments «pavloviens» selon lesquels il n'a pas commis de fait internationalement illicite<sup>162</sup>, ni le Nicaragua subi de dommages du fait de la construction de la route 1856, le Costa Rica s'appuie, dans sa duplique, sur un extrait de votre arrêt de 2009 selon lequel

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<sup>159</sup> Voir MN, p. 231-234, par. 6.13-6.17 ; CMCN, p. 132, par. 6.9 ; RN, p. 255-257, par. 7.3-7.6 ; DCR, p. 124-125, par. 4.11-4.13. Voir aussi, RN, p. 264-265, par. 7.17-7.18 ; DCR, p. 128-131, par. 4.18-4.24.

<sup>160</sup> Commentaire de l'article 30 des Articles de la CDI sur la responsabilité de l'Etat pour fait internationalement illicite, par. 4, *Annuaire* 2001, vol. II, deuxième partie, p. 94.

<sup>161</sup> Cf. l'article 29 des Articles de la CDI.

<sup>162</sup> Voir DCR, p. 124-125, par. 4.11 et 4.13.

«Il n'est pas nécessaire, et il n'est pas utile en règle générale, que la Cour rappelle l'existence de cette obligation dans le dispositif des arrêts qu'elle rend : du seul fait que la Cour constate l'existence d'une violation qui présente un caractère continu, il découle de plein droit l'obligation de la faire cesser, à la charge de l'Etat concerné.

La Cour peut estimer opportun, dans des circonstances spéciales, de mentionner expressément ladite obligation dans le dispositif de son arrêt. Elle n'aperçoit pas de raison particulière de le faire en l'espèce.»<sup>163</sup>

12. J'avoue, avec tout le respect dû, que j'ai quelque doute sur le principe même ainsi énoncé, ne fût-ce que parce que le caractère continu d'un fait internationalement illicite peut être douteux<sup>164</sup>. Mais cela n'a pas d'importance en l'espèce. Dans notre affaire

- la violation est certainement continue ;
- elle continue évidemment à produire des effets préjudiciables ; et
- il y a assurément des raisons particulières pour que la Cour insiste sur l'obligation de cessation dans le dispositif de son arrêt.

13. S'agissant du premier point (la violation continue), il faut garder à l'esprit que la construction de la route a été entreprise en décembre 2010<sup>165</sup>. Les travaux sont ensuite allés bon train (c'est une litote) : en un an (c'est-à-dire à la date du dépôt de la requête, une centaine de kilomètres de route avaient été bâclés plus que construits. Le 7 mars 2011, le Gouvernement costa-ricien publia un décret instituant l'état d'urgence<sup>166</sup> complété, en septembre, par un autre décret réglementant cet état d'urgence<sup>167</sup> ; tous deux visaient à tenter de justifier *ex post* la précipitation avec laquelle la construction de la route avait été entreprise et conduite — je ne sais si ces règles Potemkine peuvent avoir un effet exonératoire en droit interne comme le Costa Rica l'affirme<sup>168</sup> ; elles ne sauraient en tout cas constituer des «circonstances excluant

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<sup>163</sup> *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, C.I.J. Recueil 2009, p. 267, par. 148.

<sup>164</sup> Cf. le commentaire de l'article 14 des Articles de la CDI de 2001, en particulier les paragraphes 4 et 5 (*Annuaire* 2001, vol. II, deuxième partie, p. 63).

<sup>165</sup> Voir DCR, p. 102, par. 3.41 et CR 2013/29, p. 13, par. 6 et p. 14, par. 9 (Brenes).

<sup>166</sup> Costa Rica, décret n° 36440 du 7 mars 2011 (année CXXXIII), *La Gaceta* n° 46 (La Uruca, San José (Costa Rica)) (MN, vol. II, annexe 11).

<sup>167</sup> Décision n° 0362-2011, règlement du 21 septembre 2011 relatif aux procédures d'achat et de passation de marchés sous un régime d'exception, conformément au décret n° 36440 instituant l'état d'urgence (MN, vol. II, annexe 12).

<sup>168</sup> CMCR, p. 22-27, par. 2.25-2.35 et DCR, p. 61, par. 3.42. Voir aussi CR 2015/3 (Parlett), p. 47, par. 10.

l'illégalité» en droit international comme le professeur McCaffrey — toujours lui ! — l'a montré tout à l'heure.

14. L'introduction de la requête du Nicaragua a freiné l'ardeur bâtisseuse du Gouvernement costa-ricien — qui explique le ralentissement, voire la suspension des travaux par le manque de fonds<sup>169</sup>, à quoi semblent s'être ajoutés des problèmes de corruption et d'irrégularité dans l'adjudication des contrats de travaux<sup>170</sup>. Mais je ne peux m'empêcher de remarquer d'intéressantes coïncidences entre les différentes étapes de la procédure et les annonces successives du retardement de la reprise des travaux. Tout donne l'impression que le Costa Rica recule périodiquement la reprise des travaux, je dirais pour «amadouer» votre haute juridiction et éviter le prononcé de mesures obligatoires tant qu'elle est saisie. Mais dès que la procédure sera achevée ou votre arrêt rendu, le Costa Rica reprendra les travaux — qui n'ont jamais été officiellement suspendus et encore moins arrêtés. Et ce contexte justifie amplement que vous enjoignez le Costa Rica de cesser — et de ne pas reprendre ses agissements illicites. Je relève d'ailleurs en passant que les autorités costa-riciennes «jouent» très systématiquement avec le calendrier de la procédure, puisque nouvelle coïncidence, M. Segnini, ministre costa-ricien des travaux publics et des transports, a annoncé hier non pas la construction de nouveaux tronçons de route, mais des travaux de remise en état de la route qu'il décrit comme étant «détériorée et abandonnée» (*deteriorada y abandonada*)<sup>171</sup>.

**[Fin de la projection n° 1 — Projection n° 2 : Faute de remise en état le préjudice se poursuit]**

15. Au demeurant, quand bien même le Costa Rica ne donnerait pas suite à son intention proclamée de poursuivre la construction *stricto sensu* de la route, le principe même de l'utilisation dommageable du territoire continuerait — que dis-je «continuerait» ? — continue à être violé aussi longtemps que les malfaçons dans la conception et la réalisation de la route causent des dommages au fleuve San Juan de Nicaragua. Je ne peux, Monsieur le président, rivaliser d'éloquence avec

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<sup>169</sup> CR 2013/29 (Brenes), p. 17, par. 17.

<sup>170</sup> Voir notamment R. Madrigal, «Works on the Trail Paralyzed while Waiting for Designs and Modular Bridges», *crhoy.com*, 10 juillet 2014 (RN, vol. II, annexe 21). Voir aussi *La Nación*, 7 octobre 2014 ([http://www.nacion.com/sucesos/poder-judicial/Fiscal-jefe-OIJ-chocan-trocha\\_0\\_1443655659.html](http://www.nacion.com/sucesos/poder-judicial/Fiscal-jefe-OIJ-chocan-trocha_0_1443655659.html)) et *La Nación*, 5 février 2015 ([http://www.nacion.com/sucesos/poder-judicial/Llega-numero-imputados-trocha-fronteriza\\_0\\_1467853357.html](http://www.nacion.com/sucesos/poder-judicial/Llega-numero-imputados-trocha-fronteriza_0_1467853357.html)). Voir aussi *ibid.*

<sup>171</sup> J. Bravo, «Costa Rica reinicia mejoramiento de carretera fronteriza», *La Prensa*, 20 avril 2015 (<http://www.laprensa.com.ni/2015/04/20/nacionales/1818310-costarica-reinicia-mejoramiento-de-carretera-fronteriza>).

M<sup>e</sup> Reichler qui a montré dans ses présentations d'hier et de ce matin combien le fleuve avait souffert, et continuait de souffrir, des malfaçons de la route et des centaines de milliers de tonnes de sédiments qui s'y sont déversées et continuent de s'y déverser. Il a montré aussi que les travaux de remise en état, très partiels, intervenus jusqu'à présent, laissent eux-mêmes souvent grandement à désirer et n'avaient nullement mis fin aux atteintes à l'intégrité du fleuve et, pire, que, dans bien des cas, le délabrement de la route auquel il n'a pas été remédié a été jusqu'à aggraver la situation résultant de sa construction *stricto sensu*. J'aurais, si j'avais le temps, rappelé un certain nombre de chiffres mais vous en avez *eus* suffisamment.

16. De toute façon, les chiffres ne sont sans doute pas l'essentiel. En lisant ses écritures, j'ai eu l'impression que le Costa Rica voulait faire une lecture exclusivement «statistique» des dommages ; d'où ces disputes interminables sur la densité de grains de sable au mètre ou au kilomètre carré qui ont conduit hier le président Tomka à sortir sa calculette. Mais à lire ou à écouter les experts, il m'a semblé que ce n'était pas la bonne façon de poser le problème : les sédiments ne se répartissent pas uniformément sur le lit du fleuve ; leur dépôt se concentre en des lieux précis qui deviennent, très concrètement, des obstacles à la navigation du fleuve — à laquelle le Costa Rica se montre par ailleurs si viscéralement attaché —, et tout ceci accroît en particulier l'ensablement du cours inférieur du San Juan.

17. Tout ceci a été confirmé par les experts consultés par le Nicaragua que vous avez pu entendre et interroger hier. Comme l'a résumé avec force M. Weaver — que le Costa Rica n'a pas jugé utile de contre-interroger :

«Four years after construction of the Road, widespread and effective mitigation is not apparent. [. . .] The majority of watercourse crossings, cut slopes, and fill slopes remain unstable, exhibit significant visible erosion, and have not been treated or fully treated with appropriate stabilization and erosion control measures. The lack of progress is striking, as is the amount of work that remains to be done.»<sup>172</sup>

**[Fin de la projection n° 2]**

18. Le caractère continu de la violation (et de ses effets préjudiciables) ne fait donc aucun doute. Et il appartient au Costa Rica de la faire cesser. Mais il y a aussi d'excellentes «raisons

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<sup>172</sup> Déclaration écrite de M. William E. Weaver, 15 mars 2015, p. 19, par. 50.

particulières» pour que vous rappeliez avec force cette obligation dans votre arrêt, Mesdames et Messieurs les juges. Et j'en aperçois au moins trois :

- comme je l'ai dit il y a un instant, le Costa Rica, loin de s'engager à cesser la construction litigieuse, proclame au contraire son intention de la reprendre ; tout au plus retarde-t-il prudemment cette reprise à la période qui suivra le prononcé de votre arrêt ;
- ce faisant, le Costa Rica fait en sorte que la Cour ne puisse pas apprécier si ces nouveaux travaux sont ou non conformes à ses obligations internationales — c'est d'ailleurs ainsi qu'il a réussi à convaincre la Cour qu'il n'y avait pas urgence à se prononcer sur la demande en indication de mesures conservatoires présentée par le Nicaragua dans son ordonnance du 13 décembre 2013 ;
- moyennant quoi, même s'il retarde la reprise de la construction, le Costa Rica se garde bien de prendre l'engagement de procéder différemment, en s'entourant, comme il le devrait, de toutes les précautions requises pour que la construction de la route — et la route elle-même une fois construite — ne causent pas de dommage significatif au fleuve San Juan de Nicaragua ; ceci est aussi regrettable que logique puisqu'il s'obstine à ne pas reconnaître que les tronçons construits l'ont été en violation de ses obligations en vertu du droit international ;
- seuls des travaux de réhabilitation et de remise en état de l'ensemble des portions déjà construites, conçus de façon à éviter durablement toute atteinte au San Juan — c'est-à-dire à la souveraineté territoriale du Nicaragua — seraient de nature à faire cesser le fait internationalement illicite qui engage la responsabilité du Costa Rica ; or, maintes fois promise, cette remise en état est à peine achevée au quart et les travaux supposés remédier aux malfaçons actuelles ne réalisent bien souvent pas cet objectif.

19. Ceci étant, Monsieur le président, il faut s'entendre sur l'objet de la cessation que demande le Nicaragua. Il ne s'agit évidemment pas que vous ordonniez que toute construction de route dans la région, et même le long du fleuve, cesse à jamais. Comme je l'ai dit, nous ne contestons nullement le droit du Costa Rica de construire tout ce qu'il veut sur la rive droite du fleuve ; ce qui doit cesser c'est le projet actuel et ses intolérables conséquences. En ce sens, la cessation que le Nicaragua vous demande d'ordonner est inséparable de la remise des choses en l'état — la *restitutio in integrum* (j'ai toujours regretté que la CDI l'ait «délatinisée» dans



l'article 35 de ses Articles sur la responsabilité). Je pense que cet article vous est suffisamment connu donc ; je ne vais pas le relire.

**[Projection n° 3 : Le rétablissement du *statu quo ante*]**

**2. La *restitutio in integrum***<sup>173</sup>

20. Comme il l'a expliqué dans sa réplique<sup>174</sup>, le Nicaragua n'exige pas que le rétablissement du *statu quo* soit intégral — ce qui signifierait la destruction complète de la route 1856 et la réinvention, ou la réhabilitation d'une situation géographique, morphologique et paysagère qui est probablement hors d'atteinte. Loin de s'en montrer reconnaissant, le Costa Rica s'indigne de cette modération, pourtant conforme aux prescriptions de l'article 35. Il juge notre demande de restitution confuse, inadaptée et incompatible avec notre demande d'indemnisation.

**[Fin de la projection n° 3 — Projection n° 4 : Paragraphe 7.9 de la réplique du Nicaragua]**

21. Pour ce qui est de la confusion alléguée, je me permets, Mesdames et Messieurs de la Cour, de vous renvoyer au paragraphe 7.9 de notre réplique. Il est un peu long à lire mais il figure à l'onglet 18 de nos dossiers. Il vous y est demandé de décider les choses suivantes :

- replanter des arbres dans les zones touchées par des abattages inconsidérés (pour rappel : la construction de la route est à l'origine de la destruction de plus de 83 hectares de forêt, dont 68,3 hectares de forêt primaire en zone humide protégée par la convention RAMSAR<sup>175</sup>) ;
- reconstruire et consolider les rives du fleuve là où elles ont été affectées par la construction mal conçue et bâclée de la route, et, plus généralement ;
- procéder à une remise en état conforme aux règles de l'art.

Voici qui ne semble ni déraisonnable, ni hors de portée. Et le Costa Rica se montre tout d'un coup bien ombrageux lorsqu'il s'indigne que nous ayons pu suggérer que, ce faisant, il devrait agir en suivant les recommandations des experts (qu'ils soient d'ailleurs nommés par le Nicaragua, par la Cour elle-même, voire éventuellement par lui-même (le Costa Rica) — à condition que ce ne soit

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<sup>173</sup> MN, p. 241-242, par. 6.31-6.32 ; RN, p. 257-258, par. 7.7-7.10 ; DCR, p. 122-123, par. 4.5-4.8 ; voir aussi, en ce qui concerne le dragage du fleuve : MN, p. 252, par. 3 i) et ii) ; CMCR, p. 133-134, par. 6.10-6.11 ; RN, p. 277-279, par. 7.44-7.47 ; DCR, p. 134-135, par. 4.34-4.35 ; voir également CMN (*Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, p. 455-456, par. 2 iii) et iv)).

<sup>174</sup> Voir RN, p. 257-259, par. 7.8-7.10.

<sup>175</sup> Costa Rica, centre de sciences tropicales, diagnostic sur l'impact sur l'environnement de la route 1856 — volet écologique du projet — novembre 2013 (CMCR, Affaire de la *Route*, vol. II, annexe 10).

pas exclusif — j’y reviendrai si j’ai le temps). Le professeur Kohen était moins sourcilieux sur les limites de la compétence de la Cour lorsqu’il vous expliquait mercredi dernier, Mesdames et Messieurs les juges, que vous pouviez, sans scrupule particulier, ordonner l’abrogation ou la modification du décret nicaraguayen de 2009 sur la navigation touristique sur le San Juan<sup>176</sup>.

**[Fin de la projection n° 4 — Projection n° 5 : Une déclaration selon laquelle le Nicaragua est en droit de draguer le San Juan]**

22. Par ailleurs, le Costa Rica se dit troublé par notre demande d’indemnisation en compensation «*for restoring the natural flow of the waters that flow through the south basin to the San Juan River which has been modified as a consequence of the construction works which have also modified the drainage of the surrounding wetlands in the lower San Juan and its delta*». Je ne pense pas, Monsieur le président, que ceci soit tellement troublant — mais il est vrai que cette demande est, en quelque sorte, «à cheval» sur la *restitutio* et l’indemnisation. Je m’explique : il ne peut faire de doute que le dragage du San Juan constitue un élément indispensable de la remise en état ; ceci ressort notamment du rapport du professeur Andrews de juillet 2014<sup>177</sup> et de nombreux documents scientifiques que vous avez eus sous les yeux<sup>178</sup>. Toutefois, seul souverain sur le lit du fleuve, le Nicaragua entend procéder lui-même à ces travaux qui ne peuvent être menés que sur son territoire et il entend être indemnisé de leur coût par le Costa Rica. C’est bien de *restitutio* qu’il s’agit et l’indemnisation attendue de l’autre Partie est destinée à compenser le coût de cette restitution. Cela ne me paraît avoir rien d’inconsistant ou d’incohérent.

23. Le Costa Rica affirme en outre que la même demande aurait été rejetée par votre arrêt de 2009 dans la première affaire du *San Juan*<sup>179</sup>. Vous aviez relevé alors que la question — abstraite et générale — du «droit [du Nicaragua] de draguer le San Juan afin de rétablir le débit d’eau qui existait en 1858, même si cela modifie le débit d’autres cours d’eau récepteurs comme le Colorado», avait été réglée

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<sup>176</sup> Voir CR 2015/4, p. 37, par. 9.

<sup>177</sup> Edmund D. Andrews, «Evaluation des méthodes, des calculs et des conclusions du Costa Rica concernant l’apport et le transport de sédiments dans le bassin du fleuve San Juan», juillet 2014, section V)I (RN, vol. II, annexe 3).

<sup>178</sup> Déclaration écrite de M. le professeur émérite Edmund D. Andrews, 15 mars 2015, p. 2, par. 3.

<sup>179</sup> Voir CMCR, p. 133-134, par. 6.11.

«dans le dispositif de la sentence Cleveland. Cette sentence a en effet décidé, dans les points 4 à 6 de la troisième partie, que le Costa Rica n'est pas tenu de contribuer aux dépenses nécessaires pour améliorer la navigation sur le fleuve San Juan et que le Nicaragua peut exécuter les travaux d'amélioration qu'il estime convenables, à condition que lesdits travaux ne perturbent pas gravement la navigation sur les affluents du San Juan appartenant au Costa Rica»<sup>180</sup>.

Mais ici, les circonstances sont toute différentes de ce que la Cour avait à l'esprit à ce moment-là : en l'espèce, le Nicaragua ne vous demande pas de confirmer le droit reconnu par la sentence Cleveland dans l'abstrait, mais de déclarer très concrètement que, pour remettre les choses en l'état, à titre de réparation, de *restitutio in integrum*, il peut procéder à un tel dragage ; et ceci *aux frais du Costa Rica*, hypothèse qui n'est pas du tout celle de la sentence de 1888, qui est toute différente de la nôtre : ce qui est en cause ici, c'est la responsabilité du Costa Rica dans la situation qui est à l'origine de l'obligation de procéder au dragage. De même le Costa Rica proteste contre le fait que nous aurions fait la même demande dans l'affaire relative à *Certaines activités*<sup>181</sup>. Il est exact que nous avons formulé dans cette affaire une demande reconventionnelle destinée en des termes voisins de ceux utilisés dans les conclusions de la réplique relative à la route<sup>182</sup>. Mais je rappelle que la Cour a rejeté ~~notre demande reconventionnelle~~, cette demande reconventionnelle du Nicaragua en relevant qu'elle n'était «pas suffisamment liée aux demandes principales du Costa Rica pour pouvoir être déclarée recevable sur la base de l'article 80 du Règlement»<sup>183</sup>. Or, il paraît évident que le lien de connexité factuelle et juridique, qui faisait défaut en 2013 à la demande du Nicaragua, existe en la présente espèce — d'autant plus qu'il s'agit ici non pas d'invoquer (en tout cas pas exclusivement) un droit conventionnel, mais il s'agit simplement d'une modalité selon laquelle la *restitutio in integrum* pourrait et même devrait être réalisée.

**[Fin de la projection n° 5 — Projection n° 6 : Une indemnisation pour les dommages susceptibles d'évaluation financière]**

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<sup>180</sup> *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, C.I.J. Recueil 2009, p. 269, par. 155.

<sup>181</sup> Voir CMCR, p. 133, par. 6.11, et DCR, p. 134, par. 4.34.

<sup>182</sup> CMN (*Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*), p. 455-456, par. 2 iii) et iv).

<sup>183</sup> *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica) ; Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, demandes reconventionnelles, ordonnance du 18 avril 2013, C.I.J. Recueil 2013, p. 214, par. 36 et 37 ; voir aussi p. 215, par. 38.

### 3. L'indemnisation<sup>184</sup>

24. Monsieur le président, pour les raisons que j'ai indiquées il y a quelques instants, le coût du dragage nécessaire à la remise du fleuve en l'état doit être inclus dans l'indemnité que le Nicaragua prie la Cour de bien vouloir fixer dans une phase ultérieure de la procédure — conformément à la pratique bien établie dont le Costa Rica se réclame d'ailleurs dans l'affaire relative à *Certaines activités*<sup>185</sup>.

25. Nos contradicteurs n'ont pas eu grand-chose à dire sur l'indemnisation réclamée par le Nicaragua dans la mesure où la réparation ne peut être pleinement assurée par la restitution. Dans leur contre-mémoire comme dans leur duplique, ils se bornent à répéter : «the simple point is that Nicaragua's claim for compensation is not based on any showing of actionable damage. The waters continues to flow from the south basin on Costa Rican territory to the San Juan River, as it has always done.»<sup>186</sup> Eh bien non, Monsieur le président, ce n'est malheureusement pas exact : certes les eaux du bassin de la rive sud continuent à grossir le fleuve ; mais aux sédiments habituels s'en ajoutent d'énormes quantités résultant de la construction de la route, mais également des débris de ponts, des débris de ponceaux, qui entraînent une sédimentation tout à fait abusive du fleuve, affecte la qualité de ses eaux et de sa faune, entraîne la formation de deltas de sédiments dont la dimension va croissant, et entraîne une limitation de plus en plus marquée de la navigabilité du San Juan de Nicaragua — particulièrement dans le cours inférieur du fleuve (entre la bifurcation avec le Colorado et l'embouchure)<sup>187</sup>.

26. Face au mutisme obstiné de nos contradicteurs sur l'indemnisation, je me bornerai à quelques remarques en style télégraphique :

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<sup>184</sup> Voir MN, p. 242-243, par. 6.32-6.34 ; CMCR, p. 134-136, par. 6.12-6.14 ; RN, p. 265-266, par. 7.19-7.21 ; DCR, p. 123-124, par. 4.9-4.10.

<sup>185</sup> Voir CR 2015/4, p. 36-37, par. 7 (Kohen).

<sup>186</sup> DCR, p. 123-124, par. 4.10.

<sup>187</sup> Voir notamment : Déclaration écrite de M. William E. Weaver, 15 mars 2015 ; Déclaration écrite du professeur G. Mathias Kondolf (Affaire de la *Route*), 16 mars 2015 ; RN, p. 47-48, par. 2.40 et p. 48, fig. 2.13.

- 1) comme ceci est communément admis, une indemnité n'est due à titre de réparation que «dans la mesure où le dommage n'est pas réparé par la restitution»<sup>188</sup> ;
- 2) dans notre affaire, je l'ai dit, on ne peut tout attendre de la restitution, ne fût-ce que parce qu'elle ne peut pas avoir d'effet rétroactif et effacer les dommages qui ont déjà été causés au fleuve et à son utilisation par le Nicaragua (par le Costa Rica aussi d'ailleurs — mais ce n'est pas le préjudice dont nous vous demandons réparation ici !) ;
- 3) il est d'autant plus impossible d'évaluer maintenant l'étendue des préjudices matériels subis par le Nicaragua, que, faute de remise de la route en état, celle-ci — ou ses malfaçons — continuent de causer au «territoire fluvial» du Nicaragua des dommages extrêmement substantiels ;
- 4) dans l'hypothèse où la consistance et l'étendue de ces dommages ne sembleraient pas suffisamment établies par les rapports précis, détaillés, motivés, des experts que nous avons consultés, nous continuons de souhaiter que la Cour désigne un ou des experts de son choix pour établir d'une manière complètement objective et irréfutable l'existence de ces préjudices et la chaîne de leur causalité ;
- 5) et enfin, comme j'ai eu l'occasion de le dire vendredi en discutant les réparations demandées par le Costa Rica dans l'affaire relative à *Certaines activités*<sup>189</sup>, il nous paraît aller de soi que si, par impossible, vous estimiez qu'une réparation pécuniaire est due par le Nicaragua en réparation du (très modeste) préjudice matériel que le creusement et le nettoyage, en 2013, de deux petits *caños* par M. Pastora et ses ouvriers, cette réparation pécuniaire devrait être déduite de la somme, assurément beaucoup plus importante, que le Costa Rica sera appelé à verser au Nicaragua pour les dommages considérables dus à la construction de la route et qui n'auront pu être réparés par la *restitutio*. Et ceci semble être une conséquence normale en outre de la jonction des affaires.

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<sup>188</sup> Article 36 des Articles de la CDI. sur la responsabilité de l'Etat pour fait internationalement illicite et son commentaire, *Annuaire* 2001, vol. II, deuxième partie, p. 105-113. Voir aussi notamment : *Usine de Chorzów, fond, arrêt n° 13, 1928, C.P.J.I. série A n° 17, p. 47* ; *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997, p. 80, par. 149* ; *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I), p. 103, par. 273* ; *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), arrêt, C.I.J. Recueil 2010 (II), p. 691, p. 161* ou *Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant)), arrêt, C.I.J. Recueil 2012 (I), p. 153, par. 137* ; ou Tribunal international du droit de la mer, arrêt du 1<sup>er</sup> juillet 1999, *Affaire du navire Saïga (n° 2) (Saint-Vincent-et-les Grenadines c. Guinée)*, par. 170.

<sup>189</sup> CR 2015/7, p. 61, par. 43 (Pellet).

**[Fin de la projection n° 6 — Projection n° 7 : Une déclaration de la Cour constatant que le Costa Rica a commis des faits internationalement illicites]**

**4. La constatation de la violation de ses obligations par le Costa Rica**

27. Au demeurant, ni la restitution ni l'indemnisation ne sont de nature à réparer le préjudice moral (ou «juridique») subi par le Nicaragua. C'est pourquoi celui-ci prie par ailleurs la Cour de déclarer formellement que le Costa Rica a violé ses obligations internationales à son égard<sup>190</sup> et, en premier lieu sa souveraineté territoriale en déversant dans le fleuve San Juan de Nicaragua, illicitement et sans consultation aucune avec le souverain territorial, d'énormes quantités de sédiments, qui en altèrent le cours et en limitent la navigabilité. Il s'agit là d'une autre forme de déclaration, plus directement réparatrice, qui relève de la satisfaction.

28. Le Costa Rica s'y oppose en affirmant n'avoir commis aucune violation — c'est la loi du genre ! Par hypothèse, lorsque l'on discute les remèdes, il faut postuler le contraire, au moins aux fins du débat — et l'absence de toute discussion par le Costa Rica sur cette demande nicaraguayenne autre que cette défense passe-partout, montre, *a contrario*, qu'il admet que, si la Cour constate qu'il a commis les violations dont le Nicaragua l'accuse, un tel jugement déclaratoire est, en l'occurrence, justifié.

29. Il aurait, à vrai dire, mauvaise grâce à prétendre le contraire. Certes, ces constatations sont le support nécessaire de l'arrêt à intervenir mais, dans l'affaire relative à *Certaines activités*, malgré les dommages infiniment moins graves qu'il a subis, le Costa Rica a formulé, sans les justifier clairement, des demandes de déclarations comparables alors même que, dans cette affaire-là, sa souveraineté est contestée. Dans celle qui nous occupe plus directement aujourd'hui, la souveraineté territoriale du Nicaragua sur le San Juan n'est *pas* contestée, les atteintes que lui porte la construction de la route sont avérées. Il s'agit là d'un dommage immatériel qui s'ajoute aux préjudices matériels causés au fleuve et à son environnement et qui appelle une satisfaction. Comme l'a noté la Commission du droit international dans son commentaire de l'article 37 des Articles de 2001, dans des cas de ce genre, «[u]ne des formes de satisfaction les plus

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<sup>190</sup> MN, p. 229-231, par. 6.10-6.12 ; CMCR, p. 132, par. 6.8 ; RN, p. 268-269, par. 7.24-7.26 ; DCR, p. 132, par. 4.27-4.28.

fréquentes ... est la déclaration d'illicéité faite par une cour ou un tribunal compétent»<sup>191</sup>. C'est ce que le Nicaragua vous demande.

30. J'ajoute que l'attitude systématiquement blessante et outrancière du Costa Rica justifie en l'espèce tout particulièrement cette demande qui permettra de clarifier définitivement la situation juridique avec l'autorité de la chose jugée — ce qui est toujours plus incertain si l'on doit s'en remettre aux seuls motifs de l'arrêt. Et, sans que je crois utile de m'y appesantir, permettez-moi, Monsieur le président, de donner deux exemples de ces attitudes costa-riciennes qui expliquent l'amertume du Nicaragua et plaident, en l'espèce, en faveur d'un tel arrêt déclaratoire :

- il y a d'abord (encore une fois, ce ne sont que des exemples) le nom officiel de la route («Juan Rafael Mora Porras – Route 1856») qui ravive des souvenirs amers dans la mémoire collective nicaraguayenne : 1856 est l'année de l'invasion et de l'occupation du Nicaragua par l'aventurier américain William Walker ; quant à Juan Rafael Mora Porras, s'il contribua à la lutte contre Walker, son armée occupa en 1857 une partie du territoire nicaraguayen et il complota avec l'envoyé de l'homme d'affaire Cornelius Vanderbilt pour arracher le San Juan au Nicaragua<sup>192</sup> ;
- je mentionne aussi la réaction complètement disproportionnée du Costa Rica face à l'affaire des *caños* transformée en une «occupation de l'Isla Portillos» et qui est à l'origine de la proclamation de l'état d'urgence et de la construction précipitée de cette route désastreuse...

Nous sommes convaincus qu'une exposition claire et autorisée, comme vos décisions le sont, contribuerait à un apaisement nécessaire en clarifiant, dans le dispositif de votre arrêt, les obligations et les droits respectifs des deux Parties.

#### [Fin de la projection n° 7 — Projection n° 8 : Autres réparations déclaratoires]

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<sup>191</sup> Commentaire de l'article 37 des Articles de la CDI sur la responsabilité de l'Etat pour fait internationalement illicite, par. 6, *Annuaire* 2001, vol. II, deuxième partie, p. 114. Voir notamment affaire du *Détroit de Corfou (Royaume-Uni c. Albanie)*, fond, arrêt, *C.I.J. Recueil 1949*, p. 35 et sentence arbitrale du 30 avril 1990, *Affaire concernant les problèmes nés entre la Nouvelle-Zélande et la France relatifs à l'interprétation ou à l'application de deux accords conclus le 9 juillet 1986, lesquels concernaient les problèmes découlant de l'affaire du Rainbow Warrior*, Nations Unies, *Recueil des sentences arbitrales (RSA.)*, vol. XX, p. 273, par. 123.

<sup>192</sup> Arthur Mcmillan, *Cornelius Vanderbilt 163 Success Facts - Everything you need to know about Cornelius Vanderbilt*, Emereo Publishing, May 23, 2014 - Biography & Autobiography - 170 pages, Google eBook — <https://books.google.fr/books?id=ndgKBwAAQBAJ&pg=PT85&lpg=PT85&dq=juan+rafael+mora+porras+%2B+vanderbilt&source=bl&ots=rsljkFeu4h&sig=mPEuIDbro-8qOfXA6ZED9raPQjg&hl=en&sa=X&ei=9C00VcbNDZLfaP6kcgAM&ved=0CDsQ6AEwBA#v=onepage&q=vanderbiltjuan%20rafael%20mora%20porras%20%20%20vanderbilt&f=false>. Voir MN, p. 2, note 1 ; voir aussi CMN (*Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*), p. 30-31, par. 2.25-2.27 et CMN (*Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*), p. 31-33, par. 1.2.41-1.2.43.

## 5. Autres réparations déclaratoires<sup>193</sup>

31. Mesdames et Messieurs les juges, compte tenu des circonstances très particulières de l'affaire, le Nicaragua prie en outre la Cour de décider

- d'une part, que le Costa Rica ne peut entreprendre d'activités nouvelles dans la région du San Juan sans avoir *préalablement* préparé une EIE et l'avoir communiquée en temps utile au Nicaragua ; et
- d'autre part, qu'il n'utilisera pas ni ne laissera utiliser la route 1856 pour le transport de matières dangereuses.

32. Peut-être est-ce là ce que l'on appelle des «garanties de non-répétition» même si j'avoue avoir peu d'inclinaison pour cette notion que les Articles de la CDI jumellent bizarrement (à mon avis à tort) avec la cessation du fait internationalement illicite<sup>194</sup>, que les Parties ont pris la mauvaise habitude d'invoquer un peu à tort et à travers devant vous, même lorsque l'affaire qui vous est soumise ne s'y prête à l'évidence pas. Celle relative à *Certaines activités* par exemple : le Costa Rica exige de telles garanties mais se garde bien d'indiquer en quoi elles pourraient consister<sup>195</sup>.

33. Il en va différemment dans la présente espèce dans laquelle le Nicaragua a, je pense, de bonnes raisons de vous prier d'ordonner ces deux mesures très concrètes qui sont des mesures de sage précaution. Le Costa Rica les rejette l'une et l'autre.

34. En ce qui concerne l'EIE préalable à toute nouvelle activité — présentant, cela va de soi, un risque significatif de dommage transfrontière<sup>196</sup>, comme c'était le cas pour la route, le Costa Rica répond essentiellement «à côté de la question» ~~— si vous me permettez de finir, j'en ai pour trois minutes pour cette rubrique. — :~~

- selon sa coutume, il affirme n'avoir violé aucune obligation internationale puisque la construction de la route n'a causé aucun dommage au Nicaragua<sup>197</sup> — je renonce à commenter cela ;

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<sup>193</sup> Voir MN, p. 234-238, par. 6.18-6.25 ; RN, p. 258-263, par. 7.11-7.15 ; DCR, p. 125-126, par. 4.14

<sup>194</sup> Article 39 des Articles de 2001 : «Cessation et non-répétition».

<sup>195</sup> Voir CR 2015/7, p. 62, par. 46 (Pellet).

<sup>196</sup> Voir MN, p. 233-236, par. 6.17 et p. 252, par. 2 iv) ; CMC, p. 132, par. 6.9 ; RN, p. 269-273, par. 7.27-7.35 ; DCR, p. 132-133, par. 4.29-4.31.

<sup>197</sup> DCR, p. 132-133, par. 4.29.



- il en irait d'autant plus ainsi en l'espèce que la déclaration instituant l'état d'urgence l'aurait dispensé de l'obligation d'établir une EIE<sup>198</sup> ;
- de toute manière, il aurait finalement, produit l'étude en question en ... novembre 2013, soit plus de trois ans après le début des travaux ; et,
- n'en n'étant pas à une contradiction près — bien qu'il ait produit, dit-il, cette étude — le Costa Rica affirme «that it would have been impossible for Costa Rica to conduct a transboundary EIA since Nicaragua has systematically denied Costa Rica access to the San Juan River»]<sup>199</sup> !

35. C'est justement parce que tout ceci est inquiétant, Monsieur le président, qu'une ferme déclaration de la part de la Cour semble s'imposer. Il est en effet passablement préoccupant que le Costa Rica estime que la construction de la route 1856 ne comportait aucun risque de dommage significatif au territoire du Nicaragua (en l'occurrence au fleuve San Juan). Il est assez alarmant que le Costa Rica persiste à s'abriter derrière son droit interne pour prétendre à la licéité internationale de son comportement en la matière. Et il est proprement atterrant qu'il considère qu'une EIE digne de ce nom peut intervenir trois ans *après* l'achèvement des travaux qui en sont l'objet.

**[Fin de la projection n° 8 — Projection n° 9 : Imaginez un camion-citerne... (Sediment deltas downslope from failing watercourse crossings and exposed slopes. Severely Eroding Area 9, Kondolf (2014), March 2015)]**

36. L'autre déclaration de précaution que le Nicaragua prie la Cour de bien vouloir faire est surtout une affaire de bon sens — ici encore la réponse du Costa Rica ne fait qu'aviver nos inquiétudes et nous conforter dans la conviction qu'il vous faut, Mesdames et Messieurs de la Cour, déclarer que la route doit être fermée à la circulation des produits dangereux jusqu'à ce qu'elle soit conforme aux règles de l'art et présente des garanties normales de sécurité<sup>200</sup>, ce qui est loin d'être le cas. Imaginez un camion-citerne s'aventurant sur le tronçon de route visible sur cette photo...

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<sup>198</sup> *Ibid.*

<sup>199</sup> DCR, p. 133, par. 4.31

<sup>200</sup> Voir RN, p. 273-276, par. 7.36-7.43 ; DCR, p. 134, par. 4.32-4.33.

Le PRESIDENT : Monsieur le professeur, vous n'avez plus que deux minutes.

M. PELLET : Je ne prends que trente secondes.

37. La Partie costa-ricienne écrit dans sa duplique qu'il s'agit d'une simple spéculation et que, de toute façon, la route 1856 n'est pas ouverte à la circulation de produits dangereux. Soit ! mais lorsque l'on voit la manière dont le Costa Rica laisse de côté sa propre législation environnementale dont il se glorifie lorsqu'il invente un état d'urgence suite à une contestation frontalière mineure, il n'y a pas vraiment là de quoi être rassuré — le Nicaragua le serait bien davantage par un clair prononcé judiciaire, qui devrait être d'autant plus acceptable par nos amis costa-riciens qu'il correspondrait à l'état du droit national tel qu'ils le décrivent.

**[Fin de la projection n° 9]**

Je renonce à vous expliquer, Mesdames et Messieurs les juges, pourquoi nous souhaitons que vous désigniez un ou plusieurs experts. Je vous remercie, Monsieur le président. Je m'excuse pour les deux minutes ou trois minutes de retard.

Le PRESIDENT : Monsieur le professeur, nous arrivons au terme du premier tour de plaidoiries du Nicaragua. L'un des membres de la Cour souhaiterait poser au Nicaragua une question à laquelle le Nicaragua est invité à répondre lors de son second tour de plaidoiries dans la présente affaire. Je donne la parole à Mme la juge Xue.

Judge XUE: Thank you, Mr. President. I would like to pose one question to Nicaragua after the first round hearing.

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

Thank you, Mr. President.

Le PRESIDENT : Merci. Le texte écrit de cette question sera remis aux Parties à bref délai.  
La Cour se réunira de nouveau jeudi après-midi, de 15 heures à 18 heures, pour entendre le début  
du premier tour de plaidoiries du Costa Rica. Je vous remercie. L'audience est levée.

*L'audience est levée à 13 h 5.*

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