

SEPARATE OPINION OF JUDGE *AD HOC* DUGARD

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I. SEPARATE OPINION

1. I am in agreement with the Court's decisions on what I consider to be three of the principal issues: Nicaragua's violation of Costa Rica's territorial sovereignty; Costa Rica's failure to perform an environmental impact assessment (EIA) before embarking on the construction of Route 1856 along the San Juan River; and the failure of Nicaragua to prove that the construction of Route 1856 caused significant transboundary harm. I dissent from the Court's decision on two issues: first, the rejection of Costa Rica's complaint that Nicaragua failed to carry out a proper environmental impact assessment for its programme of dredging of the San Juan River and to consult with Costa Rica on this subject, as required by the Ramsar Convention; second, the rejection of Costa Rica's request for an order of costs arising from Nicaragua's construction of two *caños* in 2013. As I am in broad agreement with the Court, I consider that my opinion is more accurately to be viewed as a separate opinion.

2. I will address the first issue on which I dissent below, after some comments on Nicaragua's violation of Costa Rica's territorial integrity. In the case of the second issue I join Judges Tomka, Greenwood and Sebutinde in a joint declaration on the ordering of costs.

II. TERRITORIAL INTEGRITY

3. I agree with the Court's finding that Nicaragua has violated Costa Rica's territorial sovereignty by excavating three *caños* and establishing a military presence in part of that territory. I believe that Nicaragua further violated Costa Rica's territorial sovereignty by encouraging members of the Guardabarranco Environmental Movement to trespass on Costa Rican territory. (See my dissenting opinion in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Provisional Measures, Order of 16 July 2013*, *I.C.J. Reports 2013*, pp. 275-276, paras. 13-14.) The Court has on previous occasions emphasized that the principle of territorial integrity is an important feature of the international legal order (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 437, para. 80). This principle is enshrined in the Charter of the United Nations and the Charter of the Organization of American States and was reiterated by the General Assembly in resolution 2625 (XXV) on the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States. In these circumstances I believe that the Court should have placed greater emphasis on the serious nature of Nicaragua's violation of the territorial integrity of Costa Rica.

III. PROTECTION OF THE ENVIRONMENT

4. The protection of the environment featured prominently in both *Certain Activities* and *Construction of a Road*. In both cases the Court was required to address the questions of action that might result in significant transboundary harm and the failure to produce an environmental impact assessment in respect of projects that risk causing significant transboundary harm. I agree with the Court that neither Costa Rica nor Nicaragua proved that the actions of their neighbour had caused significant transboundary harm. I also agree with the finding of the Court, and its reasoning for this finding, that the evidence showed that Costa Rica had breached a rule of international law by failing to carry out an envi-

ronmental impact assessment when it embarked on the construction of the road along the San Juan River. I disagree, however, with the finding of the Court that Nicaragua was not obliged to conduct an environmental impact assessment in respect of its project for dredging the San Juan River and that it was not obliged to consult with Costa Rica on this subject. This disagreement, which relates to both the factual findings and the reasoning of the Court, provides the basis for my dissent. In summary, I believe that the Court erred in its findings of fact and that it failed to apply the same reasoning in *Certain Activities* that it applied in *Construction of a Road*. I also believe that the Court erred in its interpretation of the Ramsar Convention on the duty to consult.

5. Before examining the Court's finding and reasoning on the absence of an obligation on the part of Nicaragua to conduct an environmental impact assessment when it embarked on the dredging of the San Juan River it is necessary to consider the source, nature and content of the obligation to conduct an environmental impact assessment.

IV. THE PRINCIPLE OF PREVENTION AND THE SOURCE OF THE ENVIRONMENTAL IMPACT ASSESSMENT OBLIGATION

6. The main purpose of environmental law is to prevent harm to the environment. This is because of the "often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment, I.C.J. Reports 1997*, p. 78, para. 140). A cluster of principles seek to achieve this goal, including the principle of prevention, the precautionary principle, the principle of co-operation, notification and consultation and the obligation of due diligence.

7. The obligation of due diligence flows from the principle of prevention. This is emphasized by the International Law Commission's Commentary on Article 3 of its Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities which declares "[t]he obligation of the State of origin to take preventive or minimization measures is one of due diligence" (*Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, p. 154, para. 7; see also, p. 155, para. 17). The duty of due diligence therefore is the standard of conduct required to implement the principle of prevention.

8. The principle of prevention is also implemented through a number of specific obligations, which include the obligation to carry out an environmental impact assessment. These obligations must be carried out in accordance with the due diligence standard. Thus if an environmental impact assessment has been carried out, but not with sufficient care

in the circumstances, a State may be found to be in breach of its obligation to do an environmental impact assessment¹. That due diligence and the obligation to conduct an environmental impact assessment are legal tools employed to ensure the prevention of significant transboundary harm is confirmed by the Court in its present Judgment when it states that “a State’s obligation to exercise due diligence in preventing significant transboundary harm” requires it to conduct a screening exercise to determine whether it is required to do an environmental impact assessment prior to undertaking an activity. Such an obligation will arise if it ascertains that such activity has “the potential adversely to affect the environment of another State” (Judgment, para. 153; see also para. 104).

9. A State’s obligation to conduct an environmental impact assessment is an independent obligation designed to prevent significant transboundary harm that arises when there is a risk of such harm. It is not an obligation dependent on the obligation of a State to exercise due diligence in preventing significant transboundary harm. Due diligence is the standard of conduct that the State must show at all times to prevent significant transboundary harm, including in the decision to conduct an environmental impact assessment, the carrying out of the environmental impact assessment and the continued monitoring of the activity in question. The International Law Commission views the obligation to conduct an environmental impact assessment as an independent obligation (Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *YILC*, 2001, Vol. II, Part Two, Art. 7, p. 157), as do the Rio Declaration (Principle 17), the Convention on Biological Diversity (Art. 14) and the Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”) (Art. 2). None of these instruments mentions due diligence in their formulation of the obligation to conduct an EIA. The decision of the Court in *Pulp Mills on the River Uruguay* invokes the principles of prevention, vigilance and due diligence as a basis for an environmental impact assessment when it states that “due diligence, and the duty of vigilance and prevention which it implies” would not have been exercised if a State embarking on an activity that might cause significant transboundary harm failed to carry out an environmental impact assessment (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010 (I)*, p. 83, para. 204). But the Court then explains that the content of the environmental impact assessment obligation is to be assessed “having regard . . . to the need to exercise due diligence in conducting such an assessment” (*ibid.*, para. 205). This means that the due diligence obligation informs the environmental impact assessment obligation, so that, in assessing whether the duty of prevention has been satisfied, and in determining its necessary content, the Court will apply a due diligence standard. Due diligence is therefore the standard of

¹ See *Responsibilities and Obligations of States with respect to Activities in the Area*, *Advisory Opinion*, 1 February 2011, *ITLOS Reports 2011*, p. 49, para. 141.

care required when carrying out the environmental impact assessment and not the obligation itself.

10. The danger of viewing the due diligence obligation as the source of the obligation to perform an environmental impact assessment is that it allows a State to argue, retrospectively, that because no harm has been proved at the time of the legal proceedings, no duty of due diligence arose at the time the project was planned. This backward looking approach was adopted by the Court in *Certain Activities* but not in *Construction of a Road*. If the obligation to perform an environmental impact assessment is viewed as an independent obligation it is clear that a State must ascertain the risk at the time the project is planned and prior to embarking upon the project. Moreover, it is clear that the threshold for making such a decision is not the high standard for determining whether significant transboundary harm has been caused but the lower standard of *risk* assessment — even if it is proved *later* that no significant transboundary harm has been caused. An environmental impact assessment not only ensures that the principle of prevention is adhered to but also encourages environmental consciousness on the part of States by requiring them to assess the risk of harm even if no harm is proved after the project has been undertaken.

11. As the Court here has affirmed, *Pulp Mills* makes clear that the obligation to do an environmental impact assessment exists as a separate legal obligation from due diligence. Moreover, policy considerations confirm that the obligation to perform an environmental impact assessment must be viewed as an obligation separate from that of due diligence. The obligation of due diligence is vague and lacking in clear content or procedural rules. It is an obligation that can be applied either prospectively or retrospectively — as shown by the reasoning in *Certain Activities*. The obligation to conduct an environmental impact assessment, on the other hand, imposes a specific obligation on States to examine the circumstances surrounding a particular project when it is planned and before it is implemented. It is characterized by certainty whereas due diligence is a more open-textured obligation that could potentially be satisfied in a number of different ways.

V. ENVIRONMENTAL IMPACT ASSESSMENT: GENERAL RULE OR CUSTOMARY RULE

12. The Court has chosen to describe the obligation to conduct a transboundary environmental impact assessment concerning activities carried out within a State's jurisdiction that risk causing significant harm to other States as an obligation under "general international law". This

term is used in both *Certain Activities* (paras. 101, 104) and *Construction of a Road* (paras. 152, 162, 168, 229 (6)). In so doing the Court has carefully followed the language employed by the Court in *Pulp Mills* when it stated

“it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context in particular on a shared resource” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010 (I)*, p. 83, para. 204).

13. As the term “general international law” does not appear in the sources of international law listed in Article 38 (1) of the Court’s Statute there will inevitably be some debate about the precise meaning to be attached to the term.

14. “General international law” cannot be equated with “general principles of law recognized by civilized nations” referred to in Article 38 (1) (c) in the present context as the Court has accepted the obligation to conduct an environmental impact assessment as an obligation that gives rise to a cause of action (Judgment, para. 162). Were the term to be interpreted as synonymous with “general principles of law” the question would be raised whether such a “general principle of law” might found a cause of action and require the Court to enter this jurisprudential minefield.

15. General principles fall largely into the categories of rules of evidence or procedure or are used as a defence (e.g., *res judicata*). Abuse of procedure has been invoked as a general principle in a number of cases before the Court but the Court has never found the conditions for an application of the principle to be fulfilled². That a general principle of law might give rise to a cause of action cannot be discounted. In *Factory at Chorzów* the Court declared that “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation” (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29). However, that obligation to pay reparation was not an independent cause of action but a secondary obligation that arose only after the determination of a breach of some other obligation. On the other hand, there is some authority for the proposition that a general principle cannot be construed as a separate obligation. In *Mavrommatis Jerusalem Concessions (Greece v. United Kingdom)*, the Permanent Court of International Justice stated:

“It is true that the Claimant has maintained that the provision of the Protocol should be supplemented by certain principles taken from

² A. Zimmermann *et al.* (eds.), *Statute of the International Court of Justice: A Commentary*, 2nd ed., 2012, pp. 904-905.

general international law; the Court, however, considers that Protocol XII is complete in itself, for a principle taken from general international law cannot be regarded as constituting an obligation contracted by the Mandatory except in so far as it has been expressly or implicitly incorporated in the Protocol.” (*P.C.I.J., Series A, No. 5, 1925*, p. 27.)

16. What meaning then is to be attached to the term “general international law” which the International Court has used in *Pulp Mills* and other decisions? Possibly it includes general international conventions, particularly those that codify principles of international law; and widely accepted judicial decisions, particularly decisions of the International Court of Justice. Certainly it includes both customary international law and general principles of law within the meaning of Article 38 (1) (*c*) and (*d*) of the Court’s Statute. In the present case I understand the term “general international law” to denote a rule of customary international law requiring an environmental impact assessment to be carried out where there is a risk of transboundary harm.

17. There can be little doubt that there is an obligation under customary international law to conduct an environmental impact assessment when there is a risk of significant transboundary harm. The ITLOS Seabed Disputes Chamber has held that there is a “general obligation under customary international law” to conduct such an assessment³. Fourteen years ago, the International Law Commission stated in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities that “the practice of requiring an environmental impact assessment has become very prevalent”, citing the laws of several developed States in support of such an obligation and declaring that some 70 developing countries had legislation of some kind on this subject (Commentary on Article 7, para. 4, *YILC*, 2001, Vol. II, Part Two, p. 158). These Draft Articles have been commended by the General Assembly of the United Nations (resolution of 6 December 2007, UN doc. A/Res/62/68, para. 4). In addition, a growing number of multilateral conventions recognize the obligation to conduct an environmental impact assessment. See, in particular, the Convention on Environmental Impact Assessment in a Transboundary Context (“Espoo Convention”), the Antarctic Treaty on Environmental Protection (the Antarctic Protocol), the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Art. 6 (1) (*b*)), the Convention on Biological Diversity (Art. 14), and the Convention of the Law of the Sea (Art. 206). The writings of jurists lend strong support to such an obligation under customary international law. Significantly, neither Costa Rica or Nicaragua has denied such an obligation as binding on them although in their pleadings

³ *Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 50, para. 145.

they followed *Pulp Mills* and used the language of “general international law”. There was no argument as to what this term meant and it was apparently assumed that it was a synonym for custom.

VI. RULES RELATING TO AN ENVIRONMENTAL IMPACT ASSESSMENT

18. In *Pulp Mills* the Court stated that general international law does not “specify the scope and content of an environmental impact assessment” with the result “that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case” (*I.C.J. Reports 2010 (I)*, p. 83, para. 205). This dictum, which is reaffirmed by the Court in the present case (Judgment, para. 104), has on occasion been interpreted as meaning that the environmental impact assessment obligation has no independent content and that there is simply a *renvoi* to domestic law⁴. This is incorrect. Obviously there are some matters relating to the carrying out of an environmental impact assessment which must be left to domestic law. These include the identity of the authority responsible for conducting the examination, the format of the assessment, the time frame and the procedures to be employed. But there are certain matters inherent in the nature of an environmental impact assessment that must be considered if it is to qualify as an environmental impact assessment and to satisfy the obligation of due diligence in the preparation of an environmental impact assessment. This is made clear by the International Law Commission in its Commentary on Article 7 of its Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities which declares that an environmental impact assessment should relate the risk involved in an activity “to the possible harm to which the risk could lead”, contain “an evaluation of the possible transboundary harmful impact of the activity”, and include an assessment of the “effects of the activity not only on persons and property, but also on the environment of other States” (*YILC*, 2001, Vol. II, Part Two, pp. 158-159, paras. 6-8).

19. In the present case the Court has recognized that the following rules are inherent in the nature of an environmental impact assessment. An environmental impact assessment must be undertaken *prior* to the implementation of the activity in question (Judgment, paras. 104, 153, 159, 161 and 168). The State undertaking an activity must assess the risk

⁴ See, for instance, the statement of the Sea-bed Disputes Chamber of ITLOS in its Advisory Opinion of 2011 (footnote 1 above), p. 51, para. 149.

of significant transboundary harm prior to implementing the activity “on the basis of an objective evaluation of all the relevant circumstances” (Judgment, para. 153). The burden of proof in showing that an environmental impact assessment or similar preliminary assessment of the risk involved has been done is upon the State undertaking the activity (*ibid.*, para. 154). The circumstances of the particular environment must be considered in assessing the threshold for deciding whether an environmental impact assessment is required (*ibid.*, paras. 104 and 155). The fact that the activity is conducted in a Ramsar protected site “heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive” (*ibid.*, para. 155). (From this it follows that the threshold for deciding whether to conduct an environmental impact assessment is lower in the case of a wetland of international significance protected by the Ramsar Convention.) A State must exercise due diligence in carrying out an environmental impact assessment with regard to the nature and magnitude of the activity and its likely impact on the environment (*ibid.*, paras. 104 and 155). In determining the need for an environmental impact assessment it is necessary to have regard to the *risk* of harm being caused (*ibid.*, paras. 104 and 153). (By necessary implication, this rejects that argument that the test is not the risk of transboundary harm but the likelihood or probability of such harm occurring. It is also recognition of the fact that there is a lower standard — *risk* — that triggers the obligation to conduct an environmental impact assessment than the higher standard required for proving that significant transboundary harm has actually been caused. This is confirmed by the finding of the Court that Costa Rica was required to conduct an environmental impact assessment because of the *risk* its activity posed to Nicaragua’s environment, despite the fact that Nicaragua failed to prove that significant transboundary harm had in fact occurred.) Finally, the Court affirmed that a subsequent finding of an absence of significant transboundary harm does not exonerate the State that carries out an activity that risks causing such harm for its failure to carry out an environmental impact assessment when the activity was planned.

VII. CONSTRUCTION OF A ROAD AND THE OBLIGATION TO CONDUCT AN ENVIRONMENTAL IMPACT ASSESSMENT

20. Here the Court scrupulously applied the principles governing an environmental impact assessment that it had expounded in the present case (see para. 19 above). First, it held that Costa Rica had breached its obligation to conduct an environmental impact assessment by failing to carry out such an assessment *prior* to embarking on the construction of the road (Judgment, paras. 153, 159, 161 and 168). The fact that it later carried out an environmental diagnostic assessment and other studies on the impact of the road did not suffice (*ibid.*, para. 161). Second, it held

that Costa Rica had failed to prove that it had carried out a preliminary assessment before embarking on the construction of the road (Judgment, para. 154). Third, it held that the geographic conditions of the river basin where the road was to be built were to be considered in assessing the risk involved in the activity (*ibid.*, para. 155). The Court made a careful examination of these conditions and the proximity of the road to the San Juan River in order to show that the road posed a risk to Nicaragua's environment (*ibid.*). Fourth, the Court held that the fact that the road was built in the proximity of Nicaragua's Ramsar protected wetland of *Refugio de Vida Silvestre Río San Juan* heightened the risk of significant impact because of the sensitive nature of the environment (*ibid.*). Fifth, it held that in determining the need for an environmental impact assessment it was necessary for Costa Rica to have regard to the *risk* of significant transboundary harm being caused by the construction of the road (*ibid.*, para. 153). Sixth, it held that the fact that Nicaragua did not prove that significant transboundary harm had in fact been caused by the construction of the road did not absolve Costa Rica from its obligation to conduct an environmental impact assessment prior to commencing this activity.

VIII. CERTAIN ACTIVITIES AND THE OBLIGATION TO CONDUCT
AN ENVIRONMENTAL IMPACT ASSESSMENT IN RESPECT
OF COSTA RICA'S WETLANDS

21. The reasoning and fact-finding of the Court on the need for an environmental impact assessment in *Construction of a Road* must be compared to the approach it adopted in *Certain Activities*.

22. In its application and subsequent submissions Costa Rica made it clear that it had two main concerns about Nicaragua's plan to dredge the Lower San Juan River: first, the impact it might have on Costa Rica's Ramsar protected wetlands and, second, the damage it might cause to the Colorado River. In the course of the oral proceedings, on 28 April 2015, Costa Rica asked the Court to adjudge and declare that Nicaragua had breached "the obligation to respect Costa Rica's territory and environment, including its wetland of international importance under the Ramsar Convention 'Humedal Caribe Noreste', on Costa Rican territory"; and "the obligation to carry out an appropriate transboundary environmental assessment, which takes account of all potential significant adverse impacts on Costa Rican Territory" (*ibid.*, para. 49). Costa Rica also requested the Court to find that Nicaragua had breached its obligation to refrain from any activity that might cause damage to the Colorado River. This opinion will focus entirely on Costa Rica's submissions in respect of its wetlands. This is done for the sake of brevity. The expert witnesses

of both Parties agreed in 2015 that Nicaragua's dredging programme was not likely to affect the flow of water to the Colorado River. Whether the dredging as initially planned in 2006 posed a risk to the Colorado River, warranting an environmental impact assessment, remains unanswered.

23. The Court's response to Costa Rica's submissions was terse. First, it stated that

“In 2006 Nicaragua conducted a study of the impact that the dredging programme would have *on its own environment*, which also stated that the programme would not have a significant impact on the flow of the Colorado River. This conclusion was *later* confirmed by both Parties' experts.” (Judgment, para. 105; emphasis added.)

This passage indicates that the Court was aware that Nicaragua's study of 2006 dealt only with the likely impact of dredging “on its own environment” and that the Court was satisfied, in the light of the “later” evidence of experts of both Parties, that the dredging programme would have no impact on the Colorado River. Then came the Court's finding on both the flow of the Colorado River and the impact on Costa Rica's wetlands:

“Having examined the evidence in the case file, including the reports submitted and testimony given by experts called by both Parties, the Court finds that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica's wetland. In light of the absence of risk of significant transboundary harm, Nicaragua was not required to carry out an environmental impact assessment.” (*Ibid.*)

24. In order to compare and contrast the reasoning employed by the Court in *Certain Activities* with its reasoning in *Construction of a Road* it is necessary to examine the evidence in the case file of the Court, particularly “the reports submitted and the testimony given by experts called by both Parties” (*ibid.*), upon which the Court bases its finding that the Nicaraguan dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm with respect to Costa Rica's wetland, the *Humedal Caribe Noreste*.

25. There are four important documents dealing with the impact of Nicaragua's dredging programme: the terms of reference of the Ministry of the Environment and Natural Resources (MARENA)⁵, Nicaragua's

⁵ Ministry of the Environment and Natural Resources (MARENA), Specific Terms of Reference for the Preparation of the Environmental Impact Study for the Project “Dredging of the San Juan River” (undated), Counter-Memorial of Nicaragua (CMN), Vol. II, Ann. 9, p. 221.

environmental impact study (EIS) of 2006⁶, the Project Design Study attached as an annexure to the environmental impact study⁷ and the report of the Ramsar Advisory Mission No. 72 on the impact of the dredging programme on Nicaragua's wetland, the *Refugio de Vida Silvestre Río San Juan*⁸. The first three documents prepared by Nicaragua have one thing in common: they carefully examine the impact of the dredging programme on Nicaragua's own environment but make no mention of its possible impact on the territory of Costa Rica, least of all on its wetland. The terms of reference of MARENA, which define the scope of the study, do not direct any transboundary impacts to be studied. The environmental impact study mentions only Nicaragua's Ramsar protected wetland. The Project Design Study is concerned only with the increase in the flows of the channel bed of the San Juan River and makes no mention of any possible transboundary impact of the dredging programme. The Court is therefore correct in stating that Nicaragua's study considered only the "impact that the dredging programme would have on its own environment" (Judgment, para. 105).

26. The Ramsar Report of 2011, on the other hand, is concerned with the wetlands of the Lower San Juan River basin belonging to both Nicaragua and Costa Rica. It states that because any changes to the fluvial dynamics of the river due to dredging will alter the dynamics of the Nicaraguan and Costa Rican wetlands and "the distribution and abundance of the species living there", it is "important to perform studies of the relevant environmental impacts prior to its implementation"⁹. It adds that:

"Considering the main role of the San Juan River basin [is] on the entire dynamics of the San Juan River as well as the Ramsar sites *Refugio de Vida Silvestre* and *Caribe Noreste*, it is essential to develop joint actions of co-operation between Nicaragua and Costa Rica, enabling compliance with their international commitments within the framework of the Ramsar Convention, and particularly the maintenance of the ecological characteristics."¹⁰

The report then recommends "strong co-operation" between Nicaragua and Costa Rica "for a more integrated management of activities that may potentially affect the river" and "its related wetlands of international importance"¹¹. Finally it recommends the monthly monitoring of the hydrometric levels, the concentration of suspended solids in the water col-

⁶ Environmental Impact Study for Improving Navigation on the San Juan de Nicaragua River, September 2006, CMN, Vol. II, Ann. 7, p. 77.

⁷ Project Design Study, September 2006, CMN, Vol. II, Ann. 8, p. 213.

⁸ Ramsar Report of 18 April 2011.

⁹ *Ibid.*, Conclusions, para. 5.

¹⁰ *Ibid.*, para. 6.

¹¹ *Ibid.*, Recommendations, para. 1.

umn and the groundwater levels of the river at least during the construction phase of the dredging¹².

27. Not surprisingly, the Ramsar Report of 2011 was not produced by Nicaragua until requested by Costa Rica. Nicaragua wrote a hostile reply¹³ to the Ramsar Secretariat criticizing the actions of Costa Rica and requesting, *inter alia*, the deletion of the report's conclusion that any changes to the fluvial dynamics of the river due to dredging will alter the dynamics of the wetlands of Nicaragua and Costa Rica and the species living there, resulting in the need "to perform studies of the relevant environmental impacts prior to its implementation". In the oral proceedings Nicaragua dismissed the Ramsar Report as only a draft report which the Ramsar Secretariat never finalized. In the light of the concern expressed by the Ramsar Report over the impact that dredging might have on the wetlands of both Nicaragua and Costa Rica it is unlikely that this was one of the reports "in the case file" of the Court (Judgment, para. 105) which led it to conclude that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm.

28. The principal witnesses called by Nicaragua in *Certain Activities* were Professors Kondolf and van Rhee. Kondolf's report in Nicaragua's Counter-Memorial¹⁴ is largely concerned with the clearing of the *caño* and does not consider the impact of dredging on the wetlands other than in the vicinity of the *caño*. His written statement is likewise focused mainly on the clearing of the *caño* but he does state that the contemplated diversion of the Colorado River's flow into the San Juan River "does not risk harming the Colorado or the wetlands it feeds". There is no indication of the wetlands to which he refers. Kondolf's oral testimony was again centred on the clearing of the *caño* without mention of the impact of the dredging upon the wetlands. Professor van Rhee's report in Nicaragua's Counter-Memorial¹⁵ is about the dredging programme itself but it does state that it "helps to ensure the survival of the wetlands of international importance", including the *Refugio de Vida Silvestre Río San Juan* and the *Humedal Caribe Noreste*¹⁶. In a subsequent report, Professor van Rhee makes the important point that the dredging project described in the environmental impact study of 2006 "has since been reduced in scope. As such, even the small impact of the dredging project on the environ-

¹² Ramsar Report, Recommendations, para. 3.

¹³ Considerations and Changes of the Government of the Republic of Nicaragua to the draft Ramsar Mission Report No. 72.

¹⁴ G. Mathias Kondolf, "Distributary Channels of the Río San Juan, Nicaragua and Costa Rica: Review of Reports by Thorne, UNITAR, Ramsar, MEET and Araya-Montero", CMN, Vol. I, p. 461.

¹⁵ C. van Rhee and H. J. de Vriend, "The Influence of Dredging on the Discharge and Environment of the San Juan River", CMN, Vol. I, p. 525.

¹⁶ *Ibid.*, p. 540, para. 3.2.

ment . . . will likely be reduced.”¹⁷ In his written statement, van Rhee states that dredging is an “effective technique for maintaining flows to wetlands” which serves to preserve the ecological health of the environmentally sensitive wetlands of the Lower San Juan River. Professor van Rhee’s oral testimony was hampered by the fact that he had not seen the 2011 Ramsar Report No. 72 on which he was cross-examined.

29. Costa Rica’s main witness was Professor Thorne. He was unable to access the San Juan River in person as the Nicaraguan authorities denied such access. In contrast to the reports of Professors Kondolf and van Rhee, his report in Costa Rica’s Memorial¹⁸ had much to say about the impact of dredging on Costa Rica’s wetlands. In the executive summary of his report, he states that the wetland of *Humedal Caribe Noreste* that could be indirectly impacted by the dredging “provides habitats for a wide array of plants, birds, fish, amphibians, reptiles and mammals, including many iconic and endangered species”¹⁹. Risks to such species “include the possibility of extinction of those already threatened or endangered”²⁰. The report itself declares that dredging has “direct, short-term impacts on river environments and ecosystems through disturbing aquatic flora and fauna, destroying benthic communities and, potentially, increasing turbidity and reducing water quality, with impacts that will be felt throughout the trophic network”²¹. The report spells out the potential environmental impacts on the wetlands of dredging on such issues as surface drainage, water quality, vegetation, fish, aquatic plant life, birds and fauna²². The report concludes that the evidence suggests that the “morphological, environmental and ecological risks associated with continuing the dredging programme are serious”²³. Professor Thorne’s written statement was largely concerned with maps and the construction of the three *caños*. He did, however, state that “disturbance to the environment and ecosystem at each dredging site are inherent and inevitable”. Significantly, Professor Thorne accepts Professor van Rhee’s assessment that Nicaragua’s reduced dredging programme is likely to cause less environmental damage to the wetlands. He warns, however,

¹⁷ C. van Rhee and H. J. de Vriend, “Morphological Stability of the San Juan River Delta, Nicaragua/Costa Rica”, CMN, Vol. IV, pp. 19 and 23.

¹⁸ Colin Thorne, “Assessment of the physical impact of works carried out by Nicaragua since October 2010 on the geomorphology, hydrology and sediment dynamics of the San Juan River and the environmental impacts on Costa Rican territory”, Memorial of Costa Rica (MCR), Vol. I, p. 307.

¹⁹ *Ibid.*, p. 313.

²⁰ *Ibid.*, p. 315.

²¹ *Ibid.*, pp. 443-444.

²² *Ibid.*, pp. 454-458.

²³ *Ibid.*, p. 461.

that if the dredging programme were to be expanded to achieve its initial goal of greater navigability of the river this would have adverse impacts. Professor Thorne's testimony in the oral proceedings was largely devoted to maps and the cutting of the *caños*. However, when he testified in *Construction of a Road*, in response to a question by Judge Tomka, he issued the stark warning that "[t]he dredging programme, if it cuts off the sediment supply, will starve the delta, the Caribbean Sea will take it away, we will lose hundreds of hectares of wetland due to coastal erosion" (CR 2015/12, p. 52).

30. Only one expert on environmental impact assessments testified in the joined cases. He was Dr. William Sheate, who was called as a witness by Nicaragua in the *Construction of a Road* to give evidence on the question whether Costa Rica had breached its obligation to conduct an environmental impact assessment when it embarked on the construction of a road along the San Juan River. Although he did not provide evidence in *Certain Activities* there is no reason why his evidence should not be considered in that case as the two cases were joined and the issue of the obligation of a State to conduct an environmental impact assessment prior to embarking on an activity that risks causing significant transboundary harm arose in both cases. In his report in Nicaragua's Reply in the *Construction of a Road*²⁴, Dr. Sheate repeatedly stresses the sensitivity of the two wetlands, the *Refugio de Vida Silvestre* and the *Humedal Caribe Nor-este*, the fact that they are designated by Ramsar as wetlands of international importance and the need to conduct an environmental impact assessment in respect of any activity in the region. He declares that "[t]he Ramsar and UNESCO designations covering the San Juan River and adjacent areas should have been sufficient triggers on their own for an environmental impact assessment or some form of advance assessment to have been undertaken"²⁵. Later he goes further in saying that Ramsar designation should "alone" be sufficient reason to require an environmental impact assessment²⁶. Referring to the designation of an area as a Ramsar protected site, he states that

"[t]he likelihood of *significant* effects is increased because of the sensitive nature of the designated environment and the habitats and wild-

²⁴ William R. Sheate, "Comments on the Lack of EIA for the San Juan Border Road in Costa Rica, July 2014", Reply of Nicaragua (RN), Vol. II, Ann. 5, p. 281.

²⁵ *Ibid.*, pp. 284 and 297.

²⁶ *Ibid.*, p. 296.

life for which the area has been designated — the threshold for triggering an environmental impact assessment is therefore rightly expected to be much lower than if the receiving environment were not a Ramsar designated area”.²⁷

These opinions were restated by Dr. Sheate in his written statement and his oral evidence.

31. It is difficult to conclude that an examination of the “reports submitted and testimony given by experts called by both Parties” indicates that there was support for the finding that “the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm . . . with respect to Costa Rica’s wetland” (Judgment, para. 105). The documents/reports submitted by Nicaragua failed to examine the impact of the dredging programme on Costa Rica’s wetlands at all. The fact that Nicaragua felt obliged to conduct an environmental impact study in respect of its own territory, however, suggests that it had cause for concern about the environmental impacts of its dredging on the area. The report of the Ramsar Advisory Mission No. 72 of 2011 stated that dredging presented a risk of environmental impact on the wetlands of both Costa Rica and Nicaragua and suggested that a new environmental impact study be carried out. It also recommended that there be regular monthly monitoring of the situation. Professor Kondolf had little to say about the impact of the dredging on the wetlands while Professor van Rhee merely affirmed that dredging would promote the flow of water in the river which would be beneficial to the wetlands. Moreover, he was unable to respond to questions about the Ramsar Report of 2011 because Nicaragua had failed to provide him with this important report. Professor Thorne, on the other hand, made it clear that the dredging programme had serious consequences for the wetlands. The only expert witness on environmental impact assessments, Dr. Sheate, testified that the fact that an area had been designated a Ramsar site of international importance was alone sufficient to trigger the need for an environmental impact assessment and that there was a lower threshold for the assessment of risk of harm in such a designated area.

32. Rather than showing that there was no need for Nicaragua to conduct an environmental impact assessment in respect of the risk of significant transboundary harm to Costa Rica’s wetlands, the evidence contained in the reports and testimonies of witnesses called by both Parties shows that there was a risk of harm to Costa Rica’s Ramsar-designated site at the time the dredging was planned regardless of the fact that no harm was later proved. The Court should have held that in a Ramsar-designated wetland there was a lower threshold of risk, that Nicaragua had failed to show that it had considered the question of transboundary harm at all and that the risk to the wetland was sufficient for

²⁷ *Op. cit. supra* note 24, p. 297.

Nicaragua to have conducted an environmental impact assessment that examined the risk that its dredging programme posed to Costa Rica's wetlands.

33. The temporal factor is important in assessing Nicaragua's obligation to conduct an environmental impact assessment. The planned aim of the dredging in 2006 was to improve navigability on the San Juan River by deepening and widening the navigation channel²⁸. Both van Rhee (*supra*, para. 28) and Thorne (*supra*, para. 29) testified that Nicaragua had reduced the scale of the dredging programme that was planned in 2006. As a result of this the risk of harm to the wetlands had been diminished. However, in assessing the risk for the purpose of deciding whether Nicaragua should have conducted an environmental impact assessment, it is necessary to have regard to the dredging programme *as it was planned in 2006*. This was the question that required consideration and not the question whether the evidence of the implementation of the dredging in 2015 showed that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm. The evidence of Professor Thorne is important in this regard. In his first report, included in Costa Rica's Memorial, he provides a comprehensive account of the potential environmental impact of the dredging as planned in 2006. But in his written statement of 2015 he is less critical of this impact on account of the reduction of the dredging that had been planned (*supra*, para. 29). That the original dredging plan of 2006 held a risk of transboundary harm was confirmed by the Ramsar Report of 2011. Moreover, the clear implication of Dr. Sheate's evidence is that an environmental impact assessment was without doubt required when a Ramsar-designated wetland was at risk. The Court's pronouncement that "the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm . . . with respect to . . . Costa Rica's wetland" (Judgment, para. 105) based on the reports submitted and the testimony given by experts called by both Parties takes no account of the fact that Nicaragua's documents/reports had nothing to say on this subject, that the Ramsar Report of 2011 expressed serious concern about the risk to the environment and that the testimony of witnesses showed on a balance of probabilities (and possibly beyond reasonable doubt) that there was a risk to Costa Rica's wetland in 2006. Furthermore it takes no account of the fact that Costa Rica was prevented by Nicaragua from measuring the flow of water in the river to provide proof of the impact of the dredging on its wetlands; and that Nicaragua had itself either not taken such measurements or refused to disclose them. Such conduct on the part of Nicaragua

²⁸ See Environmental Impact Study for Improving Navigation on the San Juan de Nicaragua River, September 2006, CMN, Vol. II, Ann. 7, para. 2.1.3.

affects the burden of proof as was stated by the Court in the *Corfu Channel* case:

“exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available . . . By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.” (*Corfu Channel (United Kingdom v. Albania)*, *Merits, Judgment*, *I. C. J. Reports 1949*, p. 18.)

34. The fact-finding of the Court cannot be substantiated. To make matters worse the decision of the Court cannot be reconciled either with the reasoning on the obligation to conduct an environmental impact assessment employed by the Court in *Construction of a Road* or with the rules relating to environmental impact assessments expounded by the Court and set out in paragraph 19 above. First, there is no examination of the factual situation of Costa Rica’s wetlands of the kind carried out by the Court in respect of the road along the San Juan River (Judgment, para. 155). Second, there is no suggestion that Nicaragua carried out “an objective evaluation of all the relevant circumstances” (*ibid.*, para. 153). On the contrary, the Court itself states that Nicaragua’s environmental study was confined to “its own environment” (*ibid.*, para. 105). This flies in the face of the statement of the International Law Commission that an environmental impact assessment should include an assessment of the effects of the activity “on the environment of other States” (see *supra* para. 18). In these circumstances it is impossible to conclude that Nicaragua had discharged the burden of proof in showing that it had carried out an adequate preliminary assessment of the impact of its dredging programme on Costa Rica’s wetlands. Third, the Court’s finding fails to take into account the circumstances affecting the environment of the Lower San Juan River. In particular it does not mention that the Costa Rican wetland in question — the *Humedal Caribe Noreste* — like the Nicaraguan wetland — the *Refugio de Vida Silvestre Río San Juan*, invoked in the *Construction of a Road*, is a Ramsar Convention protected wetland “which heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive” (Judgment, para. 155). Fourth, the Court disregards its requirement that a State must exercise due diligence in ascertaining whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State (*ibid.*, para. 153). Nicaragua’s environmental impact study which took no account of *transboundary* harm clearly failed to meet the standard of due diligence. Fifth, the Court seems to have reached its conclusion that there was no risk of significant transboundary harm when the dredging programme was

planned in 2006 on the basis of the evidence of witnesses testifying on the impact of the dredging in 2015. This inference is drawn from the fact that the Court examined the impact of the dredging in its consideration of the question whether it had caused significant transboundary harm in 2015 but not the risk — a lower threshold — that it might cause significant transboundary harm in 2006. This finding differs fundamentally from that of the Court in *Construction of a Road* where it was careful to distinguish between the risk of transboundary harm when the road was planned and the question whether such harm had been proved in 2015. If the Court's conclusion was reached in some other way, it was careful to conceal this in paragraph 105.

35. The evidence examined shows that there was a risk of significant transboundary impacts to Costa Rica's wetlands arising from the dredging project as planned in 2006. This risk was not as obvious or as great as that posed by the construction of Route 1856 in *Construction of a Road*. Nevertheless there was a risk and Nicaragua had an obligation to carry out an environmental impact assessment that examined not only the impact of the dredging on its own territory but also the impact on Costa Rica's territory. By failing to do so it breached its obligation under general international law to conduct an environmental impact assessment.

IX. RAMSAR CONVENTION

36. *Certain Activities* and *Construction of a Road* are both concerned with the protection of the wetlands environment and the Ramsar Convention is the most important multilateral convention on this subject. It was the first conservation convention that focused exclusively on habitat. Both Parties appreciated the importance of the Ramsar Convention and accused each other of violating its terms by failing to notify and consult one other in respect of potential environmental impacts. In these circumstances, one might have expected the Court to have more seriously considered the relevance of the Convention to the two cases before it.

37. Two wetlands in the vicinity of the disputed territory and the Lower San Juan River are listed with the Secretariat of Ramsar as Wetlands of International Importance: the *Humedal Caribe Noreste* wetland of Costa Rica and the *Refugio de Vida Silvestre Río San Juan* of Nicaragua. Wetlands are selected for listing on account of their international significance in terms of ecology, botany, zoology, limnology or hydrology. Both wetlands include estuaries, lagoons and marshes and are home to migratory birds, salamanders and aquatic life.

38. The legal provisions of the Ramsar Convention relating to notification and consultation invoked by both Parties are Articles 3 (1) and 5:

“Article 3

1. The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.

.....

Article 5

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

39. In *Certain Activities* Costa Rica alleged that Nicaragua had violated Article 5 of the Ramsar Convention by refusing to provide it with information about its dredging programme or to inform it about the environmental impact study that it had conducted so that Costa Rica would have been able to consider the impacts of the proposed works on its territory (MCR, Vol. I, para. 5.17). Nicaragua contested this, arguing that the obligation to notify, consult or provide an environmental impact assessment arose only under general international law where there was a risk of a significant transboundary impact, but failed to address the obligation to consult under Article 5 of the Ramsar Convention which is not restricted to situations involving a risk of significant transboundary impact. However, Nicaragua changed its position on this in the *Construction of a Road* when it stated that “there is no requirement in this article [Art. 5] that a party’s activities cause or risk causing significant harm to another party” (RN, Vol. I, para. 6.114).

40. Article 5 requires States to consult with each other on the implementation of “obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting State or where a water system is shared by Contracting Parties”. As the listed wetlands of Costa Rica and Nicaragua share a common water system it follows that there is an obligation on both Parties to consult with each other on issues affecting this shared water system.

41. Article 5 must be read with Article 3 (1) which provides: “The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far

as possible the wise use of wetlands in their territory.” While the “wise use of wetlands in their territory” obligation is limited to Nicaragua’s territory and thus may not give rise to a specific obligation to consult, the same cannot be said of the first half of Article 3 (1) dealing with listed wetlands. According to *Lyster’s International Wildlife Law* there is “some form of collective responsibility for such sites”²⁹. Their designation as sites of international importance means that they are “resources of ‘common concern’ to the international community as a whole”³⁰. The obligation to formulate and implement planning so as to promote the conservation of wetlands applies generally to all wetlands included in the List, and thus has extraterritorial effect. “The precise nature and extent of their responsibility towards sites designated by other States is uncertain, but should at least involve an obligation to avoid causing them significant harm.”³¹

42. Article 3 (1) should therefore be read as imposing an obligation to undertake planning “to promote the conservation of the wetlands included in the List” which clearly covers the wetlands of Costa Rica and Nicaragua that share the same water system. Thus it may convincingly be argued that when Nicaragua planned its dredging programme in 2006 and carried out an environmental impact study it was bound to “formulate and implement” its planned environmental assessment study in such a way as to promote the conservation not only of its own wetland, the *Refugio de Vida Silvestre Rio San Juan*, but also of Costa Rica’s *Humedal Caribe Noreste*. Article 3 (1) thus enlivens the procedural obligation to conduct an environmental impact assessment under general international law, giving it a substantive content requirement — namely to promote the conservation of the wetlands. It does not stipulate the circumstances in which such planning is to take place, and is not subject to any separate threshold requirement. But it makes it clear that the planning must be formulated and implemented to promote the conservation of wetlands.

43. Nicaragua does not deny that there is a relationship between the environmental impact assessment obligation and Article 3 (1). In its Memorial in *Construction of a Road*, alleging that Costa Rica had breached Article 3 (1), it noted that Article 3 (1) applied whether or not the affected wetland was within Costa Rican territory, and explained that conservation of wetlands “is premised upon appropriate planning, something Costa Rica did not do in respect of its road project” (Memorial of Nicaragua (MN), Vol. I, paras. 5.74-5.75). Nicaragua accepted that the

²⁹ M. Bowman, P. Davies and C. Redgwell, *Lyster’s International Wildlife Law*, Cambridge University Press, 2nd ed., 2010, p. 420.

³⁰ *Ibid.*

³¹ *Ibid.*, p. 424.

obligation under Article 3 (1) applies equally to both Costa Rican and Nicaraguan wetlands (MN, Vol. I, para. 5.74) and acknowledged the link between Article 3 (1) and the obligation to conduct an environmental impact assessment (*ibid.*, paras. 6.112-6.115). As shown in paragraph 39 above, Nicaragua recognized that Article 5 does not require proof of significant transboundary harm to bring it into operation (*ibid.*, para. 6.114).

44. When read in conjunction with Article 3 (1), Nicaragua was obliged to consult with Costa Rica on the promotion of conservation in both its own wetland and that of Costa Rica in its planning of activities affecting the wetlands. This included the carrying out of an environmental impact assessment. To effectively consult in the implementation of Article 3 (1), Nicaragua was required at a minimum to provide a draft copy of its 2006 environmental impact study to Costa Rica and to seek its input before finalizing its plans. Nicaragua does not contest that it failed to do so, although it says that the information was publicly available, at least in summary form, through Nicaraguan press sources. This is not sufficient to constitute consultation. It therefore appears that Nicaragua is in breach of its obligations under Article 5 of the Ramsar Convention in that it failed to consult with Costa Rica on the implementation of Article 3 (1).

45. This final part of my opinion is concerned with Nicaragua's failure to conduct an adequate environmental impact assessment and to consult with Costa Rica in respect of its dredging programme as required by the Ramsar Convention. It should, however, be made clear that Costa Rica likewise breached its obligations under the Ramsar Convention by failing to conduct an environmental impact assessment for the construction of a road along the San Juan River, which forms part of Nicaragua's wetland. It is in breach of Article 3 (1) because by not carrying out an environmental impact assessment it failed to take measures to promote the conservation of the listed wetlands. Costa Rica is also in breach of Article 5 of the Ramsar Convention because it failed to consult with Nicaragua on its planned activities involving the construction of the road. Paragraph 172 of the Judgment wrongly seems to assume that the obligation to consult under Article 5 of the Ramsar Convention only comes into operation when there is proof of significant transboundary harm. As shown above, in paragraph 39, Article 5 contains no such requirement.

(Signed) John DUGARD.