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CR 2015/17

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2015

Public sitting

held on Friday 1 May 2015, at 3 p.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 vendredi 1^{er} mai 2015, à 15 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
 Caçado Trindade
 Greenwood
 Xue
 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
Mme Xue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Gevorgian, juges
MM. Guillaume
Dugard, juges *ad hoc*

M. Couvreur, greffier

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

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

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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 Costa Rica en l'affaire relative à la *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*.

Madame la juge Donoghue, pour des raisons dont elle m'a dûment fait part, ne peut être présente aujourd'hui sur le siège.

Je donne maintenant la parole à M. Wordsworth pour le Costa Rica. Monsieur Wordsworth, nous vous écoutons.

Mr. WORDSWORTH:

**THE ABSENCE OF SIGNIFICANT HARM AND RISK OF SIGNIFICANT HARM
TO THE SAN JUAN RIVER**

1. Mr. President, Members of the Court, the Court will have fully on board the point that, yesterday, there was a none too subtle shift in gear from the Nicaraguan team, with the emphasis now very much on allegations as to the absence of an EIA on the road and the need for an EIA with respect to future construction works.

2. There is still, however, a residual case on significant harm actually caused by construction of the road, and I will be dealing with that, and also with what was said about there being a risk of significant harm which is, of course, an important pre-requisite to the obligation to carry out any transboundary EIA.

3. The points, in outline, are as follows.

4. First, Nicaragua has failed to make out a case of discernible impact, let alone of significant harm.

5. Secondly, Nicaragua seeks to bypass the fact that it has no empirical evidence of significant harm, or even of impact, by mischaracterizing the purpose that would be fulfilled by the notably absent data and measurements of sediment concentrations in the river.

6. Thirdly, there is no empirical evidence that any sediment from the road is being deposited and then dredged in the delta area, while Professor Thorne's view which is that no coarse sediment from the road even reaches the Lower San Juan was mischaracterized.

7. Fourthly, Professor Thorne's estimate as to the amount of sediment coming from the road is conservative and is to be preferred to that of Dr. Kondolf, who has not even visited the road.

8. And, finally, while Nicaragua's case on impacts to aquatic species has been downgraded from a claim of harm to a claim of risk of harm, it still suffers from the same defect, which is that it is based on generalities and evidence given by counsel, instead of studies and measurements conducted by experts in the field.

9. I deal with these issues in turn, but they all point in the same direction. Nicaragua has no data or studies that evidence significant harm, or even risk of harm.

A. No significant harm; no discernible impact

10. First, by reference to the ILC Commentary¹, it was said, apparently with a straight face, that it is sufficient that the harm be "susceptible of measurement", and that this criterion had been satisfied because the amount of sediment coming into the San Juan from the road has been measured, or at least estimated².

11. But that does not come close to responding to the defence that Costa Rica put in opening, and still less does it satisfy the burden of proving significant harm. Nicaragua must show that the sediment coming from the road is (i) causing harm that (ii) is significant. Nicaragua has shown neither, and it does not assist to say that it is common ground that some sediment is coming into the river³.

12. The simple point, to which Nicaragua has no answer, is that the amount of sediment coming into the river from the road is insignificant compared to the sediment that is already in the river, and so it is unable to point to any form of harm to the river, let alone significant harm. Likewise so far as concerns risk of significant harm. As I said in opening, the sediment coming from the road represents only a tiny fraction of the total annual sediment load of the Rio San Juan:

¹Draft Articles on 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, judges' folder, tab 2.

²CR 2015/16, p. 23, paras. 19-22 (Reichler).

³CR 2015/16, p. 27, paras. 31-32 (Reichler).

on Costa Rica's figures, it is 0.6 per cent; on Nicaragua's, in the range *of* 1-2 per cent⁴. Yesterday, Mr. Reichler could only say that "This may be true, but it is not relevant."⁵ But these figures are of *central* relevance when it comes to determining whether there has been or may be any significant harm — all the more so in a case where it is not suggested that a tipping point has been reached⁶.

13. To quote Professor Thorne, who has been identified time and again by Nicaragua as a reliable expert in geomorphology and environmental impact to the Rio San Juan:

"The Road has had *no significant impact* on sediment transport in the Río San Juan because the quantity of additional sediment derived from the Road is *tiny* compared to the heavy sediment load that was already being carried by the River prior to construction of the Road. Also, the additional load from the Road is *indiscernible* due to high seasonal and inter-annual variability in sediment loads derived from other sources and complexity in sediment transport processes."⁷

14. To counter these expert views, Nicaragua offers you — nothing. No data, no sampling, no recorded impacts to any form of aquatic fauna or flora in the river. My friend Mr. Reichler might perhaps be applauded for ingenuity in seeking to fill the gaps by projecting an animation of a bucket of sand being poured into a tank of water⁸, but such projections merely highlight the absence of any evidence and do not of course demonstrate that sediment from the road is causing or even risks significant harm. Indeed, standing here on a Friday afternoon I think "hat off to Mr. Reichler", because it seems hard enough to bring these facts to life without also having to deal with the minor inconvenience of having to argue a case on significant harm with, it has to be said, zero evidence of actual harm.

15. Mr. Reichler also appeared to suggest that it was enough merely to show that the harm in question could in theory be measured, saying that: "What is important, under the ILC standard, is not the actual numerical measure of sediment, but whether it is susceptible of being measured."⁹

⁴RCR, paras. 2.64-2.65, referring to Professor Colin Thorne, *Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River: Reply Report*, Feb. 2015; RCR, App. A, paras. 4.93 and 4.94, p. 62; see also *The Road*, Written Statement of Professor Colin Thorne, Mar. 2015, paras. 3.21 (c) and 3.23 and *The Road*, Written Statement of Professor G. Mathias Kondolf, 16 Mar. 2015, para. 22 and table, p. 8.

⁵CR 2015/16, p. 25, para. 27 (Reichler).

⁶CR 2015/9, p. 32 (Andrews and Wordsworth).

⁷*The Road*, Professor Colin Thorne, Written Statement of Professor Colin Thorne, Mar. 2015, para. 7.1 (b), emphasis added; see also Professor Colin Thorne, *Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River: Reply Report*, Feb. 2015; RCR, App. A, para. 7.1 (b) ~~— emphasis added~~.

⁸CR 2015/16, p. 28, paras. 34-35 (Reichler).

⁹CR 2015/16, p. 24, para. 23 (Reichler).

That is a very confused submission. The ILC Commentary, which can only be taken as a useful reference point not as a standard, says that for there to be significant harm there must be a “real detrimental effect” which must be “susceptible of measurement by factual and objective standards”¹⁰. What is important, indeed vital as this is all largely a matter of common sense, is therefore to show harm that is significant by reference to some factual and objective standard. Nicaragua does not come close to meeting that test.

16. It is not sufficient to point to standards in the abstract such as the total daily maximum load figures that United States authorities may establish for listed waterbodies¹¹. We have no idea what a TDML for the San Juan would be, despite Mr. Reichler’s attempt to conjure up one on the supposition that all sediment that reaches the Lower San Juan is bad, whereas that is directly contrary to the evidence from the United States EPA document¹² to which Mr. Reichler has referred¹³, and likewise directly contrary to the evidence of Professors Thorne and Cowx¹⁴. As to the continued reliance on *Pulp Mills*, my argument was strangely mischaracterized¹⁵, and the basic point remains that, in that case, there was an applicable limit for a given input into the river, and here there is not.

B. The manifest gaps in Nicaragua’s evidence

17. And this leads to my second point, which is that if there had been significant harm, it could and would have been measured by Nicaragua. There would have been evidence equivalent to that submitted by the claimants in the past cases, including *Pulp Mills*, that I referred to in opening¹⁶.

18. Nicaragua offered two forms of response to this yesterday.

¹⁰Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Commentary to Art. 2, para. 4, *YILC*, 2001, Vol. II (2), p. 152.

¹¹CR 2015/16, p. 35, para. 54 (Reichler).

¹²United States Environmental Protection Agency (EPA), “Protocol for Developing Sediment TMDLs”, Oct. 1999, p. 2-1. Available at: <http://www.epa.gov/owow/tmdl/sediment/pdf/sediment.pdf>.

¹³CR 2015/10, p. 19, fn. 45 (Reichler).

¹⁴CR 2015/12, p. 52 (Thorne); *and* CR 2015/12, p. 19 (Cowx).

¹⁵CR 2015/16, pp. 35-36, paras. 55-56 (Reichler); cf. CR 2015/13, pp. 13 and 22-23, paras. 11 and 50 (Wordsworth).

¹⁶See *CR 2015/13*, pp. 12-13, paras. 9-12 (Wordsworth), referring to *Gabčíkovo-Nagymaros*, *Pulp Mills*, and *Kishenganga*.

19. The first was to mischaracterize the point Costa Rica is making. Mr. Reichler would have the Court believe that the purpose of a sampling programme would be to detect whether or in precisely what quantities sediment from the road is entering the river¹⁷. That is not correct. Rather, as Nicaragua is well aware¹⁸, the purpose of sampling would be to identify whether sediment from the road is having any significant or even measurable impact on the existing sediment load and sediment concentration levels in the river and, hence, whether it is causing or risks causing significant harm.

20. The second response was the suggestion that the focus on the importance of actual measurements was a new idea of Costa Rica's counsel, unsupported by the expert evidence¹⁹ and there is no basis for that either.

(a) As to Dr. Kondolf, he confirmed in cross-examination how "procedures developed by the United States Geological Survey" and adopted worldwide establish that "you have to do what is called a depth integrated sample across the channel" and he accepted in unambiguous terms that through this method "you would have a way of getting reliable information in terms of impact on sediment load"²⁰. The Court will recall that I went to that in some detail in opening precisely so it could not be suggested that his expert views were being taken out of context²¹. And indeed they were not.

(b) As to Professor Thorne, yesterday you were referred to part of his 2013 report, paragraph 8.17²². That passage has nothing to do with the question of whether Nicaragua could or should have measured sediment concentrations in the river. As Professor Thorne explained in cross-examination, that part of his 2013 report concerns only the very limited set of

¹⁷CR 2015/16, pp. 27-28, para. 33-35 (Reichler).

¹⁸Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE/DM-AJ/129/03/13, 5 Mar. 2013; CMCR, Ann. 48; Letter from the Agent of Nicaragua to the Registrar of the International Court of Justice, ref. HOL-EMB-108, 14 June 2013; CMCR, Ann. 54; and Letter from the Agent of Nicaragua to the Registrar of the International Court of Justice, ref. HOL-EMB-167, 30 Aug. 2013; CMCR, Ann. 64.

¹⁹CR 2015/16, pp. 28-29, paras. 36-38 (Reichler).

²⁰CR 2015/8, p. 46 (Kondolf and Wordsworth).

²¹CR 2015/13, p. 14, para. 17 (Wordsworth).

²²CR 2015/16, p. 28, para. 36 (Reichler).

measurements available from the mid-1970s and the more recent measurements that Costa Rica has taken on the Colorado River²³. More to the point, Professor Thorne said in his 2015 report:

“Costa Rica is unable unilaterally to measure discharges and sediment loads in the Río San Juan and, notably, Nicaragua’s experts choose not to do so, or indeed to supply any measured discharges or sediment loads to support any of their statements regarding the significance of Road-derived sediment in the context of the sediment load currently carried by the Río San Juan.”²⁴

(c) And as to the utility of a proper sampling exercise, Professor Thorne stated in cross-examination:

“If I were doing this and I had a free hand, the first thing I would do is set up stations just upstream and just downstream of the 17 severely eroding sites identified by Dr. Kondolf and I would expect to be able to see a signal from that sediment that comes in between two stations, if there was indeed any sediment coming in.”²⁵

21. And, far from this focus on sampling data being a recent invention of counsel, from the early stages of this case, Costa Rica has been seeking access to actual data derived from measurements of sediment concentrations in the river²⁶. Nicaragua recognized then the value of sampling, but refused access to Costa Rica²⁷, conditioning a joint measurement programme on Costa Rica’s cessation of works, including mitigation works, on the road. You will find the relevant correspondence at tab 3 of the judges’ folder of 24 April 2015, and you will see from that correspondence that it was not correct to suggest that Costa Rica withdrew its offer of joint measurements once it had received Professor Thorne’s report for its Counter-Memorial, on the basis that measurements were no longer considered necessary. I refer you in particular to Costa Rica’s letter of 27 September 2013²⁸, extracts of which are in your judges’ folder at tab 6.

²³CR 2015/12, p. 32 (Thorne).

²⁴Professor Colin Thorne, *Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River: Reply Report*, Feb. 2015; RCR, App. A, para. 4.48.

²⁵CR 2015/12, p. 33 (Thorne, under cross-examination).

²⁶Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DMAM-063-13, 6 Feb. 2013; CMCR, Ann. 46.

²⁷See Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE/DM-AJ/129/03/13, 5 Mar. 2013; CMCR, Ann. 48; letter from the Agent of Nicaragua to the Registrar of the International Court of Justice, ref. HOL-EMB-108, 14 June 2013; CMCR, Ann. 54; and Letter from the Co-Agent of Costa Rica to the Registrar of the International Court of Justice, ref. ECRPB-63-2013, 27 Sep. 2013; CMCR, Ann. 65.

²⁸Letter from the Co-Agent of Costa Rica to the Registrar of the International Court of Justice, ref. ECRPB-63-2013, 27 Sep. 2013; CMCR, Ann. 65.

22. But, as I said in opening, the details of all this do not matter. The fate of Costa Rica's initial request to carry out sampling on the Río San Juan, which turned into a back and forth on joint sampling, is irrelevant. Nicaragua is sovereign over the river and nothing prevented it from carrying out sampling itself. It was and is for Nicaragua to prove its case on significant harm; if there were significant harm, or risk of significant harm, it could and would have carried out the obvious sampling exercise that Dr. Kondolf confirmed would have yielded "reliable information in terms of impact on sediment load"²⁹. Yet Nicaragua chose not to do so.

23. And it is worth noting that the more we see of Nicaragua's documents, the more it appears that all the relevant material has *not* been put before you. The Court will recall that last week Nicaragua submitted its response to the Ramsar report of April 2011, which was referred to by Mr. Reichler in his closing submissions in the *Certain Activities* case³⁰. As with the April 2011 Ramsar report, this is a document that we ask the Court to give a careful read in due course³¹. It is at tab 7 of your judges' folder and for present purposes I would just ask you to turn to page 7. This is at page 22 of the judges' folder.

24. And what one sees there is a reference to a 2010 study:

"In 2010, a study was made of the current state of the water and sediment quality in the Rio San Juan, in an area where impacts of mining in Las Crucitas are expected to manifest themselves, as part of the establishment of a Baseline on the Rio San Juan in an area which involves three tributaries from Costa Rican territory. The information was generated through: (a) direct observation, (b) laboratory analyses carried out on water and sediment samples, and on benthic organisms collected during an initial sampling campaign (MARENA-CIRA, April 2010) and (c) the in situ measurements of some variables."

Well, where is that study, one asks? The answer continues:

"The laboratory analyses contemplated the detection and quantification of metals, anthropogenic organic compounds, nutrients, cyanides, constituent ions of waters and solids as well as, an analysis of the benthic community in the Rio San Juan and in the mouths of the Infiernito, Caño Crucitas and Caño Venado tributaries."³²

²⁹CR 2015/8, p. 46 (Kondolf and Wordsworth).

³⁰CR 2015/15, pp. 32-32, para. 25 (Reichler).

³¹Annex to *Letter* from Ms Juanita Argeñal Sandoval, Minister of Environment and Natural Resources to Mr. Anada Tiega, Secretary General of the Ramsar Convention on Wetlands, ref. DM.JAS.1359.11.11, 30 Nov. 2011; Ann. 3 to *Letter* from the Agent of Nicaragua to the ICJ, ref. HOL-EMB-078, 24 Apr. 2015; English translation, Ann. 3 to *Letter* from the Agent of Costa Rica to the ICJ, ref. ECRPB-070-2015, 28 Apr. 2015.

³²Annex to *Letter* from Ms Juanita Argeñal Sandoval, Minister of Environment and Natural Resources to Mr. Anada Tiega, Secretary General of the Ramsar Convention on Wetlands, ref. DM.JAS.1359.11.11, 30 Nov. 2011; Ann. 3 to *Letter* from the Agent of Nicaragua to the ICJ, ref. HOL-EMB-078, 24 Apr. 2015; English translation, Ann. 3 to *Letter* from the Agent of Costa Rica to the ICJ, ref. ECRPB-070-2015, 28 Apr. 2015, p. 7.

25. Now, the Court may recall these names, in particular Las Crucitas, as it is the name of the area in which Dr. Kondolf's severely eroding sites 9.4 to 9.6 are located³³. Photographs of Las Crucitas have now been up on your screen on multiple occasions because this is, in effect, the best evidence that Nicaragua seeks to put before you. And what this short extract of Nicaragua's response to the Ramsar report appears to show is not just that Nicaragua recognizes the obvious importance of sampling, but that it has to hand 2010 measurements against which to compare actual impacts — if any — arising from sediment from the road. Yet we have seen nothing of this.

C. No significant harm by deposition in the Lower San Juan

26. Thirdly, I come to the argument that sediment from the road is being deposited in the Lower San Juan, and is having to be dredged by Nicaragua, which is in turn said to represent significant harm. This comes down to presenting a number of figures on sediment that is said to be deposited as if these figures were "measurements"³⁴, when they are in fact estimates based on a number of untested assumptions, and also on a mischaracterization of the evidence of Professor Thorne.

27. To recall, there are two elements to this part of Nicaragua's argument. First, it says that, as part of its current dredging programme, it is having to dredge all the sediment that arrives in the Lower San Juan; and, secondly, it says that part of the sediment that it is having to dredge is sediment coming from the road.

28. On both points, the evidence of Professor Thorne was mischaracterized.

29. Yesterday Mr. Reichler said that Professor Thorne had told the Court during his re-examination that some of the coarse sediment from the road gets trapped upstream of the Lower San Juan. Professor Thorne was portrayed as saying that this was like staying at a "hotel room for sediment", and that in a year or more the sediment would be transported downstream. Hence, Mr. Reichler said, we are in year four of construction of the road, but only now getting the sediment from year three in the Lower San Juan³⁵.

³³Indicated on map annexed to *Letter from Costa Rica to the ICJ*, ref. ECRPB-055-2015, 10 Apr. 2015.

³⁴CR 2015/16, p. 32, para. 49 (Reichler).

³⁵CR 2015/16, pp. 33-34, para. 51 (Reichler).

30. And this was not in any way an accurate portrayal of the evidence of Professor Thorne, and we have put the relevant pages of the transcript — that is pages 40 through to 51, in the judges’ folder at tab 9. We ask the Court to read the entirety of this important passage of the evidence in due course, but I pick it up for now at the top of page 45 — and this is actually 54 at the bottom of the judges’ folder, page 45 at the top — and there you can see Professor Thorne expressing the view that Nicaragua’s current dredging programme, far from being necessary, is in fact having “a highly deleterious effect on the channel”. The questioning continues:

“Mr. REICHLER: But my question is whether there is, to *maintain* the channel that you described before, that is, the object of Nicaragua’s dredging programme, you would agree that that requires repeated dredging just to maintain that channel?

Mr. THORNE: Yes, but there are much better ways of maintaining that channel than repeatedly dredging it, which clearly is not working.

Mr. REICHLER: And the reason it is not working is because the channel keeps filling up with sediment as they dredge it?

Mr. THORNE: Yes! As I stated before, if there is a pool, if you dredge a deep hole in the channel, it will refill very quickly.

Mr. REICHLER: Especially if there is a lot of sediment coming from upstream sources, whatever they may be.

Mr. THORNE: Yes! We have got 11 live volcanoes putting sediment into the river. In my opinion, the road-derived sand has not got there yet.

Mr. REICHLER: I had a feeling you would sneak that in at one point, so *touché!*”³⁶

31. Now it does not do Professor Thorne justice to say he was sneaking anything in, but the point for present purposes is that far from this being a new point made in re-examination, as suggested by Mr. Reichler yesterday³⁷, this was a view expressed by Professor Thorne in cross-examination that Mr. Reichler had been anticipating. Moreover, Professor Thorne’s view was evidently not that the sediment from the road was just being delayed by a year. His evidence is quite clear: “In my opinion, the road-derived sand has not got there yet.”³⁸

32. And if I can ask the Court to note in due course the further evidence given by Professor Thorne starting from half way down page 49, over the page to page 50, you will see that

³⁶CR 2015/12, p. 45 (Thorne and Reichler).

³⁷CR 2015/16, p. 33, para. 51 (Reichler).

³⁸CR 2015/12, p. 45 (Thorne).

there, you find the reference to hotel rooms that Mr. Reichler picked up upon — and you will also see that it was in no sense Professor Thorne’s evidence that sediment from the road is just being delayed along the way by a year or so³⁹.

33. In addition, the Court may recall that I said in opening that there is no empirical support for the claim that coarse sediment from the road is reaching the delta area in measurable quantities⁴⁰. And notably, there was no come back on that yesterday.

34. As to the table of figures that Mr. Reichler put before you, tab 34 of yesterday’s folder, we have now put those back up on the screen, and at tab 10 of today’s folder, and there are four points.

35. First, column 2 purports to give the view of Professor Thorne. If his actual view were given, the amount for “total that must be dredged” would evidently be zero. There would also be a zero in the above row so far as concerns coarse sediment accumulating in the Lower San Juan⁴¹, while Professor Thorne did not give a figure for settlement of fine sediment.

36. Secondly, as to the contention underpinning the table that 20 per cent of the sediment from the Río San Juan enters the Lower San Juan, there should be a large asterisk saying that this is on the basis of a model prepared by Costa Rica, which has large stated uncertainties, whilst the correct position could be known, or is known, *solely* by Nicaragua⁴².

37. Thirdly, as to Dr. Kondolf’s estimates, the final total should be 7,600 tons per year, which is from 1.5 to 2.9 per cent of what Nicaragua has in fact been dredging over the past three years⁴³. Not significant, even as a proportion of what is being dredged; and much less significant harm or risk thereof.

38. Now, this figure was boosted up to 22,000 tons by the contention that Nicaragua must dredge the fine sediment. As to this, Professor Thorne and Dr. Andrews disagree as to what precisely happens to the fine sediment and how much goes out to sea, but the more immediate point is that there is no evidence whatsoever that Nicaragua is dredging *any* fine sediment from the

³⁹CR 2015/12, pp. 49-50 (Thorne and Wordsworth).

⁴⁰CR 2015/13, pp. 19-20, para. 37 (Wordsworth).

⁴¹CR 2015/12, p. 45 (Thorne).

⁴²See, e.g., CR 2015/12, p. 48 (Thorne); see also CR 2015/9, p. 28 (Andrews and Wordsworth).

⁴³CR 2015/13, p. 22, para. 48 (Wordsworth).

Lower San Juan. It has not been dredging the fine sediment in the delta region because it does not settle there — and Mr. Reichler has evidently pulled back from that contention⁴⁴. And it does not dredge the fine sediment at some other location because in fact, since 2011, it has not dredged anywhere else⁴⁵, and nor is there any evidence before you that Nicaragua is about to start dredging elsewhere.

39. Mr. Reichler put a map before you illustrating eight priority areas — and that was at tab 35 of yesterday’s folder — but all we know is that nothing has been happening in any so-called “priority areas” other than the delta, while their identification⁴⁶ apparently pre-dates construction of the road⁴⁶. So quite what they have to do with the road, and with Nicaragua’s current plans remains entirely obscure.

40. In short, the table put up by Mr. Reichler should not be allowed to confuse the basic point that Nicaragua has only been dredging one form of sediment — that is coarse sediment — in one location — that is the delta area. There is no support at all for this 22,000 tons figure that you see on the table.

41. And as to the coarse sediment, in his report of February 2015, Professor Thorne noted as follows: “even using Dr. Kondolf’s estimates and Dr. Andrew’s analysis, which I do not accept, the input of coarse sediment from the Road constitutes only 2% to 4% of the coarse sediment load expected to enter the lower Río San Juan in an average year”⁴⁷. He then explained, by reference to the uncertainties associated with bed load measurements and calculations:

“it is clear that a difference of 2% to 4% in the annual bedload would *not only be insignificant but scientifically undetectable*, ruling out even the possibility of

⁴⁴CR 2015/16, pp. 32-33, paras. 49-50 (Reichler); cf. CR 2015/10, pp. 11-12, paras 7-11, and pp. 13-14, paras. 14-15 (Reichler) and the criticism of Mr. Reichler’s approach at CR 2015/13, pp. 19-22, para. 37-46 (Wordsworth).

⁴⁵Dredging Project Technical Evaluation Analysis: Improvement of Navigation in the San Juan de Nicaragua River (EPN 2011 Annual Report), 23 Jan. 2012; CMN, Ann. 17, pp. 5-6; Project 262-09: Improvement of Navigation in the San Juan de Nicaragua River: Physical-Financial Progress Report Corresponding to 2014 (EPN 2014 Annual Report), 2015, Ann. 1 to Letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015, pp. 10, 20, 36-41. See also *Certain Activities*, Written Statement of Professor Cornelis van Rhee, 15 Mar. 2015, para. 9; and CR 2015/6, p. 26 (van Rhee).

⁴⁶Dredging Project Technical Evaluation Analysis: Improvement of Navigation in the San Juan de Nicaragua River (EPN 2011 Annual Report), 23 Jan. 2012; CMN, Ann. 17, p. 5-6; Project 262-09: Improvement of Navigation in the San Juan de Nicaragua River: Physical-Financial Progress Report Corresponding to 2014 (EPN 2014 Annual Report), 2015, Ann. 1 to Letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 Mar. 2015, pp. 9-10.

⁴⁷Professor Colin Thorne, *Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River: Reply Report*, Feb. 2015; RCR, App. A, para. 4.98.

demonstrating any causal relationship between construction of the Road and any change in the quantity of coarse bedload entering the lower Rio San Juan”⁴⁸.

42. Nicaragua might now wish to increase these percentages by reference to its opportunistic reliance on the updated ICE model of Costa Rica, when Nicaragua alone knows or can know the actual percentage of coarse sediment that goes into the Lower San Juan, but the basic point remains that Nicaragua has not shown that any coarse sediment from the road reaching the Lower San Juan is either significant or even scientifically detectable.

D. Estimate of sediment coming from the road

43. Finally, in response to Mr. Reichler, I come to the question of which expert’s estimate of the amount of sediment coming from the road should be accepted. And we submit that Professor Thorne’s evidence is to be preferred. And there are four points as to this.

44. First, unlike Nicaragua’s experts⁴⁹, Professor Thorne has visited the road not once but five times⁵⁰.

45. Secondly, Professor Thorne was throughout a credible and reliable witness, who evidently did not seek to take positions that were convenient to Costa Rica’s legal position. Nicaragua cannot just pick and choose as it sees fit ~~with~~ the evidence of Professor Thorne.

46. Thirdly, Professor Thorne’s estimate of 75,000 tons/year is a worst-case estimate which he emphasizes is very conservative, including because it takes no account of the ongoing mitigation works⁵¹.

47. Fourthly, Mr. Reichler has come up with a number of reasons why Dr. Kondolf’s estimate is said to be preferable. Not one of these points was put to Professor Thorne in cross-examination, even though Mr. Reichler had ample cross-examination time remaining to him when he stopped his questioning. Instead, he elected to make points on Professor Thorne’s estimate only when Professor Thorne was not in a position to answer.

⁴⁸Professor Colin Thorne, *Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River: Reply Report*, Feb. 2015; RCR, App. A, para. 4.99; emphasis added.

⁴⁹See CR 2015/8, p. 40 (Kondolf and Wordsworth).

⁵⁰Professor Colin Thorne, *Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River: Reply Report*, Feb. 2015; RCR, App. A, para. 3.3 (c); Professor Colin Thorne, *Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River*, Dec. 2013; CMCRC, App. A, para. 3.3 (c).

⁵¹Road case, Professor Colin Thorne, Written Statement, Mar. 2015, para. 3.14.

48. As to those points, the first and most important was that Professor Thorne's estimate only covered the roadbed and slopes, and did not include additional disturbed areas⁵². As I explained in opening, these additional 2.2 sq km are flat areas where there has been some disturbance, including because materials were stored there or undergrowth was cleared for access and other necessities of construction⁵³. These are not areas which are somehow continuously contributing sediment to the San Juan River, as Nicaragua would have you believe.

49. Mr. Reichler's second point is that Professor Thorne's estimate did not include erosion from 332 km of "access roads", which were assumed by Nicaragua's expert to be 30 m wide, on average⁵⁴. Some of these roads are up to 50 km away from the river⁵⁵, and no attempt was made by Mr. Reichler, or by Nicaragua's experts, to establish how or to what (if any) extent such roads are somehow contributing sediment to the river. Professor Thorne has driven along some of these access roads and he concluded:

"Bearing in mind the stable condition of the access roads, their remoteness from the River and the scarcity of streams linking them to the River, in my opinion it is highly unlikely that sediment from these access roads reaches the Rio San Juan in any appreciable quantities."⁵⁶

And, yet, Nicaragua's expert is telling you that they reach the San Juan in thousands of tons.

50. Professor Thorne also included in his report some views of these roads — on your screen now — and I suppose one's reaction is "more photos"; but I guess at least the Court has not seen these. To meet the obvious retort that these are, at best, evidence of the hire car selected by Professor Thorne, he does at least say that these are typical views of access roads travelled on a given day. And, from the other side of course, we have nothing; pure assertion that these access roads are 30 m wide and the like⁵⁷.

⁵²CR 2015/16, p. 31, para. 43 (Reichler).

⁵³CR 2015/13, p. 19, para. 35 (Wordsworth).

⁵⁴CR 2015/16, p. 31, para. 44 (Reichler).

⁵⁵CR 2015/13, p. 19, para. 26 (Wordsworth).

⁵⁶Professor Colin Thorne, *Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River: Reply Report*, Feb. 2015; RCR, App. A, para. 7.32.

⁵⁷Professor Colin Thorne, *Assessment of the Impact of the Construction of the Border Road in Costa Rica on the San Juan River: Reply Report*, Feb. 2015; RCR, App. A, fig. 7.10, p. 290.

51. Mr. Reichler's third point is that Professor Thorne's estimate of road surface erosion was "arbitrarily reduced" from 2013 to 2014⁵⁸. That is not correct for the reasons explained in Costa Rica's response to Nicaragua's request for information in March this year⁵⁹.

52. Mr. Reichler's final point is that Professor Thorne applied reduced erosion rates in his 2014 report, when compared to those applied in 2013⁶⁰. As was explained in the reports submitted with Costa Rica's Rejoinder, that is simply because, in 2014, more advanced technology was used to make more accurate measurements of erosion⁶¹.

E. Evidence relating to aquatic ecology

53. I move briefly onto the evidence, such as it is, relating to aquatic ecology. Yesterday Mr. Loewenstein made clear that Nicaragua had abandoned its case on significant harm, and that its only case on aquatic ecology is an EIA case, based on risk⁶².

(1) Alleged risk of significant harm to macroinvertebrates and water quality

54. As to the alleged risk to macroinvertebrates and water quality in the San Juan, there are three short points.

55. First, the only evidence on which Nicaragua relies is the CCT's study, carried out by Costa Rican experts, on small Costa Rican streams. The much-criticized study of Nicaragua's expert, Dr. Ríos, got a passing mention in Nicaragua's first round but not even a footnote in its second round.

56. Mr. Loewenstein does not agree with the conclusions of CCT as to what their data shows⁶³. However, he did not put his assertions about that data to Professor Cowx. Indeed, the Court will recall that Nicaragua was keen to get Professor Cowx off the witness stand as soon as possible, asking him only entirely general questions, and using nothing like its allotted time.

⁵⁸CR 2015/16, p. 31, para. 45 (Reichler).

⁵⁹See *Letter from Costa Rica to the ICJ*, ref. ECRPB-036-2015, 16 Mar. 2015, pp. 2-3.

⁶⁰CR 2015/16, p. 32, para. 46 (Reichler).

⁶¹University of Costa Rica Centre for Research in Sustainable Development, Department of Civil Engineering, *Second Report on Systematic Field monitoring of Erosion and Sediment Yield along Route 1856*, Nov. 2014; RCR, Ann. 1, Sec. 2.2.

⁶²CR 2015/16, p. 37, heading "The risk to the San Juan River's ecological resources" (Loewenstein).

⁶³CR 2015/10, p. 28, para. 13 and p. 25, para. 3 (Loewenstein); pp. 37-39, paras. 3-8 (Loewenstein).

57. Secondly, yesterday we heard further unevidenced assertions, including that upstream of Marker II, the river “is a different habitat”⁶⁴; that deltas “bury habitats in the San Juan with sediment” and then, when they erode, they “sweep along the bank, impacting the aquatic organisms and their habitats”⁶⁵. That is the picture as Nicaragua’s counsel would like to portray it, but it is not what the evidence before you shows.

58. Thirdly, the CCT study does not tell one what any impacts of sediment might be in the far larger, far wider Río San Juan and this was accepted to a large degree by Dr. Kondolf⁶⁶. The simple point is that any impacts on small streams in Costa Rica, most of which are about 3 m wide, do not equate to likely impacts in the river which is, on average, 292 m wide in the relevant part of the river⁶⁷.

59. Nevertheless, yesterday Mr. Loewenstein said CCT’s conclusions as the localized character of any impacts were “disproven by photographic evidence” and showed you a photograph of a slope and some deltas, saying that “plumes of sediment [have swept] the bank of the river”, a habitat for macroinvertebrates⁶⁸. Counsel’s testimony in this regard is, again, not supported by any evidence, and none of these colourful contentions were put to Professor Cowx last week.

(2) Alleged risk of significant harm to fish

60. In so far as risk to fish is concerned — impacts to fish, risk of impacts to fish — yesterday Nicaragua pointed to the absence of studies of fish in the San Juan and said that this showed that an “EIA is necessary”. It was said that Nicaragua “will co-operate in every way

⁶⁴CR 2015/16, p. 39, para. 10 (Loewenstein).

⁶⁵*Ibid.*, para. 9 (Loewenstein).

⁶⁶CR 2015/9, p. 64 (Kondolf). See also Centro Científico Tropical (CCT) *Follow-up and Monitoring Study Route 1856 Project- EDA Ecological Component*, Jan. 2015; RCR, Ann. 14, p. 519, para. 11.

⁶⁷CR 2015/11, p. 16, para. 8 (Brenes).

⁶⁸CR 2015/16, p. 38, para. 7 (Loewenstein), referring to Nicaragua’s judges’ folders, tab 38.

possible”⁶⁹, and all was as if Nicaragua had never positively refused access to CCT’s scientists when they tried to carry out sampling on the San Juan River⁷⁰.

61. And as to the obvious point that if fish in the river are not impacted by a 70 per cent increase in the suspended sediment load when the San Carlos flows into the San Juan, if, then, there is no risk of harm from an increase, and taking Nicaragua’s case at its highest, 3 per cent sediment comes into the river from the road, Mr. Loewenstein’s only answer was to suggest that fish on the San Juan upstream of the San Carlos could be more sensitive to sediment⁷¹. That may be a theoretical possibility. But of course there is no evidence of that, because Nicaragua says it has not studied the fish in this part of the river, and it has not permitted Costa Rica to do so.

62. It was also said that Nicaragua had not been able to devote resources to study the San Juan’s flora and fauna⁷². Well, that is not credible. It has put together a more than ample legal and expert team in these proceedings. Of course its experts, internal or external, could have been out doing sampling exercises in the field.

F. Conclusion

63. Mr. President, Members of the Court, that has been rather a long haul, and I will not try your patience with anything other than one short conclusion.

64. It was Nicaragua’s choice to bring this claim, and it is Nicaragua’s burden to make good its claims of significant harm and risk of such harm. It has had ample time in which to do so and, unlike Costa Rica, has unimpeded access to the San Juan to obtain all the sampling and other evidence it would need to make out its case. And yet Nicaragua has failed to put such evidence before you, the obvious inference being that it well knows that the quantity of sediment reaching the river, with its already high sediment load, is precisely insignificant, and indeed indiscernible. Nicaragua has failed to discharge the burden upon it.

⁶⁹CR 2015/15, p. 42, para. 17 (Loewenstein).

⁷⁰Centro Científico Tropical (CCT) *Environmental Diagnostic Assessment EDA*, *Route 1856 Project — Ecological Component*, Nov. 2013; CMC, Ann. 10, p. 513 (last paragraph) and p. 519, para. 2.7; and Centro Científico Tropical (CCT) *Follow-up and Monitoring Study Route 1856 Project — EDA Ecological Component*, Jan. 2015; RCR, Ann. 14, p. 456, para. 2.6. See also Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE/DM-AJ/129/03/13, 5 March 2013; CMC, Ann. 48, p. 229 (rejecting Costa Rican navigation on the San Juan River “for scientific purposes”).

⁷¹CR 2015/16, p. 39, para. 10 (Loewenstein).

⁷²*Ibid.*, p. 41, para. 16 (Loewenstein).

65. Mr. President, Members of the Court, that concludes my remarks. I thank you for your attention throughout these three weeks, and ask you, Mr. President, to call Dr. Del Mar to the podium to make some brief remarks on mitigation works.

Le PRESIDENT : Merci, Monsieur Wordsworth. Je donne maintenant la parole à Mme Del Mar.

Ms DEL MAR:

COSTA RICA'S MITIGATION MEASURES

A. Introduction

1. Mr. President, Members of the Court, I am again addressing Costa Rica's mitigation works. As was made clear during the first round⁷³, mitigation works are not relevant to the central issues in this case. However, Nicaragua's insistence on mitigation works prompts me to respond to a number of points raised by counsel.

2. A preliminary point to note is Nicaragua's contradictory position as to what it does and does not want in terms of mitigation. In 2013, Nicaragua insisted that Costa Rica carry out mitigation works on the road⁷⁴. Now it finds the temporary nature of mitigation works troubling⁷⁵. And yet it does not want Costa Rica to put in place a permanent solution for all remaining issues on the road⁷⁶.

3. I will address the permanent solution for the road, before returning to the ongoing mitigation works.

B. Permanent solution

4. In terms of a permanent solution, Mr. Reichler suggested yesterday that this was imminent. He said: "Dr. Del Mar assures us that new construction will commence *right after* CONAVI receives and approves the design plans. What this means, Mr. President, is that

⁷³CR 2015/11, p. 29, para. 1 (Del Mar); CR 2015/12, pp. 46-48 (Wordsworth and Thorne).

⁷⁴CR 2013/30, p. 25, para. 14 (Reichler); p. 29, para. 2 (Pellet).

⁷⁵CR 2015/16, p. 18, para. 7 (Reichler).

⁷⁶*Ibid.*, p. 21, para. 15 (Reichler).

Costa Rica is planning imminently to embark on new construction.”⁷⁷ That is not correct. I did not say this, nor did I suggest that work on the permanent solution would be carried out imminently. I said: “Once CONAVI receives the new designs, a new tendering process will be initiated for the construction of the road.”⁷⁸ I also said that the process had been delayed because a series of steps had first to be followed, including a system of appeals⁷⁹. After those steps are completed, and after the new designs are received, a new tendering process will be initiated. New works will not be commencing any time soon.

5. Mr. Reichler also tried to paint a picture of doom and gloom about the permanent solution. He said that it would “necessitate the bulldozing of massive amounts of earth”, that Costa Rica “is planning to demolish all of the unstable cut and fill slopes”, and that it “risks bringing many thousands of tons of sediment into the river”⁸⁰. This is scaremongering, pure and simple. It is not based on any concrete fact or evidence. Indeed, it couldn’t be. The new designs for the road have not yet been received by Costa Rica, much less implemented. The very purpose of these new designs for the road is to ensure that new works are carried out to the highest environmental and engineering standards.

C. Mitigation works — slopes

6. I turn now to the mitigation works themselves. As I said during the first round, these are ongoing⁸¹. This was confirmed by Professor Thorne last week, who said that “there was a huge effort being made in the latter third of 2014, continuing into early 2015”⁸². Mitigation works have continued at the fastest pace possible⁸³. This is despite matters outside the control of those carrying out the works delaying the implementation of some measures. For example, as Professor Thorne noted, it is difficult to carry out mitigation work during the wet season⁸⁴.

⁷⁷CR 2015/16, p. 21, para. 15 (Reichler); emphasis added.

⁷⁸CR 2015/11, p. 31, para. 6 (Del Mar).

⁷⁹CR 2015/11, p. 31, para 6 (Del Mar).

⁸⁰CR 2015/16, p. 21, para. 15 (Reichler).

⁸¹CR 2015/11, p. 37, para. 22 (Del Mar).

⁸²CR 2015/12, p. 25 (Thorne).

⁸³*Ibid.*, p. 26 (Thorne).

⁸⁴CR 2015/11, p. 26 (Thorne).

7. The success of Costa Rica's mitigation works cannot be measured by numbers listed on a table. Nicaragua's insistence on figures in charts in order to determine whether mitigation works have been successfully carried out misses the point⁸⁵, as I will demonstrate shortly.

8. You will recall that Mr. Reichler placed particular emphasis on slopes yesterday⁸⁶, emphasizing the number of sites where mitigation works were not yet complete⁸⁷. But what amounts to "complete" in terms of mitigation is not the same as to whether mitigation works have been successfully carried out at a particular site. Mitigation may be very successful at a particular site, but because — for example — vegetation has not completely covered a hillside, it is deemed to be ongoing, rather than "complete". And given the time it takes for revegetation of some areas, it is unsurprising that many sites are not yet considered complete.

9. I should make clear that mitigation work does not always involve human intervention. It can amount to the monitoring of a site whilst letting nature take its course. Dr. Mende's report documents the natural regrowth of vegetation at some sites as the only mitigation taking place there. There is nothing wrong with this. Human intervention is not required at all sites, as I will show you with respect to slopes. To do so, I am afraid I will have to unleash some more photographs on the Court.

10. On your screens is a photograph taken in October 2012, showing a location corresponding to Dr. Kondolf's so-called Severely Eroding Area number 3. You can see a small slope on the far right, a larger slope roughly in the middle, and a quarry site to the left. I will address each of these locations in turn, beginning with the small slope on the far right.

11. Now on your screen are "before" and "after" photographs of that same small slope taken in 2013 — on the left of your screens — and 2014 on the right. As you can see, the slope has remained stable. These two photographs show a year's worth of revegetation, which has grown up at the foot of and on some of the slope. The orange colour of the soil on the slope can still be seen but the slope has not failed: it is stable and *re*vegetation is ongoing.

⁸⁵CR 2015/16, p.17, para. 4 (Reichler).

⁸⁶*Ibid.*, pp. 17-18, paras. 5-6 (Reichler).

⁸⁷*Ibid.*, para. 5 (Reichler).

12. Let us look now at the larger of the slopes, located towards the middle of the 2012 photograph I showed you earlier. In this 2012 photograph, a lot of exposed earth on the slope can be seen. The road looks recently constructed. On your screens now is a photograph taken by Nicaragua of the same site in March of this year. As you can see, over a two-and-a-half-year period the exposed soil in the previous 2012 photograph has been almost entirely covered with grass and vegetation. The land between the road and the river is very green. Natural mitigation on this slope is not complete. But that does not mean mitigation has not been successful.

13. I shall now show you the quarry, which is on the left-hand side of the 2012 photograph. You can see large amounts of exposed rock and soil. The recently constructed road runs along its base. Now on your screens is a photograph of the same location taken by Nicaragua in March of this year. The exposed rock and soil is almost entirely covered with grass and vegetation. Again, mitigation at this site is not complete. But, again, this has no bearing on how successful natural mitigation at this site has been.

14. There are many other slopes which have been monitored by Costa Rica and successfully mitigated by nature alone. Some of these are now on your screens. They are shown in “before” and “after” photographs. They are also in your judges’ folder. You can see how over a relatively short period of time, slopes along the road have recovered. Every one of the slopes now on your screens is classified as “mitigation in progress” in the 2014 Mende report. As you can see, natural mitigation has been successful.

D. Mitigation works — water crossings

15. I will now say a brief word about water crossings, as this was another point of focus of counsel for Nicaragua. The Court will recall that during the first round, Mr. Reichler showed the Court a drawing from Dr. Weaver’s report, which is now on your screens⁸⁸. This, we were told in no uncertain terms, “is how it is supposed to be done”⁸⁹. With great respect, it is not. This drawing has three important features missing, namely: (1) a headwall to hold the fill material in place directly surrounding the outlet of the culvert; (2) wingwalls, to stop fill material and soil eroding

⁸⁸Nicaragua’s judges’ folder, 20 Apr. 2015, tab 3, page 1.

⁸⁹CR 2015/8, p. 25, para. 26 (Reichler).

into the path of the water stream; and (3) a bottom plate. These features are necessary in order to protect the fill and nearby soil from entering the water stream. They are required in order to prevent erosion.

16. Culverts installed by Costa Rica include these features. Two sets of “before” and “after” photographs of water crossings are on your screens. The headwalls, the wingwalls and the bottom plates in the photographs from 2014 can clearly be seen.

E. Conclusion

17. Mr. President, the Court has been supplied with photographs of mitigation works from both Parties. Costa Rica documented mitigation works on the road in photographs contained in the larger A3 size judges’ folder last week. The Court also has a video of the full length of the road filmed in February. Any problematic parts of the road can thus be viewed in their full context, as well as the many mitigation measures in place along the road.

18. One final word about photographs. Yesterday, Mr. Reichler complained that I had made “unfounded and unfair accusation[s]” during the first round about photographs counsel for Nicaragua projected on screens during the hearing, which I said might risk misleading the Court. They are on your screen again, together with the source information provided by Nicaragua in the larger font size. The photographs were taken in October 2012. I leave it to the Court to decide whether these photographs were correctly presented.

19. Mr. President, Members of the Court, that concludes my brief presentation. I thank you for your kind attention. Mr. President, I ask that you give the floor to Mr. Brenes to answer Judge Bhandari’s questions.

Le PRESIDENT : Merci, Madame Del Mar. Je donne la parole à M. Brenes.

Mr. BRENES:

RESPONSE TO JUDGE BHANDARI’S QUESTIONS: THE APPLICABLE STANDARD FOR NICARAGUA’S CLAIMS IN THIS CASE

1. Mr. President, Members of the Court, on Friday, 24 April 2015, Judge Bhandari referred to environmental standards in the context of the construction of the road, and in particular, made

reference to Principle 23 of the Stockholm Declaration, Principle 11 of the Rio Declaration, and paragraphs 12, 13 and 17 of the ILC's Commentaries to Article 3 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. The first question raised by Judge Bhandari was the following:

“1. How, if at all, should the authorities I have just mentioned be applied by the Court in assessing whether Costa Rica exercised sufficient care in constructing the Road?”⁹⁰

2. The authorities mentioned by Judge Bhandari are useful instruments that might be applied in certain cases where the particular circumstances allow it. Costa Rica understands the question as being directed to the evaluation of the care it exercised in constructing the road in order to avoid causing significant transboundary harm. As Nicaragua noted in its response to this question on Wednesday, the standard that should be applied to Nicaragua's claim of transboundary environmental harm in the present case is one of significant harm⁹¹. For that claim, Nicaragua bears the burden of proof. As Costa Rica has explained throughout these proceedings, including what you just heard from Mr. Wordsworth, there is no evidence of significant harm, or of risk thereof, and therefore Nicaragua's claim based on significant harm must fail.

3. Judge Bhandari's second question was the following:

“2. 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?”⁹²

4. Because Nicaragua's case is based on violation of the obligation not to cause significant harm, the standard of construction of the road per se is not an issue in the present case, although it is a matter that Nicaragua has nevertheless repeatedly attempted to focus on⁹³. Whether the road was initially constructed to particular engineering standards, including those applicable in other countries, or even in Costa Rica⁹⁴, is beside the point: the only question is whether the road is

⁹⁰CR 2015/13, p. 55 (Judge Bhandari).

⁹¹CR 2015/15, p. 45, para. 27 (McCaffrey).

⁹²CR 2015/13, p. 55 (Judge Bhandari).

⁹³See, e.g., RN, paras. 3.2-3.15.

⁹⁴Cf. CR 2015/16, pp. 21-22, para. 14 (Reichler).

causing significant harm to the environment of the San Juan River. Construction standards could only play a role if Nicaragua had a basis for bringing them into play. It does not.

5. Judge Bhandari's third question was as follows:

“3. What exactly is the standard of care that should be applied to Costa Rica in this case? For instance, is it one of recklessness? Negligence? Due diligence? Strict liability? Or something else?”⁹⁵

6. Costa Rica considers that the relevant applicable standard in this case is significant harm. Nicaragua has also acknowledged this⁹⁶. With respect to the threshold for the imposition of an obligation to conduct an EIA in advance of a project, as the Court noted in *Pulp Mills*, a standard of due diligence may be relevant⁹⁷. Of course, there the Court was applying a bilateral treaty régime containing detailed environmental provisions, institutions and procedures, and there is no equivalent treaty régime applicable in the present case. For the purposes of this case, Professor Craik applied the standard of due diligence in his analysis of the international obligations concerning an EIA, which led him to conclude that Costa Rica did not breach its obligations in this regard⁹⁸. In any event, the obligation of due diligence is predicated on there being a risk of significant harm, which is not the case here.

7. Costa Rica nevertheless complied with any obligation of due diligence when it contacted Nicaragua to discuss its concerns about the construction of the road, including by requesting that Nicaragua present the relevant studies and information to substantiate any claim of harm to the San Juan River⁹⁹. Nicaragua, however, did not cooperate, nor did it allow measurements to be taken by Costa Rica on the San Juan River, in spite of Costa Rica's repeated requests¹⁰⁰.

⁹⁵CR 2015/13, p. 56 (Judge Bhandari).

⁹⁶CR 2015/15, p. 45, para. 27 (McCaffrey).

⁹⁷*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports 2010 (I), p. 83, para. 205.

⁹⁸RCR, Ann. 1, Professor Neil Craik, “The Requirement to Perform a Prior Environmental Impact Assessment”, Jan. 2015, paras. 3.3-4.8.

⁹⁹CMCR, p. 10, paras 1.17-1.23. See also, CMCR, Ann. 39, letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM- AM-601-11, 29 Nov. 2011, p. 179; see also, CMCR, Ann. 41, letter from the Vice-Minister for Foreign Affairs of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DVM-AM-286-11, 20 Dec. 2011, p. 189; CMCR, Ann. 42, letter from the Vice-Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-045-12, 26 Jan. 2012, p. 197.

¹⁰⁰See, e.g., CMCR, Ann. 46, letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-063-13, 6 Feb. 2013. See also RCR, pp. 23-24, paras. 2.28-2.33, and p. 94, para. 3.29.

8. Mr. President, distinguished Members of the Court, I thank you for your kind attention throughout these proceedings. I kindly request that you call upon Professor Kohen.

Le PRESIDENT : Merci, Monsieur Brenes. Je donne maintenant la parole au professeur Kohen.

M. KOHEN :

L'ABSENCE DE VIOLATION DE LA SOUVERAINETÉ TERRITORIALE DU NICARAGUA ET DE L'OBLIGATION D'EFFECTUER ET NOTIFIER UNE ÉTUDE D'IMPACT ENVIRONNEMENTAL

1. Monsieur le président, Mesdames et Messieurs les juges, il m'appartient d'aborder aujourd'hui, dans cette journée des travailleurs, la question relative à la prétendue violation de la souveraineté et intégrité territoriales du Nicaragua du fait de la construction de la route. Je répondrai également aux allégations relatives à la violation de l'obligation de conduire et de notifier une EIE.

2. Permettez-moi tout d'abord une référence rapide aux citations par l'ambassadeur Argüello d'un prétendu «arrêt» que la Cour centraméricaine de justice aurait rendu contre le Costa Rica. Dans notre contre-mémoire, nous avons expliqué que le Costa Rica n'est pas partie au statut de cette Cour, le Parlement costa-ricien s'étant prononcé contre sa ratification en 1995. Par conséquent, la Cour centraméricaine n'a aucune compétence à l'égard du Costa Rica¹⁰¹. Le Nicaragua connaît cette situation et n'a pas daigné s'y référer. Au contraire, il persiste de manière regrettable à vouloir instrumentaliser ce prétendu «arrêt», que ce soit dans sa réplique ou encore lors de sa plaidoirie d'hier. Cela ne contribue certainement pas au développement du système judiciaire régional.

3. Par souci de clarté, j'attire votre attention sur le fait que cette Cour centraméricaine de justice n'est pas du tout le même organe que la Cour de justice centraméricaine, qui a rendu l'arrêt de 1916 condamnant le Nicaragua pour avoir conclu un accord de canalisation sans consulter le Costa Rica, et celui de 1917, dans une affaire introduite par El Salvador, que vous avez utilisé dans

¹⁰¹ CMCR, par. 3.67-3.75.

l'affaire *El Salvador/Honduras ; Nicaragua (intervenant)*¹⁰². La Cour de justice centraméricaine a été la doyenne des cours internationales, mais a malheureusement dû cesser ses activités du fait de la réaction nicaraguayenne face aux deux décisions négatives à son égard que je viens de mentionner.

A. La prétendue «invasion par sédimentation»

4. Laissons l'histoire de côté, Monsieur le président, et venons-en à ce qu'Alain Pellet a qualifié comme étant «la mère de toutes les violations» découlant de la construction de la route 1856 : la prétendue violation de la souveraineté et intégrité territoriales du Nicaragua et du traité de 1858¹⁰³. Il est somme toute assez curieux que, malgré son statut de «mère de toutes les violations», pas une phrase n'a été prononcée durant le premier tour pour la fonder devant vous. C'est une stratégie récurrente du Nicaragua, tant dans cette affaire que dans l'autre qui a été jointe, de ne plaider certaines questions importantes qu'au second tour, stratégie qui n'est certainement pas passée inaperçue.

5. De notre côté, nous suivons scrupuleusement, tant dans cette affaire que dans celle des *Activités du Nicaragua*, vos instructions, Monsieur le président. Dans les deux affaires, de nombreuses affirmations du second tour de la Partie adverse trouvent déjà une réponse dans nos exposés du premier tour. Ainsi, pas besoin de s'y référer, ni même de les mentionner.

6. Je croyais, Monsieur le président, que nos amis nicaraguayens avaient abandonné l'idée d'une invasion du territoire du Nicaragua et d'une atteinte à sa souveraineté ... par voie de sédimentation¹⁰⁴. Cette idée quelque peu biscornue apparaissait dans le mémoire¹⁰⁵, mais avait disparu de la réplique¹⁰⁶. Pourtant, je me suis trompé. Hier, mes amis les professeurs McCaffrey et Pellet sont revenus à la charge¹⁰⁷. A en croire mes deux collègues, cette invasion n'a besoin ni de

¹⁰² *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant))*, arrêt, C.I.J. Recueil 1992, p. 589-600, par. 387-401.

¹⁰³ CR 2015/16, p. 54, par. 10 (Pellet).

¹⁰⁴ CR 2015/11, p. 41, par. 10 (Kohen).

¹⁰⁵ MN, par. 4.13.

¹⁰⁶ Voir MN, par. 5.4.

¹⁰⁷ CR 2015/16, p. 43, par. 5 (McCaffrey) ; p. 55-56, par. 11-12 (Pellet).

chars ni de soldats¹⁰⁸. Selon eux, le Costa Rica utiliserait des moyens beaucoup plus subtils. Il s'agirait de la construction d'une route, sur son territoire, qui produirait des sédiments, lesquels, ne pouvant être charriés par le fleuve, produiraient à leur tour des deltas le long de sa rive, faisant gagner ainsi des mètres carrés ou plutôt des mètres cubes au fleuve et étendant de la sorte la souveraineté territoriale costa-ricienne.

7. Vous vous souvenez bien sûr de la manière dont le Nicaragua s'insurgea, il y a quelques jours à peine, nous accusant d'exagérer lorsque nous parlions d'«invasion» pour qualifier la présence des forces armées nicaraguayennes en territoire costa-ricien¹⁰⁹. A chacun sa manière de mesurer l'exagération.

8. Tant M. McCaffrey que M. Pellet vous ont parlé d'une sorte de conquête territoriale costa-ricienne par voie de sédimentation. Le premier vous disait que «Costa Rica is claiming that it can acquire Nicaraguan territory by causing Costa Rican soil to be deposited across the border into Nicaragua»¹¹⁰. Il s'est adonné à des comparaisons qui ne correspondent pas du tout à la situation à l'examen. Monsieur le président, nous sommes aux Pays-Bas et cela a peut-être inspiré nos distingués collègues, mais je tiens à les rassurer : le Costa Rica n'entreprend aucune activité de poldérisation du San Juan ! Plus simplement même, le Costa Rica n'a rien déposé ni rien déversé en territoire nicaraguayen. Pour Stephen McCaffrey¹¹¹, si le Costa Rica savait que du sédiment allait finir dans les eaux du San Juan, alors le lien de causalité existe, tout comme l'intention, et la «conquête sédimentaire» serait ainsi prouvée. Nous avons déjà réfuté tout cela lors du premier tour¹¹².

9. Je crois sincèrement que mon collègue va très vite en besogne et ce, pour les raisons suivantes :

10. *Primo*, malgré les longs discours de nos contradicteurs, les rapports scientifiques, les interrogatoires et les contre-interrogatoires, le Nicaragua n'a pas prouvé quels seraient les deltas qui seraient le résultat de la construction de la route.

¹⁰⁸ Dossier des juges du Nicaragua, 29 avril 2015, tab 13, CAG2-13.

¹⁰⁹ CR 2015/15, p. 45 et 59, par. 1 et 28 (Pellet).

¹¹⁰ CR 2015/16, p. 43, par. 6 (McCaffrey).

¹¹¹ *Ibid.*, p. 44, par. 8 (McCaffrey).

¹¹² CR 2015/11, p. 41-43, par. 10-18 (Kohen).

11. *Secundo*, il a plutôt été démontré que les deltas sont des formations alluviales qui existaient sur les deux rives du San Juan avant même la construction de la route. Alain Pellet croit pouvoir écarter cet argument, qu'il qualifie de «vraiment sot», en laissant croire que, puisque les sédiments s'arrêtent là où ils rencontrent un obstacle, alors les sédiments prétendument en provenance de la route auraient bien pu s'arrêter à l'autre rive d'où ils proviennent¹¹³. Cela requiert vraiment beaucoup d'imagination, Monsieur le président. Faut-il encore rappeler à ce stade que c'est Mme Ríos, membre de la délégation nicaraguayenne, ici présente je crois, qui a essayé de faire des études sur des deltas des deux côtés dans le but de démontrer qu'ils seraient composés de manière diverse ? Vous voyez à l'écran les deltas existant des deux côtés du fleuve qui furent visités par Mme Ríos. Certes, le Nicaragua n'invoque plus son rapport à l'appui de ses thèses. Vous voyez maintenant l'emplacement des deltas sur la rive nicaraguayenne tels qu'ils ont été relevés par le professeur Thorne dans son rapport. Je montrerai seulement trois de ces formations deltaïques côté nicaraguayen. Compte tenu de la configuration du fleuve, il n'y a rien d'étonnant à l'existence des deltas sur les deux rives¹¹⁴.

12. *Tertio*, l'apport dérivé aux deltas de sédimentation du fait de la construction de la route, s'il existe, reste infime et passager. Après avoir mis en doute la possibilité que des deltas nouveaux aient pu être créés comme résultat de la route¹¹⁵, le professeur Thorne l'affirme :

«Where sediment derived from the Road has accumulated on a pre-existing tributary delta at the south bank, any local, small-scale impacts will be transitory and short-lived. If Road-derived sediment has formed any entirely new deltas, these will be removed by the Río San Juan as the mitigation works reduce the supply of new clasts, those currently forming the delta disintegrate, and the River entrains and transports the crumbling clasts away, quickly wearing them down to sand, silt and clay-sized particles in the process.»¹¹⁶

13. *Quarto*, les deltas eux-mêmes sont par définition des formations instables, dont la configuration est fréquemment sujette à modification, voire à apparition et disparition.

14. Vous voyez, Mesdames et Messieurs les juges, la photographie de la présence illicite nicaraguayenne en territoire costa-ricien que j'ai montrée à l'écran le 23 avril¹¹⁷. Mes collègues et

¹¹³ CR 2015/16, p. 54, par. 8 (Pellet).

¹¹⁴ Voir exposé écrit de M. Thorne, par. 5.2 ; RCR, appendice 1, par. 5.8-5.10.

¹¹⁵ *Construction d'une route*, exposé écrit de M. Thorne, par. 5.3.

¹¹⁶ *Ibid.*, par. 5.5.

¹¹⁷ Dossier de plaidoiries du Costa Rica, 23 avril 2015, tab 55.

amis ont eu la délicatesse de vous la montrer hier deux fois¹¹⁸, mais en signalant que la présence des deltas constituait une atteinte au droit de navigation du Nicaragua¹¹⁹. Je crois que vous voyez comme moi qu'il y a un arbre sur ce delta. Il ne faut pas être botaniste pour s'apercevoir que cet arbre doit être là depuis un bon moment et qu'il ne peut être là du fait de la construction de la route. Difficile de croire donc au dramatisme nicaraguayen. Si on veut même laisser de côté l'hypothèse la plus vraisemblable, à savoir que ce delta n'est pas le résultat de la construction de la route, que voudrait le Nicaragua ? Qu'on procède à la démarcation d'une hypothétique frontière dont les bornes devraient être fixées là où le delta s'est étendu ? Tout cela n'est pas franchement sérieux.

15. On dirait, Monsieur le président, que le Nicaragua aime les frontières insolites. Dans l'autre affaire, il vous a suggéré, de manière même pas voilée, de tracer une frontière entre la forêt et la plage d'Isla Portillos. Dans cette affaire, il vient nous dire que les deltas sont nicaraguayens. Dans l'autre affaire, il s'insurgeait contre le fait que le Costa Rica voulait enclaver la lagune Los Portillos. Je laisse de côté le fait que le Nicaragua se trompe de destinataire. L'érosion marine qui a eu raison de la bande de sable qui se trouvait au-dessus d'Isla Portillos, tout comme du chenal qui existait entre les deux formations, n'est pas l'œuvre du Costa Rica.

16. Tout cela est curieux, voire très curieux, Monsieur le président, Mesdames et Messieurs les juges : après les avoir durement critiquées avant-hier, le Nicaragua est venu devant vous hier revendiquer l'existence d'enclaves nicaraguayennes — terrestres, cette fois-ci — sur la rive costa-ricienne du fleuve San Juan et, qui plus est, qui seraient l'œuvre du Costa Rica ! Dans la logique nicaraguayenne, il faudrait sans doute là aussi envoyer des experts pour procéder à l'abornement de la frontière deltaïque.

17. Mais revenons à la réalité. Dans sa troisième sentence, l'arbitre Alexander, examinant l'influence des crues et décrues sur la limite à la rive droite du San Juan, affirma que «[s]i la rive recule, la ligne frontière recule avec elle et si la rive se rapproche du fleuve, la frontière également»¹²⁰. Il serait franchement regrettable que le Nicaragua vienne promouvoir des querelles

¹¹⁸ Dossier des juges du Nicaragua, 30 avril 2015, tab 44, SM2-1 ; tab 48, AP2-1a.

¹¹⁹ Dossier des juges du Nicaragua, 30 avril 2015.

¹²⁰ Affaire relative à *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, MCR, annexe 11. Troisième sentence de l'arbitre E. P. Alexander sur la question de la frontière entre le Costa Rica et le Nicaragua, rendue le 22 mars 1898 à San Juan del Norte et réimprimée dans le *Recueil des sentences arbitrales* des Nations Unies, RSA, vol. XXVIII (2007), p. 229 [traduction du Greffe].

et aggraver ainsi la situation revendiquant quoi que ce soit sur la base de ces formations mineures et instables.

18. Une deuxième prétendue violation à la souveraineté nicaraguayenne serait celle faite à son droit de libre navigation, comme cela a été illustré de manière étrange par la photo avec l'arbre que nous venons d'examiner¹²¹. La justification avancée par le conseil du Nicaragua est que les sédiments s'accumuleraient en des endroits particuliers qui formeraient des obstacles à la navigation¹²². Il n'a cité aucune source scientifique à l'appui de sa thèse. Comme le professeur Thorne l'a affirmé, toute contribution que des sédiments en provenance de la route pourraient faire à des formations morphologiques dans le fleuve serait temporaire et insignifiante¹²³. Comme nous l'avons affirmé¹²⁴, aucune entrave à la navigation en raison de la construction de la route n'a été prouvée.

19. Une troisième prétendue violation à la souveraineté et intégrité territoriales identifiée hier par mon contradicteur a été la présence prétendue du débris d'un tuyau dans le fleuve San Juan. Ce sont les morceaux d'un tuyau de drainage que le Nicaragua a soi-disant «repêché» dans les eaux du San Juan, «trouvés» juste une semaine avant les audiences sur les mesures conservatoires demandées par le Nicaragua en 2013. Le professeur Pellet n'a pas hésité à vous montrer sept photographies de ce même débris¹²⁵.

20. Monsieur le président, quatre ans de travaux de construction se sont écoulés et tout ce que l'on a soi-disant trouvé comme débris, c'est un morceau d'un tuyau de drainage. Lors de sa demande d'indication de mesures conservatoires, le Nicaragua avait fourni une vidéo, où, d'après ce que l'on pouvait voir, on pouvait dire que le tuyau avait été extrait du territoire costa-ricien. Cette fois-ci la Partie adverse nous a épargné sa vidéo, et pour cause. Si c'est cela la preuve de la négligence costa-ricienne à l'égard de la souveraineté nicaraguayenne, eh bien, Mesdames et Messieurs les juges, je pense que l'on peut parler au contraire d'une bonne diligence requise, ou *due diligence*, si vous préférez l'anglais.

¹²¹ CR 2015/16, p. 53-54, par. 6-9 (Pellet).

¹²² *Ibid.*, p. 53, par. 6.

¹²³ *Construction d'une route*, exposé écrit de M. Thorne, par. 5.5-5.6.

¹²⁴ DCR, par. 3.15 ; CR 2015/11, p. 44, par. 21 (Kohen). Voir aussi RCR, appendice 1, par. 6.58.

¹²⁵ Dossier des juges du Nicaragua, 30 avril 2015, tab 49, AP2-2a, AP2-2b, AP2-2c, AP2-2c.

21. Donc, ni invasion sédimentaire, ni conquête deltaïque, ni atteinte à l'intégrité territoriale, ni violation du traité de 1858. Si la «mère de toutes les violations» était cela, on comprend bien que les espoirs quant à sa progéniture que la Partie demanderesse semble nourrir sont loin d'être encourageants pour elle.

B. Le Nicaragua n'a pas démontré l'existence de violations des obligations relatives à une EIE

22. J'en viens maintenant à la question des obligations environnementales de nature procédurale. Je vais brièvement me référer aux positions de la Partie adverse par rapport à la portée du seuil déclencheur de l'obligation de produire et notifier une EIE ; à l'existence dans la règle primaire d'une exemption d'une telle mise en œuvre et notification en raison d'une situation d'urgence ; à la situation concrète d'urgence ; ainsi qu'à la situation concrète dans laquelle le Costa Rica demanda des informations et proposa des négociations au Nicaragua et au sujet desquelles ce dernier n'a pas réagi favorablement.

23. Mon collègue et ami Stephen McCaffrey a cru devoir opposer votre position prise dans l'affaire des *Usines de pâte à papier sur le fleuve Uruguay* aux règles semblables que l'on trouve dans des instruments internationaux de diverse nature. Son but était d'abaisser le plus possible le seuil d'exigence en la matière. Il est regrettable de voir invoquée cette apparente contradiction. D'autant plus que c'est votre Cour elle-même qui s'est appuyée sur «une pratique acceptée si largement par les Etats ces dernières années»¹²⁶. Pratique qui, bien entendu, inclut les instruments internationaux auxquels nous avons fait référence.

24. Cette tentative d'abaisser le seuil déclencheur que vous avez établi aux désormais célèbres paragraphes 204 et 205 de votre arrêt du 20 avril 2010 n'est pas heureuse. Je me suis déjà expliqué sur les nombreuses différences entre l'affaire des *Usines de pâte à papier* et la nôtre¹²⁷. Steve McCaffrey souhaite abaisser le seuil du fait que votre arrêt indique l'exigence d'une EIE «lorsque l'activité industrielle projetée risque d'avoir un impact préjudiciable important dans un cadre transfrontière», au lieu de parler de l'existence «d'un risque de dommage ou préjudice

¹²⁶ *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, C.I.J. Recueil 2010 (I), p. 83, par. 204.

¹²⁷ CR 2015/11, p. 49-50, par. 34-35 (Kohen).

transfrontière important ou significatif» (j'attire votre attention sur le fait qu'important est l'équivalent français de «signifiant» en anglais). Il me semble que la formule «longue» de votre Cour et la formule «abrégée» que l'on trouve dans différents instruments ne sont pas contradictoires et correspondent parfaitement l'une à l'autre. Votre Cour saura certainement procéder à une adéquation de son analyse de 2010 avec la réalité et le contexte différents que nous sommes en train d'examiner ici.

25. M^e Wordsworth vient de vous parler de l'absence de risque de dommage transfrontière significatif et je n'insisterai pas là-dessus. En l'absence d'un tel risque, le seuil déclencheur n'est pas atteint.

26. Par contre, je vais m'attarder un instant sur l'existence, dans l'obligation primaire, d'une exemption d'EIE dans un contexte d'urgence, obligation que conteste mon collègue McCaffrey. Le professeur Craik a établi l'existence de cette exemption en droit international général, utilisant la même méthode que vous avez suivie aux paragraphes précités de votre arrêt dans l'affaire *Argentine c. Uruguay*¹²⁸. A la longue liste d'instruments nationaux et internationaux auxquels le professeur Craik s'est référé, je voudrais en ajouter un autre que mon cher collègue McCaffrey connaît très bien. Il s'agit de la convention des Nations Unies sur le droit relatif à l'utilisation des cours d'eau internationaux à des fins autres que la navigation. Certes, j'en conviens, Monsieur le président, cette convention n'est pas applicable en l'espèce. Mais son article 19, paragraphe premier, est «significatif», si je puis utiliser ce terme ici. Il contient aussi une exemption à l'obligation de notifier des mesures projetées «susceptibles d'avoir des effets négatifs significatifs pour les autres Etats du cours d'eau». Le texte pertinent a la teneur suivante :

«Si la mise en œuvre des mesures projetées est d'une extrême urgence pour la protection de la santé ou de la sécurité publiques ou d'autres intérêts également importants, l'Etat qui projette ces mesures peut, sous réserve des articles 5 et 7, procéder immédiatement à leur mise en œuvre nonobstant les dispositions de l'article 14 et de l'article 17, paragraphe 3.»¹²⁹

¹²⁸ Rapport Craik, DCR, vol. II, annexe 1, par. 5.1-5.6.

¹²⁹ Convention sur le droit relatif aux utilisations des cours d'eau multinationaux à des fins autres que la navigation, New York, 21 mai 1997, Nations Unies, résolution 51/229 de l'Assemblée générale.

27. Si cette disposition était applicable, elle l'aurait été pour la construction de la route. Quoi qu'il en soit, elle vient à l'appui de l'existence de cette exemption de notification en droit international général.

28. Le Nicaragua s'insurge contre cette exemption — alors qu'elle est présente dans son droit interne —, et argue que si elle était applicable, elle réduirait l'obligation à néant¹³⁰. Nous ne le croyons pas. De telles exceptions d'urgence ou de sécurité existent dans de nombreux instruments relatifs à des domaines très différents des relations internationales, tant sur le plan multilatéral que bilatéral¹³¹.

29. L'existence de cette exemption trouvant un solide appui dans la pratique internationale, je passe maintenant aux considérations faites à propos de la situation concrète. Le Nicaragua essaie de minimiser la situation de crise qu'il a créée, violant la frontière établie depuis 1858 avec ses forces militaires. Il s'agit de sa présence militaire à la frontière, sa menace de naviguer le fleuve Colorado sans autorisation du Costa Rica, et tout le reste dont, à ce stade, je me dois de vous épargner le récit. Le professeur McCaffrey a pourtant oublié l'essentiel dans sa lecture de l'exposé de M. Brenes : la citation du président Ortega sur le prétendu droit nicaraguayen de naviguer le Colorado dans le contexte des travaux de dragage¹³², que le Nicaragua menait comme une activité militaire, comme il l'en a lui-même fait la publicité dans son «Livre blanc» connu¹³³.

30. Enfin, quatrième point fondamental, que tant l'agent que les conseils nicaraguayens ont passé sous silence : l'attitude du Nicaragua lui-même. Comme disent nos amis anglophones, et un argentin ne les détrompera pas : «it takes two to tango». J'avais pourtant mentionné, projeté à l'écran et inclus dans vos dossiers la lettre du 29 novembre 2011 du ministre des affaires étrangères costa-ricien à son homologue nicaraguayen, lui demandant de l'information scientifique et lui proposant la tenue de négociations *sur l'ensemble des questions environnementales communes* dans le cadre de la facilitation offerte par le Mexique et le Guatemala, suite à l'occupation

¹³⁰ CR 2015/16, p. 13, par. 15 (Argüello) ; p. 46, par. 16 (McCaffrey).

¹³¹ Voir article 27 de la Convention interaméricaine des droits de l'homme ; Article 4 du Pacte international des droits civils et politiques ; Article XXI du GATT, etc.

¹³² CR 2015/11 p. 24, par. 34 (Brenes).

¹³³ Affaire relative à *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, MCR, annexe 30, Gouvernement du Nicaragua, «Le San Juan de Nicaragua : les vérités que cache le Costa Rica», (Livre blanc), 29 novembre 2010.

d'Isla Portillos et à l'absence de contacts directs entre les Parties du fait de cette occupation¹³⁴. Monsieur le président, Mesdames et Messieurs les juges, si le Nicaragua avait accepté ces propositions, peut-être que nous ne serions pas dans ce grand hall de justice un 1^{er} mai !

31. «Tout est dans le contexte», c'est la phrase que mon vieil ami Paul Reichler affectionne à dire. Eh bien, dans le cas d'obligations procédurales de nature environnementale, le contexte montre précisément que le Costa Rica ne les a pas violées.

Remarques conclusives

32. Avant de conclure, Monsieur le président, je me permettrai deux commentaires avec votre permission. Du fait que la Partie adverse avait choisi de répondre à notre position sur la nouvelle revendication nicaraguayenne de la plage d'Isla Portillos au second tour, nous avons réservé notre droit de commenter sa position. Cela ne sera pas nécessaire, Monsieur le président. En effet, malgré les distorsions évidentes de nos positions opérées par la Partie adverse au second tour, il ne s'avère pas nécessaire d'y revenir ici.

33. Mon second commentaire a trait au fait que mercredi, le Nicaragua s'est permis de commencer à plaider la délimitation maritime. Le Nicaragua vous a même montré des croquis accompagnés de prétentions au sujet desquelles nous reviendrons uniquement au moment procédural opportun. Cette troisième affaire pendante entre les mêmes parties n'a pourtant pas été jointe aux deux que nous venons de plaider. Tant l'agent que le conseil se sont permis d'estimer que l'enjeu de la requête du Costa Rica dans l'affaire des *Activités du Nicaragua* était la délimitation maritime¹³⁵. Je me demande s'il ne s'agit pas de ce que, psychologiquement parlant, on appelle une projection. Peut-être est-ce le Nicaragua qui a eu des arrière-pensées maritimes lorsqu'il a prétendu changer la réalité géographique et juridique actuellement existante, construisant un *caño* pour couper la connexion du Costa Rica à la mer des Caraïbes dans la zone de l'embouchure du San Juan.

34. Monsieur le président, le Costa Rica a toujours agi à la lumière du jour, de manière cohérente et sans demander plus que le respect de ce qui lui revient. Il n'y a aucune intention

¹³⁴ *Construction d'une route*, CMCR, annexe 39.

¹³⁵ CR 2015/15, p. 51, par. 11 (Pellet).

cachée de sa part. Il a introduit l'instance relative à la délimitation maritime avant même que l'affaire relative aux *Activités du Nicaragua* soit close. Les accusations nicaraguayennes sont ainsi dépourvues de toute justification.

35. Hier, le Nicaragua a en outre élargi le champ de ses revendications. Le Nicaragua vous demande de déclarer maintenant que le Costa Rica n'a pas le droit de développer sa région frontalière sans une EIE transfrontière¹³⁶. Son agent a dressé une liste : pas de permis de construire, pas d'utilisation des terres, pas d'hôtels, etc. Cette position extrême éclaire peut-être d'un jour nouveau les positions des Parties.

36. Après trois semaines de plaidoiries, nous avons abordé des questions fort différentes et d'une grande importance pour l'avenir des relations bilatérales, mais ayant également des répercussions allant bien au-delà de ces deux affaires. Le Costa Rica est confiant que vous saurez rendre un arrêt qui mettra fin de manière complète et précise à ces différends entre les deux Etats.

37. Je vous remercie, Mesdames et Messieurs les juges, de votre attention et vous prie, Monsieur le président, de donner la parole à l'ambassadeur Sergio Ugalde.

Le PRESIDENT : Merci, Monsieur le professeur Kohen. Je donne la parole à l'ambassadeur Sergio Ugalde.

Mr. UGALDE:

NICARAGUA'S CASE AND REMEDIAL CLAIMS

A. Introduction: Nicaragua's case

1. Mr. President, Members of the Court, after two rounds of oral argument, it is apparent that as a result of the construction of Costa Rica's 10-m-wide road¹³⁷, built entirely within its sovereign territory, no significant harm has been caused to Nicaragua, no significant harm is being caused at present, and there is no risk of significant harm being caused in the future.

¹³⁶ CR 2015/16, p. 15, par. 24 (Argüello).

¹³⁷Dr. G. Mathias Kondolf, *Erosion and sediment delivery to the Rio San Juan from Route 1856*, July 2014; Reply of Nicaragua (RN), Ann. 1, p. 62.

2. After three and a half years of Nicaragua's allegations and accusations, it is patent that Nicaragua has used the *Road* case as an attempt to divert attention away from the *Certain Activities* case.

3. At this juncture, I am afraid it is still necessary to recall, even if briefly, the facts underlying the present proceedings. In late 2010, Costa Rica found that its neighbour had militarily occupied part of its territory. As a first response, Costa Rica first sought the application of relevant dispute mechanisms, such as those under the Charter of the Organization of American States (OAS). Yet these efforts were unsuccessful, given Nicaragua's refusal to abide by them¹³⁸. Bilateral negotiations were also rejected by Nicaragua¹³⁹.

4. Further, Costa Rica found that Nicaragua had carried out works in its territory, resulting in the loss of forest and damage to the ecology of an internationally protected wetland.

5. Nicaragua then advanced claims to rights it does not possess on Costa Rican territory¹⁴⁰. It announced that the 3 sq km it had invaded were not enough, and that what it was really after were thousands of square kilometres, an entire Costa Rican Province¹⁴¹. Yesterday Nicaragua's Agent and counsel tried to minimize the significance of that threat. It was suggested that Nicaragua can claim all it wants provided that it says it will bring the matter before the Court¹⁴². But, these threats cannot be taken lightly. Costa Rica has every right to vigorously reject unlawful and unfounded territorial claims, and to take any necessary precautions within its power to protect its population and its territory.

6. Mr. President, Members of the Court, confronted with these exceptional circumstances, Costa Rica responded in two ways. First, it brought the matter before this Court. Second, it

¹³⁸The *Certain Activities* case, Memorial of Costa Rica (MCR), Ann. 112, statement of Denis Ronaldo Moncada, Nicaraguan Ambassador to the OAS, as recorded in "Call to troop withdrawal in Nicaragua, Costa Rica dispute", CNN International, 13 Nov. 2010. See also, MCR, Ann. 113, English translation by Costa Rica of the speech given by President Ortega on national Nicaraguan television on 13 Nov. 2010; extracts.

¹³⁹See MCR, para. 3.42; Note from the acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DVM-357-10, 24 Nov. 2010; MCR, Ann. 59, Note from the acting Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, ref. MRE/DVMS/VLJ/0679/11/2010, 24 Nov. 2010; MCR, Ann. 61.

¹⁴⁰See *El 19* (Nicaragua), "Nicaragua will request before the ICJ Navigation through Río Colorado", 13 Nov. 2010; Counter-Memorial of Costa Rica (CMCR), Ann. 71.

¹⁴¹"Inaugural Lesson of the Academic Year 2011, 6 April 2011", transcript of public speech delivered by President Ortega, CMCR, Ann. 16.

¹⁴²CR 2015/16, p. 14, para. 22 (Argüello); and, p. 47, para. 20 (McCaffrey).

commenced work on a basic infrastructure project, in a situation of emergency, to facilitate communication with the population along the border, and access by police and emergency personnel to Costa Rica's border territory, in order to protect these remote communities if required. There were entirely reasonable actions for Costa Rica to take in these circumstances.

7. Nicaragua, in turn, immediately took actions to bring a halt to the works on the road, invoking environmental obligations.

8. It is obvious that the *Road* case was a diversionary tactic, just as it is equally obvious that Nicaragua could not care less about fulfilling its own international environmental obligations as regards Costa Rica. The manner in which the case was put last week and yesterday was as a last-ditch attempt at justifying its dredging project by implying that Costa Rica was responsible for sediment coming into the Lower San Juan River. You have heard this afternoon from Mr. Wordsworth why that suggestion is wrong, but most obviously because there is no evidence that any material coming into the San Juan River from the road has in fact reached the area where Nicaragua has been dredging.

9. The Nicaraguan official in charge of dredging operations in the San Juan contradicts these statements. In a Nicaraguan news report dated 29 April 2015, only two days ago, which is at tab 38 of your folders, Mr. Pastora is quoted as announcing that Nicaragua has achieved 100 per cent navigability on the San Juan. This suggests no damage, and certainly no ongoing damage. But this statement is also useful because it underlines the fact that Nicaragua has not been forthcoming as to what is actually being done on the ground, which remains entirely unclear.

10. As to Costa Rica's compliance with any obligation of due diligence, it has produced 22 different technical reports, all of which have been transmitted to Nicaragua, and which demonstrate that Costa Rica was right all along. In the absence of any hard proof of its own of any harm, let alone significant harm, Nicaragua's case rests on extrapolations and exaggerations of the data underlying those reports. But it is apparent that there is no evidence of actual significant harm, and even less of any risk of significant harm. The remainder of Nicaragua's case is based on old, out-of-date pictures, and criticism of Costa Rica's efforts.

11. In making its case, Nicaragua appears to advance the extraordinary theory that any grain of sand that crosses from one State to another is a violation of the latter's sovereignty and territorial

integrity. I need not examine the implications that such a bizarre theory would have at the international level if it were to be accepted.

12. Mr. President, Costa Rica has done everything in its power to remediate the part of the road, which constitutes only 10 per cent of its length, which has been the principal focus of Nicaragua's case. We shall continue to do so. This is not prompted by Nicaragua's complaints, but by Costa Rica's long-standing compliance with its environmental obligations and its legitimate interest in having a serviceable road.

B. Nicaragua's last offensive on remedies

13. I turn now to Nicaragua's request for relief.

14. As a matter of general observation, one must wonder what exactly it is that Nicaragua wants. My understanding of what Nicaragua has been saying is: mitigate but do not mitigate, build but do not build, cease but do not cease, provide restitution, but only as far as possible and in Costa Rican territory. Finally, as Nicaragua does not know exactly what it wants, and has not been able to establish any harm at all, it asks the Court to appoint an expert to do it for it.

15. I have seven points. First, Costa Rica takes note that Nicaragua is no longer seeking a declaration that it is entitled to suspend Costa Rica's right to navigation¹⁴³. Costa Rica must, however, express its concern as to the explanation given that there is no need for a declaration to that effect by the Court if the conditions for countermeasures are in any case fulfilled, and to the ominous observation that, at least for the moment, such a measure is not envisaged¹⁴⁴.

16. Second, Professor Pellet suggested yesterday that I had said last Friday that Nicaragua had abandoned its claim for a declaration that Nicaragua is entitled to carry out dredging works¹⁴⁵. The only point I made was that Nicaragua's claim for a declaration, which parallels the declaration it seeks in the *Certain Activities* case, was more properly dealt with in the context of the other case, where it has been maintained¹⁴⁶.

¹⁴³CR 2015/16, p. 57, para. 17 (Pellet).

¹⁴⁴*Ibid.*

¹⁴⁵*Ibid.*, para. 18 (Pellet).

¹⁴⁶CR 2015/13, p. 44, para. 6-7 (Ugalde).

17. Professor Pellet is obviously anxious to discuss Nicaragua's supposed right to dredge in the context of these proceedings, as highlighted by his attempt, once again, to establish the admissibility of its claim for a declaration¹⁴⁷. The reason for this is clear — the claim for a declaration forms an essential part of the foundation for Nicaragua's claims that Costa Rica must pay an indemnity for the supposed additional cost of Mr. Pastora's dredging programme.

18. However, but for the joinder of the two cases, serious questions would have been raised as to the admissibility of Nicaragua's claim for a declaration as to its entitlement to dredge in these proceedings. The claim was not included in its Application¹⁴⁸, and was put forward for the first time in these proceedings only in Nicaragua's Memorial¹⁴⁹, without any discussion in the body of the pleading. As this shows, and notwithstanding Professor Pellet's sustained efforts to convince you otherwise, the request has little to do with the dispute submitted to the Court in the *Road* case. This dispute, as is apparent from the Application, concerns the alleged harm resulting from the construction of the road¹⁵⁰. By contrast, in *Certain Activities* case, Nicaragua's claim for a declaration as to its entitlement to dredge as it deems suitable is directly in issue.

19. In this context, I should note that Professor Pellet was wrong to suggest that Costa Rica denies Nicaragua's right to dredge, whether in this case or in *Certain Activities*¹⁵¹. As has been reiterated on a number of occasions, Costa Rica recognizes that Nicaragua is entitled to carry out works of improvement, provided it complies with the obligations and limitations arising from the Cleveland Award and international environmental law¹⁵².

20. To be clear, Costa Rica does not oppose the making of a declaration clarifying the extent of Nicaragua's entitlement to dredge in the context of the *Certain Activities* case¹⁵³. Given the events since your 2009 Judgment, a declaration by the Court clarifying the precise scope of Nicaragua's entitlement to carry out works of improvement, and making clear the limits upon that

¹⁴⁷CR 2015/16, pp. 57-58, para. 19 (Pellet); see previously CR 2015/10, p. 59, para. 23 (Pellet).

¹⁴⁸Nicaragua's Application instituting proceedings, *Construction of a Road in Costa Rica along the San Juan River*, 22 Dec. 2011.

¹⁴⁹The *Road* case, Memorial of Nicaragua (MN), p. 252, para. 3 (i) and (ii).

¹⁵⁰See the *Road* case, CRCM, paras. 4.34-4.35.

¹⁵¹CR 2015/16, p. 57, para. 19 (Pellet).

¹⁵²CR 2015/3, p. 55, paras. 2-3 (Ugalde); CR 2015/14, p. 55, paras. 35-36 (Ugalde).

¹⁵³CR 2015/16, p. 60, para. 29 (Pellet).

entitlement, would have a calming effect upon the relations between the Parties. Costa Rica's preference is for any declaration to be included in the *dispositif*, rather than merely in the body of the Judgment, such that there could be no basis for any dispute as to its binding effect.

21. Nevertheless, in the context of the present case, Nicaragua's claim for a declaration has no obvious place.

22. Third, whether looked at from the perspective of cessation or restitution, Professor Pellet continued to fail to explain how the particular measures requested by Nicaragua relate to the breaches alleged. He agreed that in determining the content of restitution required, it is necessary to have regard to the specific obligation allegedly breached¹⁵⁴. Nevertheless, although he affirmed that various obligations had been breached in addition to the obligation *not* to cause significant harm¹⁵⁵, he did not explain how the measures requested constituted cessation or restitution in relation to those obligations.

23. This is notably the case as regards the suggestion that the Court order the taking of specific measures of remediation and mitigation, in accordance with particular standards, including under the supervision of an expert¹⁵⁶. Professor Pellet gave no explanation as to how those measures constitute cessation or restitution of any of the obligations alleged to have been breached in paragraph 1 of the submissions.

24. There is no allegation that Costa Rica has breached an obligation requiring it to construct the road in a particular fashion, or to take remedial or mitigation works in a particular way. As a consequence, if — *quod non* — the Court were to conclude that the road is causing harm to Nicaragua which surpasses the relevant threshold, and that that harm is continuing in breach of Costa Rica's obligations, restitution or cessation would be achieved by putting a stop to that harm. The precise modalities of that would be a matter for Costa Rica. On such a hypothesis, there is no basis for a coercive measure involving specification of the measures required, or the appointment of an expert to supervise that process.

¹⁵⁴CR 2015/16, p. 60, para. 25 (Pellet).

¹⁵⁵*Ibid.*, p. 58, para. 21 (Pellet).

¹⁵⁶*Ibid.*, pp. 60-61, para. 25 (Pellet).

25. The same is true in relation to Professor Pellet's suggestion that restitution would require relocation, at least in part, of the road to another route¹⁵⁷. Nicaragua has not specified which parts of the road, would, in its view, need to be relocated, nor has it demonstrated that any particular segment has caused the harm alleged. In the event that the Court were to conclude that harm was being caused, in breach of Costa Rica's obligations, one amongst a number of possible options open to Costa Rica in order to comply with its obligations of cessation and restitution might well be to change the route. But that does not imply that it would have to do so, still less that the Court should make an order requiring that result.

26. It is telling that Nicaragua does not include in its submissions a request that the Court should require relocation of the road, or that it should be constructed in accordance with the views of its experts.

27. Fourth, as regards the declaration requested as to transport of hazardous substances, Professor Pellet persisted in suggesting that the risk was more than hypothetical. However, Professor Pellet's concern now appears to be that it is not clear that the relevant legislation concerns transport of everyday products such as petrol¹⁵⁸. This is a far cry from the tanker lorries he imagined last week. As I said then, given the relevant Costa Rican legislation, the short answer is that there is no prospect that significant quantities of hazardous materials will be transported on the road, and therefore no risk of the harm Nicaragua professes to fear¹⁵⁹.

28. However, if Nicaragua's alleged concern is in fact about the transport of a few litres of diesel in a jerrycan by riparian residents, this reveals this claim for what it in reality it is — a false claim designed to cause an unwarranted inconvenience for Costa Rica and its residents, and which may be portrayed as a victory for Nicaragua to its domestic audience.

29. In addition, Professor Pellet referred in this context to Principle 15 of the Rio Declaration that, in case of a risk of serious or irreversible damage, a lack of full scientific certainty is not a

¹⁵⁷CR 2015/16, p. 59, para. 22 (Pellet).

¹⁵⁸*Ibid.*, p. 60, para. 23 (Pellet).

¹⁵⁹*Ibid.*

reason for failing to take preventive measures¹⁶⁰. With respect, we fail to see the relevance of the precautionary principle and “scientific certainty” to the hypothesis under discussion.

30. Fifth, the Agent *somewhat* clarified the scope of Nicaragua’s request requiring Costa Rica to undertake a transboundary EIA in relation to all and any new development in the area, which apparently includes even such matters as the grant of authorization for construction of any new house¹⁶¹, and this whether or not they in fact present any risk of transboundary harm, which is obviously ridiculous. No such order is justified, for the reasons I gave last week¹⁶², in particular because it is both excessively broad, and insufficiently precise as to its scope. Even a more narrowly drawn requirement would do no more than simply reproduce the obligations which Costa Rica accepts are binding upon it, and it is superfluous.

31. Sixth, in light of the fact that Professor Pellet did not address the question of compensation, I will be very brief in that regard; the short point of course is that, as Mr. Wordsworth has explained, there is no evidence of significant harm, nor even any evidence that any sediment has been deposited in the reach of the Lower San Juan where Nicaragua has been concentrating its dredging¹⁶³.

32. Seventh, despite the time he spent on the topic, I note that a request for the appointment of experts is not included in Nicaragua’s submissions. I have already explained why the appointment of an expert to assure the implementation of remedial measures by Costa Rica is inappropriate. The suggestion of appointment of an expert or experts “to assist the *Court* in the *evaluation* of the damages suffered by *Nicaragua*”¹⁶⁴ is a reformulation of the plea that the Court should assist *Nicaragua* in substantiating its claim that it has suffered damage. But as I explained last week, if Nicaragua has not discharged its burden of proof that any damage has been suffered, that is the end of its claim¹⁶⁵.

¹⁶⁰CR 2015/16, p. 60, para. 24 (Pellet).

¹⁶¹*Ibid.*, p. 15, para. 24 (Argüello).

¹⁶²CR 2015/13, pp. 47-48, paras. 22-24 (Ugalde).

¹⁶³See speech 1 (Wordsworth), above.

¹⁶⁴CR 2015/16, p. 62, para. 28 (Pellet); emphasis in the original and added.

¹⁶⁵CR 2015/13, p. 46, paras. 15-16 (Ugalde).

C. Conclusion

33. Mr. President, Members of the Court, Costa Rica was in effect challenged yesterday to do one of two things: either accept that it owes Nicaragua an EIA, or to wait for the Court to decide that for it. I am not going to expand further on Costa Rica's position, except to say that for the project it started in 2010, Costa Rica had no obligation to carry out an EIA, given, first, the scale and characteristics of the project, and second, the emergency circumstances in which it was forced to carry it out.

34. That said, Costa Rica also notes that Nicaragua seemed to have finally accepted the invitation made by Costa Rica to consult and co-operate. As proposed in its letter of 29 November 2011¹⁶⁶, Costa Rica reiterates that it stands ready to meet with Nicaragua, with no reservations, in order to address all, absolutely all, the bilateral issues regarding environmental concerns that are legitimately held by each country. To that end, and in so far as the construction of the road will only resume after all designs are ready, Costa Rica remains ready to carry out additional environmental studies to complement the 22 that have been carried out thus far, in so far as they are necessary to address any reasonable concerns that Nicaragua may have in relation to the project.

35. Mr. President, Members of the Court. This brings Costa Rica's second round of pleadings to its conclusion. I wish to express my sincere appreciation for the attention that you have so kindly given to me. Mr. President, I ask that you call Ambassador Edgar Ugalde, to present Costa Rica's closing remarks and read Costa Rica's final submissions.

Le PRESIDENT : Merci, Monsieur l'ambassadeur. Je donne maintenant la parole à l'agent du Costa Rica, M. l'ambassadeur Ugalde Álvarez.

Mr. UGALDE ÁLVAREZ:

1. Mr. President, distinguished Members of the Court, as we conclude the second round of hearings in this case, there is no doubt that the road works carried out entirely on undisputed Costa Rican territory have not caused, and do not risk causing significant transboundary harm.

¹⁶⁶Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-601-11, 29 Nov. 2011; CMCR, Ann. 39.

2. The road is not a highway. The Court was shown a video of the road filmed in February of this year. As you were able to see, it is a narrow, rural road in the process of being constructed in large part on pre-existing paths and tracks in Costa Rica. It provides isolated communities of riparians with land access to essential services, and it allows the police posts in the border to have access and communication. Nicaragua has tried to present the road as some kind of disaster, although its case was focused on a very small portion of it, and based on a careful selection of out-of-date photographs, and not on any reliable and objective data.

3. There is no impact of the road on the San Juan River, and certainly no significant harm caused to the river as a result of the contribution of sediment to it. It is obviously untrue that the indiscernible proportion of sediment that may be entering the San Juan River from the road has caused, or would cause, any harm at all to the river and its ecology.

4. Work on the road was begun in the context of an emergency situation brought about by Nicaragua's military actions and threats against Costa Rica, compounded by other serious breaches by Nicaragua, including its persistent attempts to prevent Costa Rica from exercising its rights of navigation, and Nicaragua's extravagant and illegal interpretations of the well-established border régime. Despite these circumstances, Costa Rica has consistently sought to address Nicaragua's concerns about the road, including when Nicaragua's hostile acts were ongoing.

5. Costa Rica proposed addressing Nicaragua's concerns through the then facilitation of the Governments of Guatemala and Mexico, and it proposed that all environmental issues be addressed, without condition¹⁶⁷. Nicaragua did not accept this proposal. Costa Rica also proposed that the two countries undertake joint measurements on the San Juan¹⁶⁸. Nicaragua did not accept

¹⁶⁷Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-601-11, 29 Nov. 2011; CMCR, Ann. 39.

¹⁶⁸Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-063-13, 6 Feb. 2013; CMCR, Ann. 46.

this proposal¹⁶⁹. Costa Rica then proposed that Nicaragua undertake its own monthly flow measurements of the river. Apparently Nicaragua has not done so. Costa Rica thus acted in good faith, and complied with any obligation of due diligence, including by producing 22 different technical studies on the road in the context of this case.

6. We know that Nicaragua has the apparatus in place to take regular flow measurements on the San Juan River¹⁷⁰. Nicaragua has either not carried out such measurements, or it has not seen fit to share them with Costa Rica or the Court. Whatever the real reason, Nicaragua's case must fail because it has not discharged its burden of proof either that significant harm has been caused, or that there is or was any risk of significant harm.

7. Nicaragua's claims that work on the road has meant that Nicaragua has had to dredge the San Juan River are unfounded, and Nicaragua's claim that Costa Rica should pay for those works is unwarranted. As Ambassador Sergio Ugalde has stated, Costa Rica stands ready to consult and co-operate with Nicaragua in good faith, and it will do so in so far as Nicaragua's statements before you yesterday are fully backed by a genuine commitment.

8. Mr. President, Members of the Court, it is apparent that this case was conceived with the sole purpose of responding to Costa Rica's case of 2010. My country laments that a legitimate international dispute was the subject of this tactical move. Costa Rica is confident that the Court will see through this diversion, and it respectfully requests that the Court not reward Nicaragua in any way for its procedural tit-for-tat. Nicaragua's case before you must fail in its entirety.

9. Mr. President, distinguished Members of the Court, I will proceed to read Costa Rica's submissions.

¹⁶⁹RCR, para. 2.29, ftns 61 to 64 and Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, Costa Rica, ref. MRE/DM-AJ/129/03/13, 5 Mar. 2013; CMCR, Ann. 48; letter from the Co-Agent of Costa Rica to the Registrar of the International Court of Justice, ref. ECRPB-013-2013, 7 Mar. 2013; CMCR, Ann. 49; letter from the Co-Agent of Costa Rica to the Registrar of the International Court of Justice, ref. ECRPB-26-13, 24 May 2013; CMCR, Ann. 52; letter from the Co-Agent of Costa Rica to the Registrar of the International Court of Justice, ref. ECRPB-31-13, 13 June 2013; CMCR, Ann. 53; letter from the Agent of Nicaragua to the Registrar of the International Court of Justice, ref. HOL-EMB-108, 14 June 2013; CMCR, Ann. 54; letter from the Co-Agent of Costa Rica to the Registrar of the International Court of Justice, ref. ECRPB-036-13, 24 June 2013; CMCR, Ann. 55; letter from the Co-Agent of Costa Rica to the Registrar of the International Court of Justice, ref. ECRPB-052-13, 7 Aug. 2013; CMCR, Ann. 59; letter from the Registrar of the International Court of Justice to the Agent of Costa Rica, ref. 142331, 8 Aug. 2013; CMCR, Ann. 60; letter from the Agent of Nicaragua to the Registrar of the International Court of Justice, ref. HOL-EMB-167, 30 Aug. 2013; CMCR, Ann. 64; letter from the Co-Agent of Costa Rica to the Registrar of the International Court of Justice, ref. ECRPB-63-2013, 27 Sep. 2013; CMCR, Ann. 65.

¹⁷⁰See e.g. *Certain Activities*, INETER, "Summary of Measurement of liquid and suspended solids content during the years 2006, 2011, 2012", 26 June 2012; CMN, Ann. 16.

SUBMISSIONS

For the reasons set out in the written and oral pleadings, Costa Rica requests the Court to dismiss all of Nicaragua's claims in this proceeding.

10. Mr. President, distinguished Members of the Court, to conclude our participation in these oral hearings, I wish to extend, on behalf of the Republic of Costa Rica, our appreciation to you, Mr. President, and each of the distinguished Members of the Court, for your kind attention to our presentations.

May I also offer our thanks to the Court's Registrar, his staff, the interpreters and translators, and all the Court staff, who performed an extraordinary work during these long weeks. Finally, I would also like to thank publicly Costa Rica's counsel and all members of our delegation.

Thank you, Mr. President.

Le PRESIDENT : Je vous remercie, Monsieur l'agent.

La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom de la République du Costa Rica, comme elle l'a fait hier pour les conclusions finales du Nicaragua.

Cela nous amène à la fin des audiences consacrées aux plaidoiries des Parties en l'affaire relative à la *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)* et donc à la fin de la série d'audiences dans les deux instances jointes. Je tiens à remercier les agents, conseils et avocats des deux Parties pour l'assistance qu'ils ont apportée à la Cour par leurs exposés oraux et pour la courtoisie dont ils ont fait preuve tout au long de cette procédure. Je demande aux agents de rester à la disposition de la Cour pour toutes informations dont la Cour pourrait avoir besoin.

La Cour se retirera à présent pour entamer sa délibération. Les Parties seront informées en temps utile par le greffier de la date à laquelle la Cour rendra sa décision en séance publique.

L'audience est levée à 17 heures.
