

Corrigé
Corrected

CR 2015/16

International Court
of Justice

Cour internationale
de Justice

THE HAGUE

LA HAYE

YEAR 2015

Public sitting

held on Thursday 30 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)*

VERBATIM RECORD

ANNÉE 2015

Audience publique

tenue le jeudi 30 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)*

COMPTE RENDU

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

 Registrar Couvreur

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

M. Couvreur, greffier

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Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre le second tour de plaidoiries du Nicaragua dans l'affaire relative à la *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*. Je donne maintenant la parole à l'agent du Nicaragua, Monsieur l'ambassadeur Argüello Gómez.

Mr. ARGÜELLO: Merci, Monsieur le président.

1. Mr. President, distinguished Members of the Court, good morning. The first round of oral pleadings centre on specific harm that the road has already caused to the environment and, in particular, to the San Juan River. This is an important part of the case because Nicaragua is seeking compensation for all damages including the costs added to the dredging of the river due to the amount of sediment the construction of the road has caused and is still causing due to the sorry state the road has been left in.

2. Nicaragua has requested that the extent of this damage and the costs be determined in a subsequent phase of the case. For present purposes, the important point is that Costa Rica has accepted that it has caused damage to Nicaraguan territory by depositing, according to its own estimate, 300,000 tons of sediment in the river since the construction works began. What it contests is that this harm is significant. Mr. Reichler showed you last week that it is, and he will show you today that Costa Rica has failed to establish that it is not.

3. Nicaragua is not only concerned about the harm caused up to the present, but the likelihood that even greater harm will be caused in the future. Costa Rica paid no attention to its international obligation to refrain from starting the construction of the road in 2011 without first preparing a transboundary environmental impact study. As you heard from Costa Rica's counsel last week, and as Mr. Reichler will examine in more detail, Costa Rica now intends imminently to demolish much of the existing road in order to build what amounts to an almost entirely new one, with even greater potential impacts on the San Juan River, again without any intention of fulfilling its obligation to conduct a prior transboundary EIA.

4. There are certain types of construction works that are considered intrinsically to create a risk of serious harm. One of these is the construction of roads. If the road had not been immediately next to the river border but exclusively next to the land border with Nicaragua,

the EIA would have been required in spite of the fact that there would be no sediments involved. The reason is simple. Roads inevitably bring about changes in land use that have serious impacts on the environment, as well as political and security consequences. If the road is a few metres from another State, the impact is even more important. The fact that this extensive construction is next to an endangered river and crosses natural reserves and wetlands only makes it more imperative to have prepared an EIA and the more reckless not to have done so.

5. Professor McCaffrey will go into more detail on the probable impacts the EIA should have assessed and the details an EIA should contemplate before the road works are continued. Some of these obvious impacts that need to be studied are:

- on navigation, due to accumulation of sediment at shoals in the Lower San Juan that block navigation.
- on fauna, flora, air, water, soil, climate, landscape, people, etc.
- those that could be caused by the future operation of the road including the type and volume of traffic, air pollution, dust, etc.¹.
- the access to land created by the road, e.g., settlement, both formal/planned (e.g., hotels, tourism) and informal/unplanned/illegal and the (indirect) impacts these could have.

6. General international law and many national laws require that an EIA be prepared for certain type of constructions due to their inherent capacity or probability of causing significant damage to the environment.

7. Costa Rican internal law provides that an EIA is required for the construction of national roads more than 5 km long².

8. The existence of regional laws and regulations for constructing roads in Central America was taken into account in the Judgment of the highest judicial authority in the region: the Central

¹The use given to the road is particularly important in view of the fact that Costa Rica has the highest level of use of pesticides in the world; see para. 32 of the Nicaraguan Application.

² “According to the text of Costa Rica’s EIA Decree, the creation of this classification scheme was intended to embody the screening process as developed globally over the past decades, and illustrates many of the considerations described above. For example, the scale of a project can determine in part the level of EIA required: construction of national roads more than 5 km long are deemed Category A projects, which require full EIA.” (Footnote omitted.)

See more at “Comments on the lack of EIA for the San Juan Border Road in Costa Rica”, Dr. William R. Sheate, Reader in Environmental Assessment, Imperial College London Centre for Environmental Policy, UK Technical Director, Collingwood Environmental Planning Ltd., London, UK, July 2014, p. 12; Reply of Nicaragua (RN) in the *Road* case, Vol. II, Ann. 5.

American Court of Justice. In a case brought against Costa Rica by non-governmental organizations for the construction of a road without previous environmental impact studies, the Court considered, [tab 26 on]

“*WHEREAS XXVII*: The Court estimates that it is *public knowledge*, . . . that the Government of that State made unilateral decisions, in a hasty manner and without consultation, in light of the Community Integration System, which affect the bilateral commitments of that Government with the neighbouring State of Nicaragua. In addition, these news of obvious notoriety, known by the majority of the Central American and international community, reveal the absence of environmental impact and mitigation studies by Costa Rica, which are essential for commencing works of this magnitude.” [Tab 26 off]

9. And the Central American Court decided, by unanimous vote, that: [tab 27 on]

“*THIRD*: The State of Costa Rica acted without consultation, in a unilateral, inappropriate and hasty manner, violating international bilateral and multilateral agreements validly contracted by building the road in question, which cannot be obviated by alleging internal provisions. *FOURTH*: The State of Costa Rica started the work in question without conducting the studies and previous analyses required in the context of the obligations imposed by Regional Community and International Law, ignoring collaboration, mutual understanding and communication between the State Parties of all these conventions that should exist in the field of environment and sustainable development.” [Tab 27 off]

10. Professor McCaffrey will explain later that in many national and regional regulations and in general international law, a transboundary EIA is mandated when similar roads are to be constructed.

11. Professor Kohen spoke in error when he stated that: “Le risque doit être conforté par l’existence de preuves.”³

12. This cannot be so. It is not the legal obligation of Nicaragua to prove the level of risk or damage the construction would have in order to trigger Costa Rica’s transboundary EIA obligations. Nicaragua does not have — if anyone ever had — the plans for the construction of the Costa Rican road. Only Costa Rica has the designs and plans for the original road and the one that they said they are going to build in its place. Only Costa Rica is in a position to assess potential impacts on the environment, including the San Juan River. If Costa Rica conducts an EIA, before commencing any new works on the road, and notifies and consults with Nicaragua, Nicaragua will certainly co-operate with Costa Rica to assess the transboundary impacts. That is all Nicaragua can

³CR 2015/11, p. 49, para. 32 (Kohen).

do. The rest is up to Costa Rica, or up to the Court to assure that Costa Rica fulfils its transboundary EIA obligations⁴.

13. Mr. President, this case was not brought to the Court as a way to divert attention from the other case, as has been asserted by Costa Rican representatives. It is obviously a case where Nicaragua's rights have been seriously violated and its territory already damaged and further imperiled.

14. Costa Rican counsel has argued that a "list of scientific studies produced by Costa Rica in relation to the road" that was placed in the judges' folder of 20 April 2015, at tab 3, is a substitute for an EIA. These studies date from the year 2013 to the present year 2015, that is, a few years after the road works began. They are not the equivalent of an EIA. They do not cover the ground an EIA covers. They look backward, while an EIA looks forward to assess potential impacts. And they certainly do not substitute for an EIA with respect to the new construction that Costa Rica has planned. There has been no EIA process — no screening, no scoping, no *ex ante* identification and assessment of impacts, no integration of its findings with a design and planning process for the road.

15. If, in the circumstances of the case, Costa Rica's declaration of a state of emergency is allowed to overrule its international obligations, then the obligation might as well be eliminated from the rules of international law.

16. As indicated above, the Central American Court of Justice, very well placed to evaluate a claim of emergency, disregarded it.

17. Let us briefly review the facts before the Decree was enacted and published on 7 March 2011 in the Costa Rican *Official Gazette*. They speak for themselves.

18. Nicaragua began its dredging of the San Juan River proper on 18 October 2010⁵. The actual work of clearing the *caño* commenced, in November 2010 and it was fully completed in December 2010⁶.

⁴See diplomatic Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DVM-Am-286-11, dated 20 Dec. 2011; Memorial of Costa Rica (MCR) in the *Certain Activities* case, Vol. III, Ann. 74.

⁵Counter-Memorial of Nicaragua (CMN) in the *Certain Activities* case, p. 94, para. 4.30 and p. 176, para. 5.84. See also MCR, p. 102, para. 3.70.

⁶CR 2011/2, para. 39, p. 44 (Reichler). See also CMN, p. 48, para. 2.69.

19. On 3 November 2010, Costa Rica brought the situation to the Organization of American States (OAS) claiming an act of aggression and invasion by Nicaragua. The Organization of American States, in resolution No. CP/RES 978 of 12 November 2010⁷, found that it was a border issue that should be resolved in good faith between the Parties who should “Immediately resume the talks on aspects concerning the demarcation of the boundary line done to date, in accordance with the treaties and decisions in force.” No emergency was seen by the OAS.

20. On 18 November 2010, Costa Rica filed the *Certain Activities* case before the Court and requested provisional measures.

21. On 7 March 2011, one day before the Court ordered provisional measures, Costa Rica published its Emergency Decree. The Agents of the Parties before the Court are given sufficient notice before the reading of the judgments and orders of the Court⁸, so Costa Rica was well aware that the Court was to read its Order on 8 March and hurried the publication of its Emergency Decree to issue it one day earlier.

22. Mr. Brenes argued that the Emergency Decree was also justified by President Ortega’s public statements that he would bring a claim to the Province of Nicoya (Guanacaste) before this Court. Apart from the fact that these statements were made months after the Emergency Decree was published, and could scarcely justify it, since when is it a threat to come before this Court?

23. One final comment: if this road was a military response to a Nicaragua’s so-called “invasion”, almost five years after the facts, the Costa Rican security forces would not still be waiting to use this “emergency” road. If building the road was a true emergency, why has Costa Rica never appropriated the funds necessary to build it? It is only common logic that if a measure is urgently needed to protect national security, it will be given the highest budgetary priority and necessary funds will be found for it. Costa Rica’s own actions belie any claim that a real emergency ever existed.

24. Mr. President, once it is established that Costa Rica should not have begun the construction of the road without a previous transboundary EIA (TEIA), then it is a logical

⁷Available at <http://www.oas.org/council/resolutions/res978.asp>.

⁸The ICJ informed the Parties of the date of the reading of the Order on 18 Feb. 2011; letter from the Registry of the Court dated 18 Feb. 2011, ref. 138066.

consequence that the Court should order, adjudge and declare, as requested by Nicaragua, that Costa Rica should refrain from further development in the area without an appropriate TEIA. Future developments in the area include the continuation of the construction of the road itself as well as any building permits for population settlements, hotels, etc., as well as any permits for significant land use along the route. It does not mean that Costa Rica should suspend the slow and hesitant mitigation works it has announced are in progress or scheduled, even if, as Dr. Thorne indicated, these mitigation works, these band aids over the deep and lengthy gash Costa Rica has left open next to the river, will only last a short time⁹.

25. In conclusion, Costa Rica has violated international law and the rights of Nicaragua by the construction of the road without an appropriate transboundary EIA and damaged Nicaraguan territory. The amount of these damages and their compensation, as requested by Nicaragua, will be established in a subsequent phase. A transboundary EIA has to be prepared before any of the contemplated new works of construction on the road can be resumed.

26. Mr. President, Members of the Court, I have tried to concentrate this speech on the central issues. There is not enough time for me, as Agent, to respond to last Thursday's speeches that amounted, because of the content, to political speeches made by Mr. Brenes and Professor Kohen.

27. I will only take the Court's time to address quickly two points raised by Costa Rica.

28. One refers to the airport that was built to service the population of several thousand inhabitants of San Juan de Nicaragua. This airport was built in the area where the old city of Greytown had been located until it was destroyed in the 1980s by paramilitary forces coming from Costa Rica. So it was not built in an international reserve or a wetland but on the site of a former town or city. Furthermore, it was built because, apart from the limited use of the river during the wet season, it is the *only* means of transport to or from the city of San Juan de Nicaragua.

29. Professor Kohen also referred to the interoceanic canal that Nicaragua is developing. He included 16 pages of material on this topic in the judge's folders for 23 April at tabs 58 to 60. Let me point out from the start that the problem Costa Rica has with the canal is not fear of

⁹CR 2015/12, p. 29 (Thorne).

environmental damage. Since independence in the early nineteenth century, before anyone was concerned with the environment, Costa Rica coveted the canal route, which has been the cause of most of the problems in our bilateral relations. Bringing up this subject in the context of this case is only an alert signal that Costa Rica, as always, will try its utmost to prevent the construction of any Nicaraguan canal. But since the canal has been brought into this case where it does not fit, and is not under consideration, I will only remark that, quite contrary to what Costa Rica did with the construction of the road, Nicaragua has seen to it that a very comprehensive and expensive environmental impact study be prepared prior to the construction of the canal. This study is being made by Environmental Resources Management (ERM), a highly reputable international company.

Mr. President, Members of the Court, this ends my presentation. Thank you for your kind attention. Mr. President, may I ask you to please call Mr. Reichler.

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

Mr. REICHLER: Mr. President, Members of the Court, good morning!

THE ROAD AND SIGNIFICANT HARM

1. I will respond to Mr. Brenes and Dr. Del Mar on the current condition of the road, as allegedly mitigated by Costa Rica, and on what Professor Thorne called the permanent works¹⁰, that is, the rebuilding of the road that he told us Costa Rica is now planning¹¹. Then I will respond to Mr. Wordsworth on the significant harm that eroded sediment from the road has caused to Nicaragua.

2. Mr. President, I do not need to say much more about the condition of the road. At least, I do not need to say much more than Professor Thorne did last Friday. You will recall that he confirmed the numbers in his two charts¹², which were prepared by Dr. Mende, and then accepted

¹⁰CR 2015/12, 2015, pp. 27-30 (Thorne).

¹¹*Ibid.*, p. 30 (Thorne); see also, CR 2015/11, p. 28, para. 46 (Brenes); p. 31, para. 6 (Del Mar); p. 37, para. 22 (Del Mar).

¹²CR 2015/12, pp. 21-26 (Thorne).

by Professor Thorne himself, through a process that Professor Thorne described as “negotiated”¹³. The charts are in your judges’ folder of 20 April, morning session, tabs 3 and 4 for that session. You have seen them before. I need not display them again. But recalling the numbers is useful, especially in light of Costa Rica’s presentation on the current condition of the road in the first round.

3. Dr. Del Mar’s entire speech was devoted to showing you that Costa Rica has mitigated the problems at seven specific locations¹⁴, the same seven locations that Costa Rica promised to mitigate during the provisional measures hearings in November 2013¹⁵. Frankly, I am not sure what that evidence contributed. In my first round speech, I said that Nicaragua was already assuming that those seven sites were mitigated to some degree after November 2013¹⁶.

4. In fact, Nicaragua accepted in the first round that Costa Rica has done more than that. We accept the numbers in Professor Thorne’s two charts¹⁷. As of December 2014, according to his charts, Costa Rica had mitigated 28 failing sites where the road crosses watercourses, and 11 failing slopes, a total of 39 sites¹⁸, not just seven. But, as we emphasized¹⁹, this is a tiny drop in the bucket, compared to how many failed or failing water crossings and slopes there are, which have not been mitigated.

5. On Friday, Professor Thorne confirmed the figures in his two charts. There are still 54 water crossings that currently require mitigation, of which, at 31, mitigation work was not even commenced²⁰. He was unable to tell us when mitigation would be commenced at these sites, or when it would be completed. Nor did he know when mitigation would be completed at the

¹³CR 2015/12, p. 23 (Thorne).

¹⁴CR 2015/11, pp. 31-36, paras. 7-18 (Del Mar).

¹⁵CR 2013/29, p. 20, para. 24 (Brenes).

¹⁶CR 2015/8, pp. 32-33, para. 48 (Reichler).

¹⁷*Ibid.*, pp. 29-30, paras. 39-40 (Reichler).

¹⁸Andreas 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, Rejoinder of Costa Rica (RCR), Vol. II, Ann. 3, pp. 29-30, tables 5 & 7, provided in Nicaragua’s judges’ folder for 20 April 2015 at tab 3, p. 6 & tab 4, p. 2; 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, Vol. I, App. A, pp. 137-138, tables 7.4-7.5, provided in Nicaragua’s judges’ folder for 20 Apr. 2015, tab 6.

¹⁹CR 2015/8, 20 April 2015, p. 29, para. 39 (Reichler); see also p. 18, para. 7; p. 22, para. 17; p. 26, para. 28; p. 28, para. 36; p. 32, para. 47 (all Reichler).

²⁰CR 2015/12, pp. 22-23 (Reichler & Thorne).

23 locations where it remains unfinished²¹. In regard to failed or failing slopes, Professor Thorne confirmed that mitigation is still required at 165. It was not even started yet at 58. He was unable to give us any starting dates at these 58 locations, or tell us when the work would be completed at any of the 165 failed or failing slopes²².

6. And this is especially troubling, Mr. President, because Professor Thorne candidly told us that: “[T]he slopes are the heart of the matter. They are the source of, by Dr. Kondolf’s survey, 75 per cent of the sediment. It is quite correct to focus on the slopes primarily.”²³

7. Even more troubling is what Professor Thorne told us about the mitigation Costa Rica has thus far performed, including at the seven locations of which Dr. Del Mar spoke. “[T]hese are temporary works that mitigate but do not permanently solve erosion problems, and a permanent solution will not be achieved until design, planning and construction of the Road are completed.”²⁴

8. Here is how Professor Thorne explained the difference between the temporary work that Costa Rica has performed at the allegedly mitigated sites, and the permanent work that is necessary, but has not yet even been attempted:

“So, if we took an example of the fill slopes, where material has been side-cast off the side of the road and it is not compacted, a temporary solution may be to cover that with coconut matting and protect it from raindrop impact and run-off. The permanent solution may be to take it away because it hasn’t been properly compacted . . . and built up in layers in the proper fashion, and the only thing you can do with that fill slope is take it away and start again. So, that is the difference for a fill slope between protecting it for a year or two and mitigating and then actually the cure for that site; it may not be possible to stabilize that fill slope in that location. *In extremis*, the permanent solution may be to re-route the road and, again, Dr. Weaver — I wouldn’t argue with a lot of his recommendations; he knows what he is talking about.”²⁵

9. Dr. Weaver, the Court will recall, is Nicaragua’s road expert, who appeared on Monday, 20 April, but whom Costa Rica chose not to cross-examine. Dr. Del Mar, rather unconvincingly, explained that Costa Rica did not question him because its “mitigation works ha[d] been removed

²¹CR 2015/12, pp. 22-23 (Reichler & Thorne).

²²*Ibid.*, pp. 23-25 (Reichler & Thorne).

²³*Ibid.*, p. 24 (Thorne).

²⁴*Ibid.*, pp. 27-28 (Thorne), confirming statement from Prof. Thorne’s November 2013 report, para. 11.19, CMCR, Vol. I, App. A.

²⁵*Ibid.*, p. 29 (Thorne).

from the equation. Costa Rica's case does not depend on them."²⁶ Then she spent the rest of her speech, some 21 paragraphs, describing the mitigation works in graphic detail²⁷, with a special volume of their judges' folder filled with 47 travel-agency style photographs of the works Costa Rica claims to have carried out at a handful of different sites.

10. That's all well and good. What is not, is the unfounded and unfair accusation that my colleague, Professor Pellet, or I, displayed photos last Tuesday that "risk misleading the Court"²⁸. She rather unkindly accused us of displaying old photos of various sites while giving the impression to the Court that they were recent²⁹. Mr. President, included in your judges' folder today at tab 28 is the map Nicaragua submitted to the Court, at its request, on 10 April. There is no need for me to display it now. It is included so that you can see, at your convenience, that the photographs Nicaragua submitted with its map, properly bear the dates on which they were taken. After counsel for Costa Rica spoke, I checked the photos that I displayed in Court on 20 April, during my speech on the road. Every photo displayed was properly dated. I displayed no photos of the road on Tuesday, 21 April. Professor Pellet did. Each of his photos was identified by its source in the case file. He did not make any representations about the dates they were taken, or suggest that they were the most recent. His point was to show how badly the road had been initially constructed at those sites. His photos accurately depicted that. He did not say or imply that no subsequent mitigation was attempted. That is because, as Professor Thorne emphasized, the mitigation work, where it was performed, was at best only a temporary solution.

11. In regard to the effectiveness of Costa Rica's mitigation efforts, here is how Dr. Weaver assessed them, in his summary report, based on his very recent observations. I think you will discern a difference from the way counsel for Costa Rica portrayed them:

"Four years after construction of the Road, widespread and effective mitigation is not apparent. We observed no indication of ongoing or recent earthmoving in February-March 2015. The majority of watercourse crossings, cut slopes and fill slopes remain unstable, exhibit significant visible erosion, and have not been treated or

²⁶CR 2015/11, p. 29, para. 1 (Del Mar).

²⁷*Ibid.*, pp. 29-37 (Del Mar).

²⁸*Ibid.*, p. 36, para. 20 (Del Mar).

²⁹*Ibid.*, pp. 31-35, paras. 8-11 & 14-16 (Del Mar); see also pp. 20-21, para. 22 (Brenes).

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.”³⁰

12. To fix the problems with the road, Dr. Weaver provided specific recommendations, which Professor Thorne has endorsed, because, as he told you on Friday, Dr. Weaver “knows what he is talking about”³¹. [Slide on] Dr. Weaver’s recommendations are at paragraph 53 of his summary report, subparagraphs A through E— at tab 29 today, they are projected on the screen. The Court may wish to review them at its convenience³². I will read only the first one:

“A. Assess the relocation of portions of the Road built on steep, unstable and erodible terrain and in close proximity to the Río San Juan, to a more inland, stable route, as recommended in our 2014 report, and in the 2013 EDA and 2015 follow up.”³³

I should point out that the 2013 EDA and 2015 follow-up recommending relocation of the road to a more stable place inland, are Costa Rica’s own reports³⁴. [Slide off]

13. On Friday, I asked Professor Thorne what Costa Rica needs to do about the road; this is at tab 30 of the folder. [Slide on] My question, and Professor Thorne’s answer:

“Mr. REICHLER: What you are recommending that Costa Rica do is not just mitigate, but perform the works necessary to permanently resolve the problems at these sites?

Mr. THORNE: Yes, Route 1856 should be brought to the same standard as all other comparable roadways in Costa Rica, many of which are built to an extremely high standard and this one should be too, but it is not being built that way.”³⁵

14. Professor Thorne has thus answered an important question that Judge Bhandari put to both Parties on Friday; his question number 2. Judge Bhandari asked: “How much weight should the Court place on standards or ‘best practices’ from highly developed countries while evaluating Costa Rica’s construction of the Road?”³⁶ Nicaragua’s answer to Judge Bhandari’s question is that Costa Rica need not be required to construct a road to the same standard as may be applicable in the United States, or the European Union, or in other countries with a higher level of economic

³⁰Weaver Summary Report, Mar. 2015, p. 19, para. 50.

³¹CR 2015/12, p. 29 (Thorne).

³²See Weaver Summary Report, Mar. 2015, p. 20, para. 53, provided in judges’ folder, tab 29.

³³*Ibid.*

³⁴Centro Científico Tropical, “Environmental Diagnostic Assessment (EDA), Route 1856 Project — Ecological Component”, Nov. 2013, pp. 13, 147, CMCR, Vol. II, Ann. 10; Centro Científico Tropical, “Follow-up and Monitoring Study Route 1856 Project — EDA Ecological Component”, Jan. 2015, pp. 10, 57, RCR, Vol. III, Ann. 14.

³⁵CR 2015/12, p. 30 (Thorne).

³⁶CR 2015/13, p. 55 (Bhandari).

development. However, in Nicaragua's view it is appropriate to hold Costa Rica to its own Costa Rican standard, which, as Professor Thorne himself has stated, is an "extremely high standard, and this [road] should be [held to that standard] too, but it is not being built that way."³⁷

[Slide off]

15. Mr. President, we are told by Costa Rica that the permanent works recommended by Professor Thorne and Dr. Weaver will be performed. Dr. Del Mar assures us that new construction will commence right after CONAVI receives and approves the design plans³⁸. What this means, Mr. President, is that Costa Rica is planning imminently to embark on new road construction, adjacent to the San Juan River, that will dwarf everything that has been done until now. This consists of two enormous projects, each of which will necessitate the bulldozing of massive amounts of earth in close proximity to the river, including on more than 100 steep slopes that are already eroding sediment into the San Juan. First, they are planning to demolish all of the unstable cut and fill slopes they have already created, which, by moving or removing so much earth, risks bringing many thousands of tons of sediment into the river; and then they plan to construct what amounts to an entirely new road in the same vicinity, again disturbing enough earth in the process to cause even more sediment to be deposited in the river, even if they build it better this time.

16. Such a project, such a major demolition and construction effort, screams out for an EIA, before any of these works are undertaken, while there is still time to influence the design and construction choices; that is the very purpose of EIA³⁹. What they have done to date has already caused significant harm to Nicaragua, as I will come to shortly. What cannot be denied is that the new works, which Costa Rica's counsel told you they *will* undertake, as soon as the designs are approved by CONAVI⁴⁰, will create a major risk of much greater harm to Nicaragua in the near future. There is simply no argument that Costa Rica legitimately can make to escape its international obligation to conduct an EIA prior to commencement of a project of this scale.

³⁷CR 2015/12, p. 30 (Thorne).

³⁸CR 2015/11, p. 37, para. 22 ("Construction of the road will be resumed once designs are ready.") (Del Mar).

³⁹Sheate Summary Report, March 2015, paras. 3 & 22.

⁴⁰CR 2015/11, p. 31, para. 6 & p. 37, para. 22 (Del Mar).

17. Mr. President, as Professor McCaffrey will elaborate, it is Costa Rica's obligation to conduct a proper EIA — one that includes an assessment of the transboundary impacts on the San Juan River and Nicaragua — prior to commencement of the permanent works that Costa Rica says it is planning to carry out. I am instructed by the Agent of Nicaragua to state that, if Costa Rica carries out such an EIA, either on its own accord or by order of the Court, Nicaragua will co-operate in every way possible in assessing the impacts on the river. However, it appears that Costa Rica needs some motivation from the Court to fulfil its EIA obligation. How else can we explain that the designs are almost ready, and construction will commence soon thereafter, without even a thought given to carrying out a transboundary EIA prior to making irrevocable design and construction choices? The evidence suggests Costa Rica has no intention of honouring its international obligations in regard to EIA, unless it is ordered to do so by the Court.

18. I turn now to the significant harm that Costa Rica's construction of the road has already caused to the river. I will begin, Mr. President, by showing you that Costa Rica's counsel have already made our case on significant harm for us. First, both Professor Kohen and Mr. Wordsworth — two good friends of mine and each other — helpfully told the Court what the legal standard is for showing significant transboundary environmental harm. They both invoked the ILC's definition⁴¹. Nicaragua is pleased to agree that this is the applicable legal standard in regard to its environmental claims.

19. [Slide on] Let us look at it. Here — and it is also at tab 31 — exactly as Professor Kohen projected it. It is worth a careful reading. “The term ‘significant’ is not without ambiguity and a determination has to be made in each specific case. It involves more factual determination than legal determination.” There is no disagreement to this point. But the next sentence appears to be problematical for Costa Rica. Mr. Wordsworth skipped it entirely, beginning his reading with the next sentence, as if this one did not exist. So it falls to me to read it now. “It is to be understood that ‘significant’ is something more than ‘detectable’ *but need not be at the level of ‘serious’ or ‘substantial’.*” These seem like important words that should not be ignored, as Costa Rica does. Then: “The harm must lead to a real detrimental effect on matters

⁴¹CR 2015/11, pp. 46-47, para. 27 (Kohen); CR 2015/13, p. 13, para. 14 (Wordsworth). Both referencing ILC, Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, Commentary to Art. 2, para. (4), *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II (2), p. 152.

such as, for example, human health, industry, property, environment or agriculture in other States.” Certainly, navigation fits into at least one of these categories. It does not appear that Costa Rica contends otherwise. And finally: “Such detrimental effects must be susceptible of being measured by factual and objective standards.” [Slide off] End of quote, end of definition.

20. Mr. President, my friends on the other side have not only given us the applicable legal standard; they have shown us that, in this case, it has been met!

21. They concede, and Professor Thorne confirms, that many thousands of tons of sediment from the road are transported to the delta, and to the Lower San Juan River, where it aggrades or accumulates, especially at shoals that obstruct navigation, enlarging those shoals and other barriers to navigation, and thereby adding to the amount of sediment Nicaragua has had to dredge over the last four years⁴². They claim that it is a very small amount. But, most importantly, and this is their most critical admission, they *measure* it! Here are the measurements Mr. Wordsworth gave you:

“For 2012, the dredging was 176,918.90 cubic metres, as to which the percentage figure of sediment from the road would be 2.57 per cent. The dredging was much higher in 2013, 304,490.84 cubic metres, so the percentage would be 1.49 per cent. And then, in 2014, less dredging, so the percentage is 2.88 per cent.”⁴³

22. I will leave to one side, for the moment, the fact that Mr. Wordsworth reduced my figure of 22,000 tons per year of sediment from the road accumulating in the Lower San Juan River, to only 7,600 tons per year. That is not unimportant, but the critical point is this: he has given us estimates, that is *measurements*, of the amount of sediment that the road contributes to the sediment already accumulated in the Lower San Juan, which Nicaragua has been dredging. *Ergo*, the applicable legal standard is satisfied: the detrimental effects of construction of the road, in the form of additional accumulated sediment in the Lower San Juan that has to be dredged out by Nicaragua, is susceptible of being measured! And we have that on Costa Rica’s own authority. In fact, actual or exact measurements may not be required to meet the ILC standard. The harm need only be “susceptible of measurement” to qualify as significant. Costa Rica’s counsel have confirmed that it is.

⁴²CR 2015/12, pp. 42-44 (Reichler & Thorne); Thorne Summary Report for the *Construction of a Road* case, Mar. 2015, para. 4.6; see also RCR, para. 2.55; ICE (2014), pp. 29-31; RCR, Vol. III, Ann. 4.

⁴³CR 2015/13, p. 22, para. 46 (Wordsworth).

23. We say the measurement here should be considerably higher. As I said last Tuesday, at 22,000 tons per year⁴⁴, instead of the 7,600 tons measured by Mr. Wordsworth, the impact of sediment from the road is higher⁴⁵: 8.5 per cent of the amount Nicaragua dredged in 2014⁴⁶. But in terms of Costa Rica's international responsibility, it makes no difference whether Nicaragua's measurement or Costa Rica's measurement is more accurate. Nor would it make a difference if Costa Rica could show you that the actual amount of sediment from the road reaching the river is half, or less than half, of the amount or percentages its counsel gave you. Mr. Wordsworth says that Nicaragua is "dramatically overestimating the amount of sediment" going into the river⁴⁷. We disagree, but even if he is right, *quod non*, Costa Rica loses. What is important, under the ILC standard, is not the actual numerical measure of sediment, but whether it is susceptible of being measured. Both Parties have now shown you that it is. The applicable legal standard for significant harm, the one invoked by Costa Rica⁴⁸, is satisfied whether you accept Nicaragua's measurement or Costa Rica's.

24. Under that legal standard, the Court need not consider the impact to be "serious" or even "substantial" for it to be "significant". Costa Rica's attempt to ignore those critical words only makes them stand out that much more. The requirements are that the impact must be "detrimental" and "susceptible of being measured". On Costa Rica's own evidence and argument, those requirements are met. It is true that the Parties, in measuring the impact, have calculated different amounts. But that only affects the amount of significant harm Nicaragua has suffered, that is, the quantification of the damages, which can, and should, be determined in subsequent proceedings on compensation.

25. Costa Rica has made a number of arguments that the harm it has caused to Nicaragua is not significant. None of them, Mr. President, withstands even modest scrutiny. First, Costa Rica argued that there is no impact because the sediment from the road spreads evenly across the bottom of the Lower San Juan River, such that its effect is to raise the bed by no more than the width of a

⁴⁴CR 2015/10, p. 13, para. 14 (Reichler).

⁴⁵CR 2015/13, p. 22, paras. 45-46 (Wordsworth).

⁴⁶CR 2015/10, p. 13, para. 15 (Reichler).

⁴⁷CR 2015/13, p. 18, para. 33 (Wordsworth).

⁴⁸*Ibid.*, p. 13, para. 14 (Wordsworth); CR 2015/11, pp. 46-47, para. 27 (Kohen).

few grains of sand⁴⁹. That, Mr. President, you will recall was their main argument at the provisional measures hearing in November 2013⁵⁰. It is now dead. Professor Thorne told us at his cross-examination last Friday that the sediment does not spread evenly across the river bottom. He agreed with Dr. Andrews that: “It will instead tend to form [shoals], creating reach-wise instabilities and obstructions to navigation that will need to be removed through dredging.”⁵¹ He emphasized: “[t]he shoals are the problem” in the Lower San Juan⁵², because they “are depositional centres and they do accumulate sediment”⁵³.

26. Costa Rica’s second argument against significant harm likewise failed to survive Professor Thorne’s testimony. Undaunted, Mr. Wordsworth made it last week anyway, unchanged from the November 2013 hearing: “[T]he sediment coming from the road represents only a tiny fraction of the total annual sediment load of the Río San Juan.”⁵⁴ He said that it was 0.6 per cent, according to Costa Rica’s measurement of the amount of sediment coming from the road, and 1-2 per cent according to Nicaragua’s measurement⁵⁵.

27. This may be true, but it is not relevant, and it is certainly not determinative of the significant harm caused by that sediment. Everyone agrees that navigation is not seriously impeded in the San Juan River proper, upstream from the delta. The “problem”, which is what Professor Thorne called it⁵⁶, is in the Lower San Juan, due to the accumulation of sediment — including sediment from the road — at shoals in that Lower San Juan River, creating or enlarging obstacles to navigation⁵⁷.

28. On Friday, Professor Thorne told us: “Context is everything.”⁵⁸ I thought I heard myself talking, because those were my words earlier in the week, on 21 April⁵⁹. Professor Thorne made

⁴⁹CMCR, para. 3.76 (c).

⁵⁰CR 2013/29, p. 10 (Ugalde Álvarez) and p. 27 (Wordsworth).

⁵¹CR 2015/12, pp. 43-44 (Reichler & Thorne); see also CR 2015/9, pp. 31-33 (Andrews).

⁵²CR 2015/12, p. 43 (Thorne).

⁵³*Ibid.*, p. 44 (Thorne).

⁵⁴CR 2015/13, p. 22, para. 48 (Wordsworth).

⁵⁵*Ibid.*

⁵⁶CR 2015/12, p. 44 (“The Lower Río San Juan is a problem, I agree.”) (Thorne).

⁵⁷*Ibid.*; van Rhee Summary Report, Mar. 2015, paras. 4-6; Andrews (2014), pp. 26-29; RN, Vol. II, Ann. 3.

⁵⁸CR 2015/12, p. 39 (Thorne).

⁵⁹CR 2015/10, p. 14, para. 17; p. 15, para. 19; p. 18, para. 27; p. 23, para. 42 (all Reichler).

them vividly clear. He told us the Colorado River receives at least four times as much sediment as the Lower San Juan, but has no navigation problem because sediment does not accumulate there⁶⁰. By contrast, he said: “Although the Lower San Juan River receives less of the sediment than the Colorado, it is unable even to accommodate that load.”⁶¹

29. And this is because, as Professor Thorne explained, the Lower San Juan is a “response reach”, which he defined to mean “that the river has no unfilled capacity to transport additional sediment and morphologic adjustments are likely to occur in response to changes in sediment supply”⁶². And he told us what these morphologic changes, caused by “additional sediment”, would be: the formation and enlargement of shoals that obstruct navigation, especially at and below the delta⁶³. Magnitude is not everything. Context is. Professor Thorne confirmed this.

30. I come to what appears to have now become Costa Rica’s main argument against significant harm: that Nicaragua has failed to make out a case for it, because it has not proven that sediment from the road is entering the river. This argument was made at great length by Mr. Wordsworth⁶⁴. Nicaragua is alleged to have failed to make its case, because it did not produce samples of sediment concentrations upstream and downstream of the road, showing that the sediment concentrations downstream were higher. Not only Mr. Wordsworth, but several of Costa Rica’s advocates harped repeatedly on this theme: Nicaragua’s failure to produce samples showing increased sediment concentrations downstream of the road. Costa Rica now seems to have put all its eggs in this one basket. But it is a basket with an enormous hole at the bottom; and Costa Rica’s eggs have fallen through it.

31. The hole is this. The Parties’ experts are agreed that massive amounts of sediment have entered the river from the road. Mr. Wordsworth somehow avoided mentioning this, but Costa Rica’s own expert, Professor Thorne, measured that up to 75,000 tons of sediment from the

⁶⁰CR 2015/12, p. 38 (Thorne).

⁶¹*Ibid.*, p. 39 (Thorne); Thorne October 2011 Report in *Certain Activities* case, p. II-27; see also CR 2015/8, p. 42 (Kondolf).

⁶²CR 2015/12, pp. 40-41 (Thorne); Thorne, “Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River”, November 2013, p. 34, para 6.12, CMCR, Vol. I, App. A; see also CR 2015/8, p. 42 (Kondolf).

⁶³CR 2015/12, pp. 43-44 (Thorne).

⁶⁴E.g., CR 2015/13, pp. 13-17, paras. 15-27 (Wordsworth).

road has entered the river every year since 2011⁶⁵. By now, the total has surpassed 300,000 tons by his count. On cross-examination last Friday, Professor Thorne confirmed to us that he has concluded that sediment is going into the river as a result of construction of the road⁶⁶, and Dr. Kondolf reached the same conclusion; the only difference between them is in the amount measured⁶⁷. For Professor Thorne, it was 75,000 tons annually⁶⁸. For Professor Kondolf, it was between 190,000 and 250,000 tons annually⁶⁹.

32. As Dr. Kondolf testified, in response to Mr. Wordsworth's questions:

“[T]he Court already has hard data in front of it that sediment is entering the Río San Juan from the eroding sites on the road . . . [I]t is very clear that sediment is getting into the river, that is agreed by experts for Costa Rica and Nicaragua, and there are different estimates for how much that is but it is very clear that sediment is entering the river and adding to the sediment load.”⁷⁰

Professor Thorne made the same point⁷¹.

33. In these circumstances, what would Mr. Wordsworth's sampling exercise tell us? Nothing that we don't already know. The sampling exercise Costa Rica seems so devoted to would add nothing of importance to the conclusion already reached by both Parties' experts: that at least 75,000 tons, and possibly as much as 190,000 to 250,000 tons of sediment, are contributed by the road to the river annually. The purpose of sampling — as Costa Rica's counsel have repeatedly told us — is to determine *whether* sediment from the road is entering the river and, if so, how *much* of it. But we already *know* that, from both Parties' experts, and from the more direct and reliable methods they used to measure the amount of sediment eroding from specific sites. Both experts measured the size of the area at each of these sites that is eroding as a result of construction of the road, and applied erosion rates — in many cases the same ones — to determine the total volume of

⁶⁵Thorne Summary Report for *Construction of a Road* case, March 2015, p. 11, Table 4.16 & para. 3.17; Thorne Reply Report, February 2015, p. 56, Table 4.16, RCR, Vol. I, App. A (both reporting sediment yields of 74,949 t/year); see also RCR, para. 2.61.

⁶⁶CR 2015/12, pp. 33-34 (Thorne).

⁶⁷*Ibid.*

⁶⁸Thorne Summary Report for *Construction of a Road* case, March 2015, p. 11, Table 4.16 & para. 3.17; Thorne Reply Report, February 2015, p. 56, Table 4.16, RCR, Vol. I, App. A; see also RCR, para. 2.61.

⁶⁹CR 2015/9, p. 14 (Kondolf); see also Kondolf Summary Report for *Construction of a Road* case, March 2015, pp. 7-8, para. 22 & table (estimating an annual contribution of 116,000-150,000 m³, which equals approximately 190,000-250,000 t/year); Kondolf, “Erosion and Sediment Delivery to the Río San Juan from Route 1856”, July 2014, p. 62, RN, Vol. II, Ann. 1 (same estimate).

⁷⁰CR 2015/8, p. 41 (Kondolf).

⁷¹CR 2015/12, pp. 33-34 (Thorne).

eroded sediment entering the river from all of the sites that are eroding. That is a direct measurement of the sediment entering the river. What Costa Rica proposes, and accuses Nicaragua of failing to do, is an indirect and far less reliable method of obtaining the same information.

34. Please permit me to give you an illustration. I hope you will indulge me for a moment. [Slide on] To assist, we have prepared a drawing: on the screen, and at tab 32 of the judges' folder. Imagine, if you will, that I have placed on the lectern in front of me a bucket of sand. Alongside it, I have placed a tank of water, which already has a lot of sand mixed in. I am planning to dump the sand from the bucket into the tank. The most direct way — the most reliable way — to determine the amount of sand that is going to go into the tank is to measure the sand directly, before I pour it into the tank. To do that, I measure the volume of the bucket, determine the fraction of the bucket that is filled, and multiply the two. That tells us the volume of sand that is going to be poured into the tank. And that is effectively how Professors Thorne and Kondolf measured the amount of sediment entering the river from the road. They measured the area subject to erosion, multiplied it by a fraction — the erosion rate — and got the volume of eroded sediment going into the river.

35. But that is *not* the way Costa Rica says *you* should do it, Mr. President. For *them*, you first have to take a microscopic measurement of the concentration of sediment in the tank, or sand in the tank. Then you dump the bucket of sand into it. Then you take another microscopic measurement of the sediment concentration in the tank, and then you compare the two measurements. And if you do, what do you get? Another way — an indirect and less reliable way — of determining the same thing that Professors Thorne and Kondolf determined directly: how much sediment or sand enters the river from the road. This is an unnecessary exercise if you already have the direct measurement from Professor Thorne or Professor Kondolf. And also, as applied to this case, it is an unreliable method. [Slide off.]

36. Professor Thorne prepared four reports regarding the road, including his summary report of 15 March, prior to these oral hearings. In none of them did he suggest that there was a need for sampling to determine how much sediment was entering the river from the road, or even to confirm *his* measurement that the amount was 75,000 tons per year. To the contrary, here is what he wrote in his November 2013 report: “[N]o possibility exists for using measured loads to estimate how

much sediment derived from erosion of the Road has been added to the Río San Juan, due to the very high natural variability in those loads.”⁷²

37. My friend Mr. Wordsworth strained to invoke Dr. Kondolf in support of Costa Rica’s sampling theory⁷³. But Dr. Kondolf repeatedly confirmed that the most reliable way to determine the amount of sediment coming into the river from the road was by direct measurement, as both he and Professor Thorne had done⁷⁴. Professor Kondolf in his testimony, like Professor Thorne in his reports, emphasized that: “there is a lot of variability in suspended sediment data . . . such that that would have to be taken into account in trying to interpret whether there is a change reflected”⁷⁵. When pressed by Mr. Wordsworth, Dr. Kondolf explained how sampling could be done. But he never said, as Costa Rica would have it, that sampling would be a reliable, or a more reliable, way of measuring the sediment from the road that is entering the San Juan River⁷⁶. In fact, he said exactly the opposite, as you will see in the citations that are provided in the footnotes to this speech⁷⁷.

38. Mr. President, Costa Rica’s “sampling” argument is a diversionary tactic. It is intended to divert you from the undisputed evidence provided by Professors Thorne and Kondolf that massive quantities of sediment have been entering, and are continuing to enter, the river from the road. The only disagreement is over the amount. The argument is also intended, as are many of Costa Rica’s arguments, to cast Nicaragua as some sort of sinister villain. Nicaragua is blamed for preventing a joint sampling exercise by insisting, as a precondition, that construction of the road be suspended. What is wrong with that? Assuming, *quod non*, that sampling would have produced anything useful— and it might have been one way of gaining some information, before Professors Thorne and Kondolf measured the amount of sediment entering the river by their more direct methodology — why not assess impacts before the works are carried out? That is what EIA is all about.

⁷²Thorne, “Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River”, November 2013, p. 70, para. 8.17, CMCRC, Vol. I, App. A.

⁷³CR 2015/13, p. 12, para. 7 (b); p. 14, para. 17; p. 17, para. 26 (all Wordsworth).

⁷⁴CR 2015/9, pp. 14-16 (Kondolf).

⁷⁵CR 2015/8, p. 41; see also, pp. 42 & 48 (Kondolf).

⁷⁶*Ibid.*

⁷⁷*Ibid.*, p. 16 (Kondolf).

39. Mr. Wordsworth referred you to Nicaragua's correspondence of August 2013. That was several months before Costa Rica submitted its Counter-Memorial in December of that year, which included Dr. Thorne's original estimate of the amount of sediment entering the river each year. What Mr. Wordsworth did not tell you, is that, after receiving Dr. Thorne's report, Costa Rica withdrew its offer to engage in a joint sampling exercise⁷⁸. Apparently they considered that Professor Thorne's measurements rendered sampling unnecessary. Their arguments at these hearings thus ring hollow.

40. What about the difference between Professor Thorne's and Professor Kondolf's measurements of the amount of sediment eroding into the river from the road? In the first place, we say that the harm to the Lower San Juan River is significant in either case because, as both experts have shown, it is susceptible of being measured and they have in fact measured it. Second, we say that Professor Kondolf is right. In explaining why, I will attempt to answer the question put by Judge Robinson at the end of Professor Kondolf's examination on 20 April in regard to the differences between the Parties' measurements.

41. Mr. President, I beg your indulgence because answering Judge Robinson's question requires me to enter into some detail. I will do it as briefly as possible. There are at least four reasons why Costa Rica's measurement of eroded sediment entering the river is too low. At the outset, it should be pointed out that some of the measurements relied on by Professor Thorne were not actually made by him, but by Costa Rica's Dr. Mende⁷⁹. You will recall from Friday's testimony, that Professor Thorne expressed some consternation with Dr. Mende's numbers in regard to mitigated or partially mitigated sites, explaining that they were not what he would have determined, but were "negotiated" with Dr. Mende to produce figures that Professor Thorne ultimately could consider acceptable⁸⁰. As I take you through the process, I believe you will understand why Professor Thorne was not entirely comfortable with the reliability of Dr. Mende's measurements.

⁷⁸Letter from the Co-Agent of Costa Rica to the Registrar of the International Court of Justice, ref. ECRPB-63-2013, 27 Sep. 2013, CMCR, Vol. III, Ann. 65.

⁷⁹Thorne (2015), paras. 4.21-4.40; RCR, Vol. I, App. A.

⁸⁰CR 2015/12, p. 23 (Reichler & Thorne).

42. The difficulty is this: Dr. Mende underreported the area of land moved or disturbed by construction of the road and that was thereby subject to erosion; and to this unreasonably small area, arbitrarily low erosion rates were applied. Here are four of the ways in which this was done.

43. First, Dr. Mende did not include in the area subject to erosion over 2.2 million sq m of bare earth in close proximity to the river that had been disturbed, moved and devegetated in the construction process, and which was eroding sediment into the river. Dr. Mende arbitrarily limited the area of concern — the area he measured — only to slopes and roadbed⁸¹. Had he included all areas subject to erosion, Costa Rica's estimate of total annual erosion would have been at least 40,000 tons higher annually: $75,000 + 40,000 = 115,000$.

44. Second, Dr. Mende's measurement did not account for any eroded sediment contributed by the more than 300 km of access roads constructed or improved by Costa Rica to connect with Route 1856. [Slide on] On the screen, and at tab 33, is Costa Rica's map showing in red these access roads. As you can see, the access roads all come right up close to the river. Most significantly, they all cross numerous streams and other tributaries that feed into the San Juan. That is how sediment from these road surfaces gets into the river, at the water crossings that have also been such a problem all along Route 1856 itself⁸². Dr. Kondolf conservatively applies very low rates of erosion and sediment delivery here⁸³. If Dr. Mende had accounted for any sediment from these access roads, instead of zero, his measurement would have been increased by at least another 16,000 tons per year⁸⁴: $115,000 + 16,000 = 131,000$ tons. [Slide off]

45. Third, in its 2013 report, ICE, the Costa Rican government agency, measured road surface erosion at 24,200 tons per year⁸⁵. However, the next year, in its 2014 report, it arbitrarily reduced this to 2,900 tons, partly by reclassifying large portions of what was previously called road as trail, and then applying an unjustifiably low rate of erosion to the newly designated trail

⁸¹Kondolf Summary Report for *Construction of a Road* case, March 2015, paras. 10, 44-47; see also, Mende (2014), pp. 8, 31-33, RCR, Vol. II, Ann. 3.

⁸²Kondolf Summary Report for *Construction of a Road* case, March 2015, para. 21.

⁸³*Ibid.*

⁸⁴See *ibid.*

⁸⁵*Ibid.*, para. 37.

portions⁸⁶. If the higher 2013 measurement by ICE is taken as correct, this adds another 21,300 tons per year of eroded sediment to the river: $131,000 + 21,300 = 152,300$ tons.

46. Fourth, Dr. Mende, without justification, reduced the rates of erosion he applied to slopes from his 2013 to his 2014 report⁸⁷. Had he applied his own erosion rates from 2013, this would have added another 12,000 tons of sediment eroding into the river annually: $152,300 + 12,000 = 164,300$ tons.

47. Mr. President, by simply correcting for four of Costa Rica's errors, or, if you will, bias in favour of itself, we have narrowed the difference between the Parties' measurements to some 25,000 tons per year: at least 190,000 for Dr. Kondolf, and at least, or approximately, 165,000 tons for Dr. Mende. I could go on and account for the rest of the difference but I think this is enough to make the point, and I hope Judge Robinson will be satisfied with the answer.

48. Mr. Wordsworth's main criticism of Dr. Kondolf's measurement is that, allegedly, Dr. Kondolf's estimate of the total area of slopes subject to erosion is considerably higher than Dr. Mende's, who, according to Mr. Wordsworth, "walked the length of the road", electronic range finder in hand⁸⁸. Nicaragua would have more confidence in Costa Rica's measurement if it had been Professor Thorne who walked the length of the road and did the actual measurement. Dr. Kondolf used standard methods, based on remotely-sensed images, to measure the sizes of the eroding slopes⁸⁹. Nicaragua considers his measurements more reliable than Dr. Mende's.

49. Mr. President, based on the measurement of the amount of sediment entering the river from the road, Nicaragua's experts have measured the amount that accumulates in the Lower San Juan, where it aggrades primarily at shoals, enlarging them and exacerbating their capacity to obstruct navigation. [Slide on] At tab 34 you will find three sets of alternative calculations, using as a starting-point, the amount of sediment entering the river as measured, respectively, by Professor Thorne and the two estimates, the low and the high, provided by Professor Kondolf. These calculations are consistent with the methodology I outlined on 21 April. As

⁸⁶Kondolf Summary Report for *Construction of a Road* case, March 2015, paras. 37-43.

⁸⁷See *ibid.*, paras. 34, 36.

⁸⁸CR 2015/13, p. 19, para. 35 (Wordsworth).

⁸⁹See Kondolf Summary Report for *Construction of a Road* case, Mar. 2015, para. 14.

Mr. Wordsworth acknowledged, Nicaragua is content to use Costa Rica's own figures, as determined by ICE, for the distribution of sediment between coarse and fine, and the proportions of coarse and fine sediment that are transported to the Lower San Juan River. Why fault us for that? Often, the best way to prove a case is by using the other side's evidence. They cannot dispute it that way. Because he does not like Costa Rica's own evidence, Mr. Wordsworth has done his best to discredit it. But it was good enough for Professor Thorne, who relied on it in his reports⁹⁰.

50. Mr. President, you have the calculations before you. Even if, *quod non*, Professor Thorne is right about the amount of sediment entering the river from the road, the portion of that sediment that accumulates in the Lower San Juan is susceptible of measurement. And it is detrimental. As Dr. Andrews testified on 20 April, it is a "large amount" and it "has to be dredged"⁹¹. [Slide off] Even Professor Thorne, who is not an admirer of Nicaragua's particular dredging programme, agreed in his testimony that there is still a "dredging requirement", especially "dredging of the tops of the shoals . . ."⁹². Mr. Wordsworth told you that some of the sediment accumulates downstream of the area where Nicaragua is currently dredging⁹³. That is correct. But that sediment still is an obstacle to navigation and has to be dredged. [Slide on.] At tab 35 is the same map I showed you last week, indicating the eight locations, including downstream locations, where Nicaragua must eventually dredge. Costa Rica has not disputed this evidence. [Slide off]

51. On Friday, Costa Rica came up with an entirely new argument, one that they had never made before: that not all the coarse sediment gets to the Lower San Juan, because some of it aggrades upstream. Professor Thorne, who did not address this subject in any of his written reports, told us during his re-examination by Mr. Wordsworth, that some of the coarse sediment gets trapped upstream⁹⁴. But Professor Thorne also testified that this entrapment was only temporary, like staying at a "hotel room for sediment", and that it eventually, in a year or more, will be transported downstream to the Lower San Juan⁹⁵. Well, we are now four years into

⁹⁰E.g., Thorne (2015), para. 5.23, RCR, Vol. I, App. A; Thorne Summary Report for *Construction of a Road* case, Mar. 2015, para. 4.3.

⁹¹CR 2015/9, pp. 30-31 (Andrews).

⁹²CR 2015/12, p. 52 (Thorne).

⁹³*Ibid.*, p. 49 (Thorne).

⁹⁴*Ibid.*, pp. 49-50 (Thorne).

⁹⁵*Ibid.*

construction of the road, so it means, according to Professor Thorne, that it is now year three's sediment that is accumulating in the Lower San Juan. That does not even put a dent in Nicaragua's argument about significant harm.

52. In fact, it strengthens our argument. [Slide on] This figure — which is at tab 36 — shows where, in the San Juan River, just upstream from the Lower San Juan, sediment accumulates. The figure is from the 2014 EPN report⁹⁶. Perhaps counter-intuitively, the figure shows the shallow parts of the river in blue; the darker the blue, the shallower the water, and the greater the obstruction of navigation. As you can see, the part of the San Juan proper, immediately upstream of the entrance to the Lower San Juan, is the shallowest, just as shallow as the other problematic stretches a short distance downstream. This is one of the places on the river where navigation is obstructed because sediment accumulates. And, as shown on the figure through the yellow and red lines, this is precisely where Nicaragua has been required to dredge and is dredging. So it does not help Costa Rica that some of the coarse sediment accumulates, temporarily, upstream of the Lower San Juan. In fact, as this figure shows, that only makes the problem of sediment accumulation, and obstruction of navigation, worse. It blocks entrance to, and exit from, the Lower San Juan. Professor Thorne's comment that some of the sediment also ends up in marshlands does not change this conclusion⁹⁷. The marshlands, including the disputed area, are downstream of the sediment-obstructed reaches, so they do not trap sediment before it gets to those reaches. [Slide off]

53. Finally, Mr. President, I want to address Costa Rica's casual dismissal of the total maximum daily load requirements imposed by many States⁹⁸, including Argentina and Uruguay, and Costa Rica's even brisker dismissal of the *Pulp Mills* case⁹⁹. What these TMDL requirements undeniably show, is that the international community recognizes that magnitude should not be confused with significance in determining environmental impacts on rivers. Once a pre-established level of a particular substance, including sediment, has been reached, *any* amount, no matter how

⁹⁶EPN, "Project 262-09: Improvement of Navigation in the San Juan de Nicaragua River: Physical-Financial Progress Report Corresponding to 2014" (i.e., EPN 2014 Annual Report), 2015, p. 37, Ann. 1 to letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015. Figure provided in judges' folders at tab 36.

⁹⁷CR 2015/12, p. 49 (Thorne).

⁹⁸CR 2015/13, pp. 22-24, paras. 50-52 (Wordsworth).

⁹⁹*Ibid.*, p. 24, para. 52 (Wordsworth).

small in quantity, is prohibited. That is because, after a river accumulates as much of the substance as it can accommodate, anything above that amount is considered harmful.

54. We recognize that Nicaragua has not established a TMDL for sediment, with respect to the San Juan River. But that is wholly beside the point. Both Parties' experts agree that the Lower San Juan was already "unable to accommodate" the sediment load it received from upstream before the road was constructed¹⁰⁰. In Professor Thorne's words, it had "no unfilled capacity to transport additional sediment"¹⁰¹. By definition, therefore, any quantity of sediment added by the road is harmful¹⁰². Nicaragua has not needed to establish TMDLs for the San Juan River because it has never authorized Costa Rica to dump any substances, including sediment, into a river over which Nicaragua alone is sovereign. In effect, the TMDL for the San Juan River, in regard to Costa Rican sediment, is zero.

55. Mr. Wordsworth's description of the *Pulp Mills* case was not entirely accurate. He told the Court that Argentina proved its case by use of the sampling methods Costa Rica has advocated here¹⁰³. I do know a little bit about that case. Mr. Wordsworth is wrong on two counts. First, Argentina did not prove its case. Its claim of environmental harm was rejected by the Court¹⁰⁴. Second, and more importantly for present purposes, the contribution of phosphorous by the pulp mill to the river was determined not by sampling, but by direct measurement, at the mill, before it entered the river, before it entered the river it was determined how much phosphorous was included in the mill's discharge. This was calculated at 15 tons¹⁰⁵. This was a mere 0.1 per cent of the phosphorous already in the river, one-tenth, percentage-wise, of the contribution of sediment by the road to the river in this case, according to Costa Rica's measurement. The Court itself considered this proportion to be insignificant. But it was not the proportionate contribution that mattered in the end. It was the fact that even 15 tons of phosphorous would have been too much, because the

¹⁰⁰CR 2015/12, p. 39 (Reichler & Thorne); Thorne October 2011 Report for *Certain Activities* case, p. II-27, CMCR, Vol. I, App. A.

¹⁰¹CR 2015/12, pp. 40-41 (Thorne); Thorne November 2013 Report for *Construction of a Road* case, p. 34, para. 6.12, CMCR, Vol. I, App. A.

¹⁰²E.g., CR 2015/8, p. 42 (Kondolf).

¹⁰³CR 2015/13, p. 13, para. 11 (Wordsworth).

¹⁰⁴Case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 96.

¹⁰⁵*Ibid.*, para. 240.

river had already accumulated, and surpassed, the maximum amount of phosphorous it could safely accommodate under the applicable legal limit¹⁰⁶.

56. Thus, it was because Uruguay compensated for the mill's addition of phosphorous to the river, by requiring the operators to reduce the emission of phosphorous elsewhere along the river in an equal or greater amount, that international responsibility was avoided. Costa Rica, unlike Uruguay only *adds* sediment to the river; it does nothing to *offset* that contribution. In fact, it has done very little even to mitigate it. *And now* it is preparing to embark on an enormous new project that, at least during the execution phase, will greatly multiply the amount of sediment going into the river. And it is preparing to do so without complying with its obligation to perform a prior transboundary EIA.

57. Mr. President, Members of the Court, this concludes my presentation. As it is my last one in these joint proceedings, I want to thank the Court especially for all the courtesy, and patient attention, you, the Members of the Court, the Registry, the interpreters, the entire staff of the Court, have honoured me with these past three weeks. And I want to compliment the Court, including the Registry, on the masterful way it arranged for, and supervised, the cross-examination and re-examination of the experts. I ask that you call Mr. Loewenstein to the podium, perhaps after a break.

Le PRESIDENT : Merci, Monsieur Reichler. En effet, la Cour va à présent se retirer pour une pause de 15 minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 25 à 11 h 45.

¹⁰⁶Case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), paras. 244-247.

Le PRESIDENT : Veuillez-vous asseoir. Je donne la parole à M. Loewenstein pour la suite des plaidoiries du Nicaragua.

Mr. LOEWENSTEIN:

THE RISK TO THE SAN JUAN RIVER'S ECOLOGICAL RESOURCES

1. Mr. President, Members of the Court, good morning. I will respond to Costa Rica's pleadings concerning the risk the road poses to aquatic life.

2. Last week, we saw that data reported by Costa Rica's Tropical Science Center, or CCT, show the road is harming macroinvertebrates and water quality in the tributaries that flow into the San Juan. Costa Rica's response was to urge the Court to disregard these data in favour of conclusions drawn by CCT that would minimize the data's obvious import.

3. The Court should decline this invitation. These studies were "commissioned" by Costa Rica's Foreign Ministry to respond to Nicaragua's claims in this case¹⁰⁷. As the Court observed in analogous circumstances, this makes the conclusions suspect, especially when they serve Costa Rica's litigation interests¹⁰⁸. This does not mean everything in CCT's reports should be discarded — it is for the Court to decide how much weight to give its various findings. Objective data, for instance, may prove credible. But it does suggest that CCT's conclusions, especially those that appear to serve Costa Rica's interests in this case, should be approached with caution. That is especially warranted where the conclusions contradict the data.

4. Consider CCT's conclusion that the water quality "index scores were not substantially different downstream and upstream" and that there was "no 'extreme difference'" between the upstream and downstream sites¹⁰⁹. Costa Rican law sets six water quality levels, each defined by a

¹⁰⁷Centro Científico Tropical (CCT), Follow-up and Monitoring Study Route 1856 Project-EDA Ecological Component, Jan. 2015; Rejoinder of Costa Rica (RCR), Ann. 14, p. 10.

¹⁰⁸*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 731, para. 244; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, pp. 225-226, para. 159; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 43, paras. 69-70).

¹⁰⁹CR 2015/13, p. 36, para. 31 (Parlett).

range of scores¹¹⁰. The lower the score, the worse the water quality. For instance, “polluted” is defined as ranging from 36 to 60; and “very polluted” as 16 to 35¹¹¹. The EDA describes an “extreme change” as a shift of *two or more water quality levels*¹¹².

5. Given the data we reviewed last week, how could CCT conclude there were no extreme changes? The answer: it treated the categories of “polluted” and “very polluted” *as a single category*¹¹³. That eliminated the two-level changes. At site 6, the water quality score fell from 80 to 35¹¹⁴. The water quality index defines this as a two-level shift: from “moderate pollution” to “very polluted”. Hence, an extreme change. By collapsing the “polluted” and “very polluted” categories, CCT converted this two-level change into a one-level change. Presto! No extreme change. The same thing happened at site 9. The water quality score fell from 44 to just 10, that is, from “polluted” to “extremely polluted”, a two-level change¹¹⁵. But because CCT lumped together “polluted” and “very polluted”, another extreme change was eliminated.

6. What about CCT’s conclusion that impacts are “temporary”? Again, the data contradict the conclusion. CCT sampled the same ten streams twice. The first time showed that five streams had lower water quality downstream of the road than upstream¹¹⁶. When CCT resampled, the same sites still had worse water quality downstream than upstream. Four more sites did as well¹¹⁷. So the impacts *persisted*, and became more widespread. They were *not* temporary.

7. The conclusion that impacts are only local? CCT did not support this with analysis, and it is disproven by photographic evidence. Consider the photos taken in March of this year — which you can find at tab 38. The coconut fibre and geotextile have not prevented plumes of sediment from sweeping the bank of the river. These areas are habitat for macroinvertebrates, which the

¹¹⁰Centro Científico Tropical (CCT), Follow-up and Monitoring Study Route 1856 Project-EDA Ecological Component, Jan. 15; Rejoinder of Costa Rica (RCR), Ann. 14, p. 99.

¹¹¹*Ibid.*

¹¹²*Ibid.*, p. 50.

¹¹³*Ibid.*, p. 99.

¹¹⁴*Ibid.*, p. 98.

¹¹⁵*Ibid.*

¹¹⁶*Ibid.*

¹¹⁷*Ibid.*

experts for both Parties agree are food for many species of fish. Professor Cowx's report shows that 37 species in the San Juan depend upon various forms of macroinvertebrates¹¹⁸.

8. CCT also ignores the cumulative effect of sediment from the 127 tributaries that cross the road. I raised this in the first round¹¹⁹; Costa Rica said nothing in response. As you can see at tab 39, in the stretch between Majon 2 and Boca San Carlos there are 75 such watercourse crossings identified by Dr. Mende. There are 12 in just the 2.5 km stretch where some of the worst eroding sites are located, on average only about 200 m apart. It is indefensible to assume there is no risk from the cumulative impact of such closely spaced tributaries.

9. The deltas that have arisen, or grown, from road-derived sediment, such as those shown at tab 40, also contradict CCT's assumption that the road's impacts are confined to Costa Rican tributaries. Not only do they bury habitats in the San Juan with sediment, the deltas have effects downstream. Professor Thorne's report observes that road-derived deltas tend to, in his word, "disintegrate", with the eroded sediment transported by the river's current¹²⁰. As a result, sediment from the deltas sweeps along the bank, impacting the aquatic organisms and their habitats. In contrast, Professor Thorne states that natural deltas — that is, those that are not caused by the road — are "stable and persistent morphological features"¹²¹.

10. Dr. Parlett suggested that aquatic organisms in the San Juan are adapted to high sediment loads. The reason, she said, is that much of the San Juan's sediment is contributed by a few large tributaries, including the San Carlos, which accounts for a 70 per cent increase in sediment load¹²². But, as you can see at tab 41, the San Carlos is *downstream* of 14 of the 17 severely eroding sites that contribute most of the road's sediment. The upstream area, where road erosion is particularly bad, does *not* have the high sediment load to which Dr. Parlett referred. It is a different habitat. Even if the organisms downstream of the San Carlos are adapted to high sediment loads, there is no

¹¹⁸Ian Cowx, "Ecological Impacts of Route 1856 on the San Juan River, Nicaragua", Dec. 2014; RCR, Ann. 2, App. 1, pp. 26-31.

¹¹⁹CR 2015/10, p. 28, para. 14 (Loewenstein).

¹²⁰Colin Thorne, "Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River: Reply Report", Feb. 2015, p. 98, para. 5.16; RCR, Vol. I, App. A.

¹²¹*Ibid.*

¹²²CR 2015/13, p. 30, para. 12 (Parlett).

justification for assuming the same is true of the upstream part of the river, where most of the road's erosion into the river is occurring.

11. In any event, the Parties agree there have been no studies of the fish species in the San Juan to determine whether they are vulnerable to elevated levels of sediment¹²³. Professor Cowx agreed that a "species by species" study would need to be done, taking into account "each species' habitat and environmental tolerances"¹²⁴. He testified this is the "classical way" of determining vulnerability to sediment, and he also testified that no such studies have been carried out¹²⁵. Although he suggested that a high sediment load might be required to impact macroinvertebrates, when asked repeatedly during re-examination what studies support this claim in the San Juan, the only study he mentioned concerned a river in Papua New Guinea¹²⁶. Tellingly, he did *not* refer to the EDA.

12. Mr. President, the picture that emerges is that the San Juan is a remote river in a developing country where the aquatic life has not been the subject of much scientific study. A major infrastructure project is being built metres away, and the project promises to become larger. The Food and Agriculture Organization (FAO) anticipated this type of situation. Its Technical Guidelines for Responsible Fisheries address how States should approach lack of data about fish. They say: "The absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment."¹²⁷

13. The FAO also says that EIA is how lack of data should be addressed. "In inland waters, where the major impacts arise from activities outside the fishery, the precautionary approach should be extended to all developments within the basin. This means that *careful impact assessments should be made of non-fishery projects*."¹²⁸ The FAO could easily have been referring to the San Juan when it warned that "major damage" can arise "from a series of minor interventions

¹²³CR 2015/12, p. 14 (Cowx).

¹²⁴CR 2015/12, p. 14 (Cowx).

¹²⁵*Ibid.*

¹²⁶*Ibid.*, p. 17 (Cowx).

¹²⁷Inland Fisheries: FAO Technical Guidelines for Responsible Fisheries, 1997, available at: <http://www.fao.org/3/a-w6930e.pdf>, p. 10, para. 6.5.

¹²⁸*Ibid.*

whose *cumulative* or antagonistic impacts can be enormous”¹²⁹. It mentioned “diffuse pollution caused by widescale agriculture” as an example¹³⁰. The need to evaluate the “cumulative” impacts on fish from “diffuse pollution” applies also to eroded sediment, which the United States Environmental Protection Agency describes as a major non-point source of pollution¹³¹.

14. Costa Rica’s expert, Professor Cowx, endorsed the FAO’s approach in both his academic writing and his testimony. Here is what he said about what should be done when there is a “lack of baseline data”: “Where information on which to make a decision remains inadequate the precautionary approach must be adopted. This is particularly important where development schemes are likely to impact on fish communities about which little is known.”¹³²

15. Mr. President, that describes the present situation. There have been no studies of fish in the San Juan¹³³. The two studies relied upon by Costa Rica are both studies of fish in Costa Rica, not the San Juan. Moreover, the San Juan is not just a Ramsar site, it is a Ramsar site that is specifically designated for fish¹³⁴, a fact that Professor Cowx testified is particularly important, although he appeared to be unaware that it applies to the San Juan¹³⁵. By Costa Rica and Professor Cowx’s estimation, there are 11 aquatic species in the San Juan that are specially designated, nationally or by the IUCN¹³⁶, because of their vulnerable state.

16. Nicaragua’s ecological resources should not be placed in jeopardy simply because it is a developing country that has not been able to devote the human and financial resources needed to study the San Juan’s flora and fauna. Some developed States may have had the luxury of building extensive datasets for their riverine biota, but this was not something Nicaragua has been able to

¹²⁹Inland Fisheries: FAO Technical Guidelines for Responsible Fisheries, 1997, available at: <http://www.fao.org/3/a-w6930e.pdf>, p. 10, para. 6.5.

¹³⁰*Ibid.*

¹³¹US EPA, NPS Categories, available at: <http://water.epa.gov/polwaste/nps/categories.cfm>.

¹³²CR 2015/12, p. 15 (Cowx); Ian Cowx, “The role of catchment scale environmental management in freshwater fish conservation”; judges’ folder, tab 26.

¹³³CR 2015/12, p. 14 (Cowx).

¹³⁴Information Sheet on Ramsar Wetlands, Rio San Juan Wildlife Reserve, NI1138RISformer2000, p. 3 available at: https://rsis.ramsar.org/RISapp/files/.../NI1138RISformer2000_EN.pdf.

¹³⁵CR 2015/12, pp. 12-13 (Cowx).

¹³⁶Ian Cowx, “Ecological Impacts of Route 1856 on the San Juan River, Nicaragua”, Dec. 2014; Rejoinder of Costa Rica (RCR), Ann. 2, p. 9, table 9.

do, at least with respect to the San Juan. And, because the road was built without prior notification, Nicaragua had no reason to make this a priority.

17. Mr. President, the expert evidence and international guidelines are clear about what should be done in these circumstances: EIA is necessary. Not to carry one out, especially in light of the new road construction that appears to be imminent, would be a violation of Costa Rica's international obligation in regard to transboundary EIA. The EIA should especially consider the impacts of new road construction on aquatic life, and fill in the blanks that Costa Rica has left concerning these potential impacts. If, as Mr. Reichler said this morning, Costa Rica carries out an EIA, either on its own accord or by order of this Court, Nicaragua will co-operate in every way possible.

18. Mr. President, this concludes my presentation. Thank you once again for your kind attention. I invite you to call upon Professor McCaffrey.

Le PRESIDENT : Merci. Je donne la parole à M. le professeur McCaffrey.

Mr. McCAFFREY:

**COSTA RICA'S EMERGENCY DECLARATION AND ITS BREACHES OF ENVIRONMENTAL
AND OTHER OBLIGATIONS OWED TO NICARAGUA**

1. Merci Monsieur le président. Mr. President, distinguished Members of the Court, my task today is to respond to Costa Rica's argument that it has not breached obligations of environmental impact assessment, or EIA, owed to Nicaragua.

2. Before addressing that topic, Mr. President, allow me to recall the basic features of the context in which these issues arise.

1. Costa Rica's violation of Nicaragua's territorial integrity

(a) *Costa Rica's knowing violation*

3. Mr. President, over the millennia, humans have used rivers as a convenient way to dispose of waste¹³⁷: you put something in the river, it goes away. Or it seems to. But we have now long

¹³⁷See, e.g., *Comprehensive Assessment of the Freshwater Resources of the World*, World Meteorological Organization/Stockholm Environment Institute 1997, United Nations doc. A/CN.17/1997/9, 4 Feb. 1997.

understood the fallacy of that assumption. Waste deposited in rivers does have effects, both on other humans and on aquatic ecosystems, and Nicaragua has shown the Court what some of those effects are in the present case. Yet Costa Rica is still operating under the antiquated, fallacious assumption in respect of its road project: put dirt into the river, and it magically disappears. [Slide 1 on]

4. There is visible, tangible evidence of the enormous quantities of sediment Costa Rica is knowingly causing to be deposited in the San Juan River: the large sediment deltas that have formed on the right bank of the river directly below some of the road's seriously eroding sites. You see one of them on your screens and at tab 44 of your folders; this was an image shown last week by Costa Rica. Breathtakingly, this is one of what Dr. Parlett has called "micro deltas"¹³⁸. One wonders how large a delta would have to be by her standard not to qualify as "micro".

5. In fact, Mr. President, it is a universally accepted principle that one may be said to have intended the consequences that are substantially certain to follow from one's acts. This principle fits Costa Rica's conduct with respect to the road perfectly. In this sense, these deltas are literal, physical invasions, incursions by Costa Rica into Nicaragua's sovereign territory, incursions that Costa Rica has knowingly caused by its careless road construction methods. Incursion through the agency of sediment is no less real, as evidenced by the photograph on the screen, than incursion by humans.

6. As if to drive this point home, Mr. President, Costa Rica now apparently claims that these incursions form a part of its own territory. This is evident from the title of the slide on your screens, which contains the words: "illegal presence in Costa Rican territory", evidently referring to the fact that individuals are standing on the edge of the enormous delta depicted in the photograph¹³⁹. Thus Costa Rica is claiming that it can acquire Nicaraguan territory by causing Costa Rican soil to be deposited across the border into Nicaragua. Such a stunning claim is unprecedented, both in its boldness and in its lack of any legal foundation.

7. And, Mr. President, it should be borne in mind that the visible portions of these deltas — the portions above the water's surface — are only the virtual tips of the sediment icebergs, in two

¹³⁸CR 2015/13, p. 40 (Parlett).

¹³⁹Costa Rica judge's folder, 23 Apr. 2015, tab 55 (Kohen).

senses: first, that as with icebergs, the portion of the deltas beneath the surface dwarfs the portion that is visible above the surface; and second, that the deltas form only a tiny fraction of the total sediment coming into the river from the road, the rest of which is transported downstream. [Slide 1 off]

8. Mr. President, if these quantities of sediment had been dumped by Costa Rica onto Nicaragua's land territory rather than into the river, this would be a violation of its territorial integrity, a trespass that no country would tolerate. Nicaragua submits that the fact that Costa Rica has knowingly undertaken an activity that will result in sediment being deposited into the river, also Nicaragua's territory, should likewise not be tolerated, including by this Court.

(b) *No requirement of harm for a violation of territorial integrity*

9. Mr. President, there is another aspect of Costa Rica's causing of sediment to be deposited into the river, which in law may be regarded as an intentional act, as I have explained, that bears emphasis, and to which I have already alluded. It is that a violation of a State's territorial integrity by another State need not cause any actual harm at all to be wrongful. Mr. Wordsworth acknowledged this on Tuesday¹⁴⁰. It is perhaps an obvious point but it nonetheless bears emphasis because Costa Rica has based their entire case on what they say is a lack of "significant harm" from the sediment pollution. But, Mr. President, as the Court is well aware, whether it is an unauthorized entry of troops or overflight by an airplane, or the deposit of waste into the territory of another State, it is the trespass that is prohibited by international law; there is no requirement that the trespass be harmful¹⁴¹. A rule that knowing but harmless trespasses were not prohibited would encourage all sorts of violations of the territorial integrity of States, contrary to the most fundamental principles of the United Nations Charter.

10. For these reasons, Nicaragua rejects Costa Rica's contention that it is not responsible for the sedimentary encroachments on Nicaragua's territory caused by the haphazard construction of the road¹⁴².

¹⁴⁰CR 2015/14, p. 21, para. 37 (Wordsworth): ("The precise minutiae of damage inflicted on Costa Rican territory by Nicaragua are irrelevant to the question now before you, which is the question of breach.")

¹⁴¹*Ibid.* Cf. CR 2015/3, p. 16, paras. 24-25 (Wordsworth).

¹⁴²E.g., CR 2015/11, pp. 41-42, paras. 10-14 (Kohen).

2. Environmental impact assessment

11. Mr. President, allow me now turn to environmental impact assessment.

(a) *Costa Rica has not answered Nicaragua's case on the lack of effect of Costa Rica's emergency declaration*

12. In order to escape from what the Court has found to be “a requirement under general international law to undertake an environmental impact assessment”¹⁴³, Costa Rica would have to show one of two things: either that its emergency declaration of 21 February 2011 exempts it from the requirement; or, if it is not exempted, that the threshold for triggering the obligation to conduct an EIA was not satisfied in the present case¹⁴⁴. Costa Rica has demonstrated neither. I will address these requirements briefly, in turn.

13. First of all, Mr. President, Costa Rica has not chosen to challenge Nicaragua's case that Costa Rica may not assert its declaration of emergency under its domestic law to exempt it from its international obligations, or that the only way Costa Rica can exempt itself from its international obligation, to prepare an EIA for the road, is to establish an applicable circumstance precluding wrongfulness. Professor Kohen said simply: “Il n'y a nul besoin de se référer aux règles secondaires de la responsabilité, pour utiliser la terminologie de Roberto Ago, relatives aux circonstances excluant l'illicéité.”¹⁴⁵ Professor Kohen also said it was not necessary to refer to what he called the very interesting but irrelevant rule that domestic law cannot trump international obligations¹⁴⁶.

14. Instead, Professor Kohen referred to what he called the “long list” of national and international instruments recognizing an exemption from EIA obligations in cases of emergency. But as Nicaragua has pointed out, the glaringly obvious problem for Costa Rica here is that it is not a party to any of these international instruments, and its own EIA law does not recognize an emergency exemption.

¹⁴³*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 83, para. 204.

¹⁴⁴Professor Kohen dealt with these requirements in reverse order (CR 2015/11, p. 45, para. 25), but the first, the applicable threshold, would only become relevant if Costa Rica were not exempted from the obligation by its emergency declaration.

¹⁴⁵CR 2015/11, p. 51, para. 41 (Kohen).

¹⁴⁶*Ibid.*, pp. 51-52.

15. The only other possibility, Mr. President, is that Costa Rica is implicitly arguing that such an exemption is recognized by general international law. If this were the case, then surely with the exemption would come the full panoply of safeguards that condition its applicability in all of the domestic and international instruments Costa Rica cites — safeguards that Costa Rica has studiously failed to observe.

16. At bottom, Costa Rica seems to have chosen to cling to the vain notion that international law will exempt a State from its obligation to conduct an EIA whenever that State chooses to declare an emergency, whether or not the emergency is genuine, whether it bears any relation to the project involved, and no matter how long it lasts. If this were the case, Mr. President, there would be little left of the rule of law in international relations.

17. The second point, Mr. President, is that these hearings have added yet more evidence that there was no genuine emergency justifying the disastrous construction of the road. Mr. Brenes last Thursday repeated the same arguments supporting construction of a road that Costa Rica made in the *Navigational and Related Rights* case in 2006 and that relate to problems Costa Rica should have remedied since that time if it were really concerned about them.

18. For example, Mr. Brenes said the purpose of the road “was to allow land communication to protect the border area . . . , particularly by allowing travel between the police posts along the border by land, and allowing access to emergency personnel”¹⁴⁷. This and other similar points he raised were in fact addressed in your Judgment in *Navigational and Related Rights*¹⁴⁸.

19. Mr. President, this is not the proper forum in which to complain of such internal matters. The fact that Costa Rica has failed to address these rather mundane situations for such a long time demonstrates that Costa Rica clearly does not consider them to amount to an “emergency”.

20. But Mr. Brenes went further in his attempts to justify the emergency declaration, and thus the haste with which the road project was undertaken, stating that: “The need to have access to [the delta] area was prompted by comments made by the President of Nicaragua[, who] publicly announced that Nicaragua could claim rights on the Colorado River, . . . [and with respect to] the

¹⁴⁷CR 2015/11, p. 22, para. 27 (Brenes).

¹⁴⁸*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 270, paras. (1) (f) and (g).

Costa Rican province of Guanacaste . . .”¹⁴⁹ [Slide 2 on] You see on your screens — and it is at tab 45 of your folders — the slides shown by Mr. Brenes as he was making these charges. What he did *not* call to your attention is that President Ortega said in both instances these claims would be brought before this Court. You can see the references to the Court outlined by Nicaragua in yellow. There was absolutely no implication that such claims would be pursued by forceful or any other unlawful means. Nicaragua trusts that it is not a violation of international law to declare that a dispute may be brought before the principal judicial organ of the United Nations and that such a statement offers no justification for an emergency declaration, let alone otherwise unlawful acts. All the less so because some of these statements were made by President Ortega months, and even years, after the emergency decree was issued in February 2011¹⁵⁰. [Slide 2 off]

21. To conclude on this point, Mr. President, there was no emergency that justified Costa Rica’s reckless construction of the road without preparing and notifying Nicaragua of an EIA. This is not to say the road was not needed; that is something for Costa Rica to determine. But the fact that there was no genuine emergency means Costa Rica had no excuse for circumventing normally applicable national and regional requirements and standards for road planning and construction, much less an excuse for not preparing a transboundary EIA as you have said is required by general international law.

22. Mr. President, even though its own EIA law contains no emergency exemption, Costa Rica repeats its argument that virtually all EIA régimes, whether domestic or international, contemplate exempting States from the requirement of conducting an EIA in cases of emergency, and cites Professor Craik, whom it did not call as a witness, perhaps because he substantially agrees with Professor Sheate¹⁵¹. Costa Rica ignores the fact, pointed out by Nicaragua in our first round, that all of these régimes limit strictly both the circumstances in which emergency exemptions may be invoked and the duration of their validity, and also typically provide for the preparation of a substitute form of *ex ante* assessment, such as in the Mt. St. Helens case I mentioned in an earlier intervention.

¹⁴⁹CR 2015/11, pp. 24-25, paras. 33-36 (Brenes).

¹⁵⁰E.g., Costa Rica judges’ folder, 23 Apr. 2015, tab 14 (6 Apr. 2011), and tab 15 (14 Aug. 2013).

¹⁵¹CR 2015/11, p. 51, paras. 40 and 41 (Kohen).

23. None of these limitations is present in this case. Costa Rica thus invokes precedent that has nothing to do with its declaration of an emergency where, demonstrably, there was none, in relation to a project that, by Costa Rica's own admission, must be entirely rebuilt¹⁵² some four-and-a-half years after construction commenced. Yet we have heard that the state of emergency declared in February of 2011 "est loin d'être terminée"¹⁵³. Nicaragua is left to wonder how long this will continue to be the case, and for how many other obligations owed to Nicaragua *Costa Rica* will invoke it? Finally, on this point, Mr. President, it is important to recall that an EIA must be conducted *prior* to the implementation of a project as you said in *Pulp Mills*. Thus, Costa Rica's post-hoc EDA, environmental diagnostic assessment — which I prefer to call its environmental damage assessment — is no substitute for an *ex ante* EIA.

B. The Trigger for EIA: Risk of a Significant Adverse Impact

24. Mr. President, I turn now to what has been called in these proceedings the "trigger" for the obligation to prepare a transboundary EIA. A fundamental point ~~is~~ that it is important to bear in mind with regard to EIA in relation to Costa Rica's project is that the trigger for the obligation to conduct an EIA is the "risk", as you called it in *Pulp Mills*, that the planned project "may have a significant adverse impact in a transboundary context"¹⁵⁴. The trigger is thus *risk* of significant adverse impact, *not* significant impact itself¹⁵⁵.

25. Under the heading, "Absence de risque", Professor Kohen relied on the ILC's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted in 2001¹⁵⁶, in his effort to show that the road posed no risk of such harm. At the outset, Mr. President, one is bound to have some misgivings about the applicability of this set of draft articles to Costa Rica's road project, since it deals with "hazardous" activities. Yes, hazardous materials may be transported on the road, but the road itself would not seem to be a hazardous "activity". Indeed, the Commission's commentary says: "For the purposes of these articles, 'risk of causing significant

¹⁵²CR 2015/12, p. 29 (Thorne). Cf. CR 2015/11, p. 31, para. 6 and p. 37, para. 22 (Del Mar).

¹⁵³CR 2015/11, p. 53, para. 45 (Kohen).

¹⁵⁴*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 83, para. 204.

¹⁵⁵Cf. CR 2015/14, p. 51, para. 10 (Ugalde).

¹⁵⁶International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, p. 148, para. 98.

transboundary harm’ refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact.”¹⁵⁷ This explanation tells us that the Draft Articles are concerned, at least primarily, with activities that may result in “accident[s]”. While Nicaragua is properly concerned about future accidents on the road that may involve spills of hazardous substances into the San Juan River, and that these be taken into account in a full EIA on a rebuilt road, the question under consideration is whether Costa Rica should have prepared an EIA prior to beginning construction of the road itself. And roads themselves are generally not considered to be hazardous activities, which is what these Draft Articles are concerned with — though one could be forgiven for concluding that Costa Rica has done its best to make this particular road a hazardous activity.

26. But the point, Mr. President, is that the Draft Articles are calibrated according to the concept of “hazardous activities”, and therefore contemplate higher thresholds of potential harmfulness for determining whether a given activity is covered by the Articles. Costa Rica would like the Court to apply such higher thresholds to the road, when it comes to such things as triggers for EIA and the obligation of prevention of transboundary harm. Nicaragua believes such high thresholds are not intended by the ILC to be applicable in such cases as the present one, and indeed are not applicable in this case.

27. To illustrate Costa Rica’s strategy, Mr. President, Professor Kohen said that according to Article 2 of the Draft Articles, the Articles «utilise l’expression «risques» dans le sens des risques «dont il est *fort probable* [internal quote with his emphasis] qu’ils causeront un dommage transfrontière significatif»¹⁵⁸. [Slide 3 on] What Article 2 actually says is the following, which is now on your screens and is at tab 46 of your folders:

“For the purposes of the present articles:

- (a) ‘Risk of causing significant transboundary harm’ includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm; . . .”¹⁵⁹

¹⁵⁷International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *YILC*, 2001, Vol. II, Part Two, p. 152, para. 2 of commentary to Art. 2.

¹⁵⁸CR 2015/11, p. 46, para. 27 (Kohen).

¹⁵⁹International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *YILC*, 2001, Vol. II, Part Two, pp. 151-152.

28. Well, this is in keeping with the substantive scope of the draft articles which, again, deal with “hazardous activities”. However, the national and international EIA régimes cited by Costa Rica generally do not contain such a high threshold of “probability” of causing significant harm. Indeed, you did not use this standard either, in your statement of the rule in *Pulp Mills*, which referred only to a requirement to undertake an EIA “where there is a risk that the proposed industrial activity *may have a significant adverse impact* in a transboundary context” (emphasis added). “May have” is certainly less than “a high probability of”. And it should be borne in mind that “significant adverse impact”, or “effect”, is an expression used by the Commission, the ILC, to refer to something less than significant “harm”¹⁶⁰ and is also used in Principle 17 of the Rio Declaration, which concerns EIA. Thus, the obligation to conduct an EIA is triggered by a “risk”, or possibility, of “adverse impacts”, which do not rise to the level of “significant harm”. [Slide 3 off]

29. The ILC’s commentaries are useful in determining what constitutes a “risk” for the purpose of triggering the EIA obligation. [Slide 4 on] They say, and this is on your screens and at tab 47, and I will just hit the highlights:

“As to the element of ‘risk’, this is by definition concerned with future possibilities, and thus implies some element of assessment or appreciation of risk . . . [and that] appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had [is the key].”¹⁶¹ [Slide 4 off]

30. It should of course be borne in mind that this explanation relates to risk in relation to hazardous activities, not activities such as road construction. But the commentary conveys the idea that a person with a modicum of knowledge should be able to tell whether the applicable threshold would be met.

31. Here, that threshold, as we have seen, is the possibility that building the road could have a significant adverse impact “in a transboundary context” — and I would note that you refrained from saying — and this is in the *Pulp Mills* decision — you refrained from saying “transboundary

¹⁶⁰See, e.g., the Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, UNGA res. 51/229, Ann., Art. 12, and commentary thereon by the ILC, in *YILC*, 1994, Vol. II, Part Two, p. 111, para. 222 (“The threshold established by this standard is intended to be lower than that of ‘significant harm’ under Article 7. Thus a ‘significant adverse effect’ may not rise to the level of ‘significant harm’ within the meaning of Article 7.”).

¹⁶¹*Ibid.*, p. 151, para. 14, (commentary on Art. 1).

impact”, saying “in a transboundary context” instead — which broadens the applicability of the requirement. Nicaragua submits that — (a) the proximity of the road to the border, which in places is only a matter of meters away; (b) the fact that the river, which runs along the border for some **108** km of the road, is itself a Ramsar site and thus sensitive; (c) that Costa Rica’s expert, Dr. Thorne, has described the Lower San Juan as “unable to accommodate” even its pre-road sediment level; and (d) the fact that international experience and mere common sense indicate that development follows road construction, as described by the Agent this morning — all of these factors should lead any such observer to conclude that it would be essential to conduct an EIA with respect to the road project.

32. And, Mr. President, this would be all the more true of the wholesale rebuilding of the road that Professor Thorne says, and again, common sense indicates, is required.

33. Mr. President, I unfortunately do not have time to discuss some of the detail on EIA referred to by Ambassador Argüello this morning. But fortunately the Agent himself provided some of this detail. And in addition I addressed this in my first round speech. And the details as to what EIA *should* cover, are set forth in Professor Sheate’s reports to which I would refer the Court.

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

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

M. PELLET :

RESPONSABILITÉ

1. Merci beaucoup, Monsieur le président. Monsieur le président, Mesdames et Messieurs les juges, il m’appartient ce matin de discuter la responsabilité du Costa Rica du fait de la construction de la route 1856 — et une précision déjà : le mot «construction» vise à la fois une action (construire) et un fait (qui est le résultat de cette action).

2. On le sait, et l'ambassadeur Ugalde s'en est montré d'accord¹⁶², pour que la responsabilité d'un Etat soit engagée sur le plan international, il faut et il suffit qu'une violation d'une obligation internationale de l'Etat puisse lui être attribuée. Le professeur McCaffrey a montré que le Costa Rica avait manqué (et continuait de manquer) à plusieurs de ses obligations environnementales. Les mêmes faits constituent également des manquements aux obligations lui incombant en vertu du traité de limites de 1858 ; c'est ce que je m'efforcerais d'établir dans un premier temps ; puis, dans un second temps, je reviendrai sur les réparations qui sont dues en conséquence au Nicaragua dans la limite du temps *mesurée* que mes collègues ont eu la bonté de me laisser.

I. Les violations du traité de 1858

3. Monsieur le président, je conviens avec le professeur Kohen que «le traité du 15 avril 1858 est une pièce maîtresse dans la relation bilatérale»¹⁶³ et que le fleuve San Juan «joue un rôle capital» dans le règlement des questions frontalières entre les deux pays¹⁶⁴. Et nous ne contestons nullement, comme vous l'avez expliqué dans votre arrêt de 2009, «que les Parties n'ont pas entendu établir une hiérarchie entre la souveraineté du Nicaragua sur le fleuve et le droit, qualifié de «perpétuel», de libre navigation du Costa Rica»¹⁶⁵. MAIS — et quel «mais», Monsieur le président ! — «la formule employée à l'article VI signifie que le droit de libre navigation reconnu au Costa Rica par cette disposition ne s'applique *que* dans le domaine de la navigation «aux fins du commerce» et cesse de s'appliquer en dehors de ce domaine...»¹⁶⁶.

4. De ce «mais» capital, le Costa Rica se refuse toujours à tirer les conclusions et s'obstine à revendiquer un droit de navigation «tout court» et à «oublier» qu'il est limité «aux fins du commerce» : dans l'ensemble de ses plaidoiries de la semaine dernière, il se prévaut abondamment de ce droit de navigation illimité — six fois dans la seule plaidoirie du 23 avril de Marcelo Kohén,

¹⁶²CR 2015/13, p. 46, par. 12 (Ugalde).

¹⁶³ CR 2015/11, p. 38, par. 3 (Kohen).

¹⁶⁴ *Ibid.*

¹⁶⁵ *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, C.I.J. Recueil 2009, p. 237, par. 48.

¹⁶⁶ *Ibid.*, p. 241, par. 61 (les italiques sont de nous) ; voir aussi notamment p. 244, par. 71.

qui ne rappelle que deux fois que ce droit n'est reconnu au Costa Rica que «con objectos de comercio»¹⁶⁷.

5. Au demeurant, cette discussion récurrente sur la portée du droit de navigation du Costa Rica sur le San Juan de Nicaragua est d'autant plus révélatrice qu'elle n'a aucun intérêt particulier pour résoudre le différend que le Nicaragua vous a soumis. Ce qui est en cause ici, ce n'est pas le droit de navigation du Costa Rica mais — entre autres — celui du Nicaragua lui-même — et ceci non seulement sur toute sa partie commune, mais aussi jusqu'à son embouchure. (Si le Costa Rica porte du même coup atteinte à son propre droit de navigation aux fins du commerce, c'est son affaire — et il ne peut que s'en prendre à lui.)

[Projection n° 1 : Les atteintes au droit de navigation sur le San Juan]

6. Ceci me conduit, Monsieur le président, à préciser à nouveau en quoi la construction de la route (dans ses deux aspects : action et fait) a porté et porte atteinte à la libre navigation (du Nicaragua donc) sur le fleuve. Les quatre collègues et amis qui m'ont précédé à cette barre l'ont montré : la question n'est pas essentiellement que cette construction a entraîné une sédimentation globale (ou moyenne) accrue du fleuve et de son lit ; elle est que ce surplus de sédiments s'accumule en des endroits particuliers qui forment des obstacles à la navigation.

7. Selon le professeur Thorne lui-même, l'expert du Costa Rica, la sédimentation additionnelle résultant de la construction de la route 1856 constitue effectivement un obstacle à la navigation dans le cours inférieur du San Juan — et que l'on ne vienne pas se prévaloir du fait que nous citons le professeur Thorne de préférence à nos propres experts¹⁶⁸ : nous avons évidemment pleine confiance en eux ; mais qui peut être moins suspect de complaisance pour nos thèses que l'expert auquel le Costa Rica a fait pleine confiance et qui a revendiqué avec panache son indépendance¹⁶⁹, que nous saluons d'ailleurs ?

¹⁶⁷ CR 2015/11, p. 38, par. 3 et p. 40, par. 8 (Kohen).

¹⁶⁸ Voir CR 2015/13, p. 11, par. 5 et p. 21, par. 41 (Wordsworth).

¹⁶⁹ Voir CR 2015/3, p. 30.

8. Admettons donc que la sédimentation ne constitue un obstacle à la navigation que dans le cours inférieur du fleuve, même si d'assez nombreux doutes me semblent subsister¹⁷⁰ — il n'en reste pas moins que le fait internationalement illicite est établi et cela, je pense, me dispense de discuter l'argumentation de nos contradicteurs, bien que tout de même, Monsieur le président, je ne puisse résister à la tentation de citer un argument que je crois vraiment sot (et pourtant répété deux fois par les conseils du Costa Rica)¹⁷¹ selon lequel l'existence de deltas sédimentaires le long des deux rives du fleuve prouverait que leur formation n'est pas due à la construction de la route ! Les sédiments d'où qu'ils viennent (et y compris de la route bien sûr) s'arrêtent là où ils rencontrent un obstacle sans, évidemment s'attacher particulièrement à la rive du fleuve dont ils proviennent !

9. Ceci étant et quoi qu'il en soit, il n'en reste pas moins que la construction de la route — toujours dans ses deux acceptions — est contraire aux dispositions du traité :

— d'abord parce que le Nicaragua a le droit d'«empêcher l'obstruction de la baie de San Juan del Norte, pour assurer une navigation libre et sans encombre sur le fleuve ... ou pour améliorer celle-ci dans l'intérêt commun»¹⁷² et donc d'y naviguer et d'y assurer cette libre navigation «sans encombre» («unembarrassed») — le Costa Rica a le devoir corrélatif de ne pas l'empêcher («not to embarrass it»), y compris dans le delta ;

[Fin de la projection n° 1]

— ensuite parce que le Costa Rica a d'autres obligations en vertu du traité, des obligations qu'il a gaillardement violées, non pas — j'y insiste — en construisant la route (nous ne contestons évidemment pas son droit de construire une route sur son territoire), mais en la construisant n'importe comment et sans concertation aucune avec le Nicaragua malgré le voisinage très particulier résultant de la fixation de la frontière à la rive.

10. La première de ces violations, «la mère de toutes les autres» en quelque sorte, est l'atteinte portée à la souveraineté territoriale du Nicaragua. Le Costa Rica tente de s'en exonérer

¹⁷⁰ MN, p. 128-133, par. 4.13-4.19 et RN, p. 170-172, par. 5.22-5.25. Voir aussi notamment : rapports du professeur Kondolf, décembre 2012, sect. 6 (MN, vol. II, annexe 1) et juillet 2014, sect. 11 (RN, vol. II, annexe 1), rapport du professeur Andrews, juillet 2014, sect. V I) (RN, vol. II, annexe 3) et la déclaration écrite de M. Edmund D. Andrews, professeur émérite, 15 mars 2015, p. 2, par. 5. Voir également le rapport de la *Federated Association of Engineers and Architects of Costa Rica*, 8 juin 2012, p. 16 (MN, vol. II, annexe 4).

¹⁷¹ CR 2015/11, p. 42, par. 14 (Kohen) ; CR 2015/13, p. 32, par. 18 et p. 40, par. 41 (Parlett).

¹⁷² Sentence arbitrale du président des Etats-Unis d'Amérique au sujet de la validité du traité de limites de 1858 entre le Costa Rica et le Nicaragua, 22 mars 1988, Nations Unies, *RSA*, vol. XXVIII, p. 210, point 4 (MCR, vol. II, annexe 7).

un peu facilement en assénant qu'il «n'a pas exercé la moindre autorité ou activité en territoire nicaraguayen. Cela» dit, le professeur Kohen, «suffirait largement pour écarter le grief nicaraguayen de violation de sa souveraineté et de son intégrité territoriales»¹⁷³. Tel n'est assurément pas le cas, Monsieur le président. Mon contradicteur a de ces principes une conception abusivement restrictive. Il oublie en particulier qu'ils sont indissociables de celui de l'utilisation non dommageable du territoire qui implique d'une façon très générale, selon la célèbre formule du *Détroit de Corfou*, «l'obligation, pour tout Etat, de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits d'autres Etats»¹⁷⁴.

[Projection n° 2 : Atteintes à la souveraineté territoriale du Nicaragua – chute de débris dans le fleuve]

11. Nous ne sommes plus ici dans le domaine de la protection de l'environnement mais dans celui, plus général, de la défense de la souveraineté territoriale. Celle-ci implique qu'un Etat n'utilise pas, ni ne laisse utiliser, son territoire à des fins dommageables par un pays voisin sans l'autorisation du souverain territorial. En d'autres termes, qu'il fasse preuve de vigilance, de *due diligence* pour empêcher toute atteinte à cet autre territoire. Et je dis bien «toute atteinte» sans qu'il y ait lieu de discuter un seuil particulier : la gravité du préjudice n'a d'effet qu'en ce qui concerne les modalités ou le montant de la réparation. Ceci a été parfaitement exposé avant-hier par Mme Parlett : «there is no threshold of 'significant' when it comes to damage caused on another States' territory»¹⁷⁵. Le problème n'est donc pas que le dommage soit d'une gravité particulière (ce qui ne signifie pas qu'il ne l'est pas en l'espèce).

12. Il n'est pas non plus que les atteintes au territoire d'un Etat voisin soient objectivement volontaires ou délibérées comme semble le penser le professeur Kohen¹⁷⁶, mais que l'Etat sur le territoire duquel est menée l'activité litigieuse ait laissé celle-ci être menée, alors qu'il aurait pu empêcher ses répercussions sur le territoire de l'autre Etat. C'est évidemment le cas ici : n'eussent été les malfaçons de la route, je n'aurais pu, Mesdames et Messieurs les juges, faire défiler les

¹⁷³ CR 2015/11, p. 41, par. 11 (Kohen).

¹⁷⁴ Affaire du *Détroit de Corfou* (*Royaume-Uni c. Albanie*), fond, arrêt, C.I.J. Recueil 1949, p. 22 ; voir aussi sentence arbitrale (Max Huber), 4 avril 1928, *Ile de Palmas* (*Pays-Bas c. Etats-Unis d'Amérique*), Nations Unies, RSA, vol. II, p. 839.

¹⁷⁵ CR 2015/14, p. 41, par. 8 b) (Parlett) ; voir aussi, *ibid.*, p. 20, par. 36 (Wordsworth).

¹⁷⁶ CR 2015/11, p. 41, par. 12 (Kohen).

images que vous voyez depuis quelque temps sur vos écrans : de nombreux débris de la route, ou de ponts, ou de matériaux de construction, sont tombés dans le fleuve qui ont ensuite dû être déblayés. Il s'agit là d'autant d'atteintes à la souveraineté territoriale du Nicaragua que moins de négligence et d'impéritie de la part des autorités costa-riciennes «compétentes» eussent pu (et dû) éviter.

[Fin de la projection n° 2]

13. Je ne m'attarde pas sur la justification que le Costa Rica a cru pouvoir trouver dans l'invocation de l'article IV du traité. Il concerne la défense du San Juan «en cas d'agression extérieure».

14. Pour sa part, l'obligation de notification qui peut être déduite du traité de la même manière que la Cour a déduit une telle obligation à la charge du Nicaragua s'agissant de la réglementation de la navigation sur le fleuve. Nous avons montré qu'il en est ainsi dans notre réplique¹⁷⁷; le professeur Kohen a l'obligeance de se référer à cette démonstration dans une note de bas de page¹⁷⁸; mais il ne juge pas utile de la réfuter, je me permets donc de vous y renvoyer. Voilà qui renforce le poids de la même objection telle qu'elle découle des règles environnementales décrites par le professeur McCaffrey.

15. Monsieur le président, ces violations du traité de limites de 1858 s'ajoutent à celles de ce que nos amis de l'autre côté de la barre appellent le «régime de protection de l'environnement» (the «Applicable Environmental Law Regime»). Que ce soit à l'un ou à l'autre de ces points de vue, le Costa Rica a violé — et continue de violer — ses obligations en matière de :

- respect de la souveraineté du Nicaragua ;
- respect de la liberté de navigation sur le fleuve San Juan ;
- respect de son obligation de ne pas utiliser son territoire à des fins préjudiciables à un Etat voisin.

En l'absence de toute circonstance excluant l'illicéité (et Steve McCaffrey a montré que le soi-disant état d'urgence n'en constituait certainement pas une !) — en l'absence de cause

¹⁷⁷ MN, p. 135-139, par. 4.22-4.27 et RN, p. 172-177, par. 5.26-5.34.

¹⁷⁸ CR 2015/11, p. 40, par. 9, note 150 (Kohen).

exonératoire donc, il s'agit là de faits internationalement illicites qui engagent la responsabilité du Costa Rica. Il me reste à dire quelques mots des conséquences à en tirer.

II. Les remèdes demandés par le Nicaragua

16. En d'autres termes, j'en arrive aux «remèdes» demandés par le Costa Rica, terme qui ne veut rien dire de bien précis en tout cas en français ; d'ailleurs, il n'y a pas d'entrée «remède» dans le *Dictionnaire Salmon de droit international public*¹⁷⁹. Disons que cela recouvre l'ensemble des conséquences de la responsabilité, y inclus, mais pas seulement, la réparation.

17. Au bénéfice de cette remarque, je peux confirmer en premier lieu à l'ambassadeur Ugalde¹⁸⁰ que, dans les conclusions que va lire notre agent dans quelques instants, nous ne demanderons pas que la Cour adopte une déclaration autorisant le Nicaragua à suspendre le droit de navigation du Costa Rica sur le San Juan — ne serait-ce que parce que ce serait inutile : si les conditions pour adopter une contre-mesure étaient réunies, une «autorisation» de la Cour ne serait pas nécessaire ; et parce que, de toute manière, une telle mesure n'est pas envisagée à l'heure actuelle.

18. En revanche, je suis au regret de devoir détromper mon contradicteur lorsqu'il dit que nous avons renoncé à prier la Cour de déclarer, dans le dispositif de son arrêt, que le Nicaragua est en droit «d'effectuer des travaux pour améliorer la navigabilité du fleuve San Juan, y compris des travaux de dragage visant à lutter contre la sédimentation et les autres obstacles à la navigation» conformément au traité de 1858¹⁸¹. Nous vous le demandons plus que jamais, Mesdames et Messieurs les juges.

19. Les événements récents ont en effet prouvé que, malheureusement, ceci était beaucoup moins inutile que vous le pensiez dans votre arrêt de 2009 puisque le Costa Rica s'obstine à refuser ce droit de dragage au Nicaragua. Il ne peut prétendre que cette demande, formulée dans le mémoire¹⁸² du Nicaragua, n'entre pas dans le cadre de la présente affaire : le dragage du cours inférieur du San Juan, dont il conteste la licéité, est rendu indispensable par la construction de la

¹⁷⁹ J. Salmon (dir.), *Dictionnaire de droit international public*, Bruxelles, Bruylant, 2001, 1198 p.

¹⁸⁰ Voir CR 2015/13, p. 44, par. 5.

¹⁸¹ Voir *ibid.*, p. 44-45, par. 6-7.

¹⁸² MN, p. 252, par. 3 i).

route 1856 ; c'est celle-ci qui a entraîné une surcharge supplémentaire insupportable pour le cours inférieur du San Juan. Cette déclaration de la Cour nous paraît non seulement être utile mais être, en réalité, un élément clef en vue d'un règlement durable de ce différend récurrent entre les Parties. Il s'agit là d'ailleurs d'un point commun entre l'affaire qui nous occupe ce matin et celle qui nous réunissait hier, et peut-être de l'un des aspects qui justifie le plus rationnellement la jonction que vous avez décidé d'opérer entre elles.

20. La première déclaration figurant dans les conclusions nicaraguayennes vise à faire constater par votre haute juridiction que «par ses agissements, la République du Costa Rica a enfreint ... i) l'obligation lui incombant de ne pas violer l'intégrité du territoire nicaraguayen».

21. J'avais rappelé en passant à cet égard dans ma présentation du 21 avril que la responsabilité de l'Etat était engagée en conséquence de la seule existence d'un fait internationalement illicite¹⁸³. L'ambassadeur Ugalde a eu la bonne grâce de s'en dire d'accord en principe, mais il relève qu'il en va différemment si la règle primaire elle-même fait dépendre la violation de la commission d'un dommage comme c'est le cas de certaines règles protectrices de l'environnement¹⁸⁴. Cette fois c'est moi qui tombe d'accord — avec une égale bonne grâce, Monsieur le président — avec mon contradicteur ! Mais en ajoutant trois précisions :

- d'une part, en l'espèce, la construction de la route a causé un préjudice réel (et qui existe quel que soit le qualificatif dont on l'assortit) ;
- d'autre part, s'agissant de certaines règles, même environnementales, violées par le Costa Rica, celles-ci n'exigent pas la preuve d'un dommage mais du *risque* de sa survenance ; il en va ainsi de l'obligation de ne pas mettre en œuvre un projet présentant un risque de dommage transfrontière sans avoir procédé à une étude d'impact de l'environnement, dont l'absence est capitale en la présente espèce — c'est l'objet de la conclusion 3) i) du Nicaragua sur laquelle je n'aurai pas le temps de revenir : elle a été commentée abondamment par mes collègues ;
- enfin et de toute manière, la conclusion nicaraguayenne relative à sa souveraineté territoriale ne porte ni exclusivement ni principalement sur la violation de règles protectrices de l'environnement, mais sur celles des principes généraux du droit international — la

¹⁸³ CR 2015/10, p. 50-51, par. 5 (Pellet).

¹⁸⁴ CR 2015/13, p. 46, par. 12-13 (Ugalde).

souveraineté territoriale, l'utilisation non dommageable du territoire, etc. — qui ne fixent pas de seuil du préjudice pour que la responsabilité de l'Etat soit engagée et pour que la réparation et les autres «remèdes» en découlant soient dus.

22. Par contre, Monsieur le président, je ne suis pas sûr que mon contradicteur ait bien compris ce que j'ai dit en ce qui concerne notre demande tendant à ce que la Cour dise et juge «qu'il incombe au Costa Rica de mettre fin à tous les faits internationalement illicites en cours qui portent atteinte ou sont susceptibles de porter atteinte à ses droits». C'est sûrement parce que je me suis mal exprimé. M. Ugalde affirme «[u]ltimately, [I — Alain Pellet — would have] accepted that the declaration for cessation sought by Nicaragua is indistinguishable from the measures it is seeking by way of restitution^[185]. The claim for cessation therefore appears no longer to be pursued as a separate head of relief.»¹⁸⁶ With respect, Mr. President, I have conceded nothing of the kind and Ambassador Ugalde assumes erroneously when he asserts that «[t]he claim for cessation therefore appears no longer to be pursued as a separate head of relief»¹⁸⁷. Certes, la demande d'une décision ordonnant au Costa Rica de cesser ses faits internationalement illicites n'aura plus de raison d'être lorsque la Partie costa-ricienne *aura* procédé à la restitution — qui implique notamment une relocalisation, au moins partielle, de la route. Mais, comme je l'ai montré la semaine dernière¹⁸⁸, en cas de violation continue, la première conséquence de la responsabilité de son auteur est qu'elle doit cesser. En particulier, il convient que les futurs travaux de remise en état soient effectués conformément aux règles de l'art et n'ajoutent pas de nouvelles malfaçons à celles qui existent.

23. Nous n'abandonnons pas davantage nos demandes concernant le comportement futur du Costa Rica¹⁸⁹.

24. Pour ce qui est de l'exclusion de la circulation sur la route de camions ou d'engins transportant des matières dangereuses, le Costa Rica nous oppose un décret de 1995 dont il n'a

¹⁸⁵ Note de bas de page 172 : CR 2015/10, p. 58, par. 19 (Pellet).

¹⁸⁶ CR 2015/13, p. 46-47, par. 16 (Ugalde).

¹⁸⁷ *Ibid.*, p. 47, par. 16.

¹⁸⁸ CR 2015/10, p. 52, par. 10 (Pellet).

¹⁸⁹ Voir *ibid.*, p. 64, par. 32.

produit que des extraits¹⁹⁰ mais dont il n'est pas évident qu'il concerne les produits courants comme l'essence ou le fuel, dont le déversement accidentel d'une quantité même moyennement importante dans le San Juan serait pourtant fort catastrophique. Nos contradicteurs clament qu'il ne s'agit que d'un risque hypothétique. Lorsque l'on voit l'état de la route en certains endroits, l'hypothèse ne paraît malheureusement pas si chimérique que cela. Au demeurant et de toute manière, selon la célèbre formule de l'article 15 de la déclaration de Rio, «En cas de risque de dommages graves ou irréversibles, l'absence de certitude scientifique absolue ne doit pas servir de prétexte pour remettre à plus tard l'adoption de mesures effectives visant à prévenir la dégradation de l'environnement.»¹⁹¹

25. Le Costa Rica a construit sa route sans étude d'impact de l'environnement, dans des conditions extrêmement préjudiciables au Nicaragua. Ceci étant, Monsieur le président, le mal est fait et il incombe au Costa Rica d'en réparer les conséquences dommageables. Ceci suppose d'abord qu'il s'efforce de rétablir la situation qui existait avant que le fait illicite — c'est-à-dire la construction défectueuse de la route — ne soit commis¹⁹². Certes, comme le disent nos contradicteurs, cette obligation de remise en état doit s'entendre en fonction du contenu de l'obligation primaire qui est violée¹⁹³ ; en l'espèce, ces obligations sont nombreuses — et pas limitées, comme ils l'ont affirmé, à l'obligation de ne pas causer de dommage significatif¹⁹⁴. En outre, M. Ugalde se montre surtout préoccupé que le Costa Rica soit libre de procéder à la *restitutio* par les moyens de son choix¹⁹⁵. Mais il va un peu vite en besogne lorsqu'il suggère que nous avons abandonné l'idée que, ce faisant, il devait respecter un certain nombre de contraintes¹⁹⁶. Même si nous n'avons pas spécifié celles-ci dans le corps de nos conclusions, il nous semble toujours aussi

¹⁹⁰ Décret exécutif n° 24715-MOPT-MEIC-S, 6 octobre 1995 (DCR, vol. IV, annexe 15). Voir CR 2015/13, p. 39-40, par. 38 (Parlett) et p. 47, par. 20 (Ugalde).

¹⁹¹ Déclaration de Rio sur l'environnement et le développement, 14 juin 1992, art. 15 ; voir aussi l'article 3 du projet d'articles de la CDI sur la responsabilité internationale pour les conséquences préjudiciables découlant d'activités qui ne sont pas interdites par le droit international et son commentaire, notamment, *Annuaire* 2001, vol. II, deuxième partie, p. 166, par. 14.

¹⁹² Voir l'article 35 des Articles de la CDI de 2001 sur la responsabilité de l'Etat pour fait internationalement illicite.

¹⁹³ CR 2015/13, p. 50, par. 33 (Ugalde).

¹⁹⁴ *Ibid.*, p. 50, par. 34.

¹⁹⁵ *Ibid.*, p. 50-51, par. 35-41.

¹⁹⁶ *Ibid.*, p. 50, par. 36.

nécessaire que le Costa Rica respecte les avis d'experts compétents — y compris ceux qu'il a consultés lui-même ; et je note à cet égard que le professeur Thorne a estimé que — cela a déjà été cité mais c'est fort important : «In extremis, the permanent solution may be to re-route the road and, again, Dr. Weaver, I wouldn't argue with a lot of his recommendations; he knows what he is talking about.»¹⁹⁷

26. ~~Avant~~ Monsieur le président, avec votre permission, *encore* un mot très court sur l'indemnisation dont le Nicaragua vous demande de fixer le principe dans l'arrêt à venir et le montant dans une phase ultérieure de l'affaire. Je n'ai vraiment pas besoin de m'y attarder, l'ambassadeur Ulgade s'est borné à affirmer que le Nicaragua n'avait pas prouvé avoir subi de dommage et qu'il n'y avait dès lors pas lieu à indemnisation¹⁹⁸. Puisque nos contradicteurs s'obstinent à affirmer que la terre est plate, il ne me paraît pas utile de vous démontrer le contraire : vous savez ces choses, Mesdames et Messieurs de la Cour !

[Projection n° 3 : Désignation d'un ou de plusieurs experts]

27. Ceci me permet d'en arriver à la question de la nomination d'un ou de plusieurs experts¹⁹⁹.

28. Dans sa réplique (ainsi que dans la lettre de l'agent au greffier de la Cour du 4 août 2014), le Nicaragua a demandé que la Cour procède à la nomination d'un expert neutre — et cela sans faire nulle injure ni au professeur Thorne²⁰⁰ ni aux autres éminents experts qui ont assisté les Parties dans cette affaire. L'expert ainsi désigné, dont le Nicaragua a proposé que les Parties partagent le coût des frais et honoraires, pourrait d'ailleurs être assisté par des experts nommés par les Parties — un peu à la manière dont a fonctionné la commission arbitrale présidée par le général Alexander. Cet expert, ou cette commission d'experts, pourrait, dans un premier temps, assister la Cour pour déterminer l'ampleur des dommages résultant de la construction de la route pour le Nicaragua — si, du moins, les preuves abondantes et expertes que nous avons produites

¹⁹⁷ CR 2015/12, p. 29 (Thorne) ; voir en ce sens : déclaration écrite de William E. Weaver, Ph.D. 15 mars 2015, p. 20, par. 53.

¹⁹⁸ CR 2015/13, p. 52, par. 44 (Ugalde).

¹⁹⁹ Voir RN, p. 260-263, par. 7.13-7.15, p. 273, par. 7.35 et DCR, p. 126-128, par. 4.15-4.17.

²⁰⁰ Voir CR 2015/3, p. 30 (Reichler et Thorne).

n'avaient pas suffi à convaincre votre haute juridiction. Mais, même si c'est le cas, cet expert ou cette commission pourrait, croyons-nous, jouer un rôle très utile à au moins deux points de vue :

- d'une part, pour assister la Cour dans l'évaluation des dommages subis par le Nicaragua du fait de la construction de la route ; et,
- d'autre part, pour s'assurer de l'adéquation des mesures de remise en état prises par la Partie costa-ricienne.

29. Le Costa Rica, fidèle à sa politique de défiance systématique, a rejeté assez vertement cette proposition : «Costa Rica is of the view that there is no basis for the Court to exercise its power to appoint an expert as requested by Nicaragua.»²⁰¹ Ceci dans une lettre adressée au greffier par le coagent du Costa Rica. Et, encore plus négative, la Partie costa-ricienne écrit dans la duplique :

«The obvious explanations for this late request are that either it is a dilatory tactic or it constitutes a belated recognition that it has been unable to make out its case by reference to its own evidence. Either way, the proposal should be rejected.»²⁰²

30. Monsieur le président, comme on dit familièrement, «il n'y a que les imbéciles qui ne changent pas d'avis» ! Le Costa Rica semble en avoir changé, même si l'on peut attribuer au souci de ne pas perdre la face, le libellé un peu différent de la lettre du coagent du Costa Rica en date du 2 février dernier, proposant non pas la nomination d'un expert mais la visite sur les lieux d'une délégation, pourquoi une délégation, d'une délégation de la Cour, qui, je cite : «would allow the Court to have a better understanding of the scale and location of the Road, of the context of the allegations of harm, and of the Road's capacity (if any) to cause harm to or on the territory of Nicaragua.»²⁰³ C'est une façon de reconnaître qu'une vérification sur place est indispensable (sauf, bien sûr, je le répète, si la Cour se satisfait des preuves apportées par les Parties — et nous pensons que les nôtres sont solides).

31. Comme je l'ai indiqué vendredi dernier, à propos d'un problème comparable se posant dans l'affaire relative à *Certaines activités*²⁰⁴, le Nicaragua a, par une lettre de notre agent adressée

²⁰¹ Lettre du coagent du Costa Rica adressée au greffier de la Cour, 14 août 2014, réf. ECRPB-085.

²⁰² DCR, p. 128, par. 4.17.

²⁰³ Lettre du coagent du Costa Rica adressée au greffier de la Cour, 2 février 2015, réf. ECRPN010-15.

²⁰⁴ CR 2015/7, p. 63-64, par. 51 (Pellet).

au greffier le 10 février dernier, approuvé dans son principe la proposition costa-ricienne — tout en relevant qu'elle était fort tardive, et réitéré celle de nommer un ou plusieurs experts.

32. Certes, comme je l'ai rappelé il y a quinze jours, et à nouveau hier dans l'affaire *relative* à *Certaines activités*, il est loisible à la Cour, en vertu de l'article 66 de son Règlement d'effectuer une visite sur les lieux «à tout moment»²⁰⁵. Ce n'est cependant peut-être pas l'option la plus réaliste... Mais la désignation d'un expert ou d'une commission d'experts comme nous l'avons suggéré, demeure et serait, selon nous, une initiative procédurale particulièrement bienvenue.

33. Mesdames et Messieurs de la Cour, les deux affaires dont vous avez été saisis respectivement par le Costa Rica et le Nicaragua sont liées au fleuve San Juan. Elles posent à juger des questions qui ne sont pas identiques — c'est sans doute pourquoi vous avez fixé un calendrier fort complexe pour les audiences dont il est résulté un jeu inédit ici de chaises musicales. Il reste que vous avez joint ces affaires en estimant que

«Elles sont l'une et l'autre fondées sur des faits en rapport avec des travaux exécutés sur le San Juan, le long de ce fleuve ou à proximité immédiate de celui-ci, le Nicaragua se livrant à des activités de dragage du fleuve et le Costa Rica ayant entrepris de construire une route le long de sa rive droite. Les deux instances ont pour objet les conséquences de ces travaux pour la liberté de navigation sur le San Juan et leur incidence sur l'environnement local et l'accès au fleuve. A cet égard, les Parties font l'une et l'autre état d'un risque de sédimentation du San Juan.»²⁰⁶

Ceci justifie au moins que l'on effectue des rapprochements et des comparaisons.

34. Pour faire bref, Monsieur le président, ce qui caractérise nos deux affaires c'est que leur importance est sans aucune commune mesure. Dans un cas, celui des *Activités* reprochées au Nicaragua *dans la région frontalière*, l'incertitude concernant le tracé de la frontière constitue une donnée fondamentale ; si cette incertitude était levée au bénéfice du Costa Rica et si, en outre, une violation du droit international était avérée — je me place dans cette hypothèse pour les seuls besoins de la discussion — le dommage subi par le Costa Rica, de nature exclusivement juridique, serait tout juste symbolique malgré la dramatisation orchestrée par nos amis de l'autre côté de la barre. Dans l'autre, il ne fait aucun doute que la construction de la route 1856 par le Costa Rica,

²⁰⁵ CR 2015/7, p. 63-64, par. 51 (Pellet).

²⁰⁶ *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* ; *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, jonction d'instances, ordonnance du 17 avril 2013, C.I.J. Recueil 2013, p. 170, par. 20 et p. 187, par. 14.

dans les conditions dans lesquelles elle a effectuée, a causé — et continue de causer — au territoire incontesté du Nicaragua des dommages très concrets et considérables.

35. Mesdames et Messieurs les juges, ceci conclut ma présentation que je vous remercie d'avoir bien voulu écouter — mais pas tout à fait notre second tour de plaidoiries puisqu'il reste à notre agent le devoir de lire les conclusions finales du Nicaragua. Avant que vous l'appeliez à la barre, Monsieur le président, permettez-moi une petite remarque personnelle : nous devons nous retrouver ici demain, qui est le 1^{er} mai ; comme je l'ai constamment fait durant ma longue participation à la Commission du droit international, je fais remarquer que je trouve vraiment regrettable que les Nations Unies n'observent pas cette trêve du travail ; la seule fête vraiment internationale et sans connotation religieuse ; j'ai décidé que demain je ferai grève de la toge ! Je vous demande de ne pas prendre ceci comme une offense, Mesdames et Messieurs les juges ; c'est juste une preuve d'attachement aux valeurs internationalistes qui sont les miennes. Monsieur le président, pourriez-vous donner la parole à M. l'ambassadeur Argüello Gomez ?

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

Mr. ARGÜELLO: Thank you, Mr. President, distinguished Members of the Court. I am thankful that today I could continue working and have an opportunity of reading the submissions.

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

FINAL SUBMISSIONS

1. For the reasons explained in the written and oral phase Nicaragua requests from the Court to adjudge and declare that, by its conduct, the Republic of Costa Rica has breached:

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

- (iii) Its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wild Life Sites in Central America.
2. Nicaragua also requests the Court to adjudge and declare that Costa Rica must:
- (i) Cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua;
 - (ii) Inasmuch as possible, restore the situation to the *status quo ante*, in full respect of Nicaragua's sovereignty over the San Juan de Nicaragua River, including by taking the emergency measures necessary to alleviate or mitigate the continuing harm being caused to the River and the surrounding environment;
 - (iii) Compensate for all damages caused in so far as they are not made good by restitution, including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case.
3. Furthermore, Nicaragua requests the Court to adjudge and declare that Costa Rica must:
- (i) Not undertake any future development in the area without an appropriate transboundary Environmental Impact Assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction;
 - (ii) Refrain from using Route 1856 to transport hazardous material as long as it has not given the guarantees that the road complies with the best construction practices and the highest regional and international standards of security for road traffic in similar situations.
4. The Republic of Nicaragua further requests the Court to adjudge and declare that Nicaragua is entitled:
- (i) In accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River and that these works include the dredging of the San Juan de Nicaragua River to remove sedimentation and other barriers to navigation.

Mr. President distinguished Members of the Court, this is the end of Nicaragua's final submissions and I must add that, this is the first time that Nicaragua has had to express its gratitude and read its submissions two days in a row. Nevertheless, I once again thank you for your attention; this is extensive to the Registrar and the staff, the interpreters and general staff that have made possible the orderly proceedings during these three long weeks. Finally, I must specially thank the members of the Nicaraguan team for their dedication and, frankly, for their instinct for survival after such a long hard work. Thank you, Mr. President, Members of the Court.

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

La Cour se réunira de nouveau demain après-midi, de 15 heures à 18 heures, pour entendre le second tour de plaidoiries du Costa Rica.

Je vous remercie. L'audience est levée.

L'audience est levée à 13 h 5.
