

尼加拉瓜在边境地区实施的特定活动及哥斯达黎加沿圣胡安河修建道路案

张 帆

[案件导读]

本案是国际法院对哥斯达黎加诉尼加拉瓜在边境地区实施的特定活动案和尼加拉瓜诉哥斯达黎加沿圣胡安河修建道路案的合并审理和判决。¹ 前案涉及两国边境地区争议领土的主权归属，以及尼加拉瓜在边境地区开凿、疏浚水道等活动的争端；后案涉及哥斯达黎加沿圣胡安河修建道路的争端。案件双方都诉称对方违反了不造成重大跨境损害义务、环境影响评价义务和通知与磋商义务，法院在判决中讨论了这三项国际义务在不同情形下的适用以及三者之间的关系，系统阐释了国际习惯法上“环境影响评价”义务的内涵、地位和适用方式，丰富了相关国际法的法理和实践。继乌拉圭河纸浆厂案之后，本案再次突显了国际水法与国际环境法的交融，以及国际水法“程序化”的发展趋势。

[关键词]

边界河流，领土争端，环境影响评价，谨慎义务，重大跨境损害，重大跨境损害风险，紧急状态，不造成重大损害原则，通知与磋商，程序化，《拉姆萨尔公约》（《湿地公约》），《生物多样性公约》，航行权

一、哥斯达黎加-尼加拉瓜边境活动及筑路争端的产生与发展

哥斯达黎加和尼加拉瓜是以圣胡安河右岸为界的相邻国家。根据两国 1858 年签订的边界条约及解释该条约的克利夫兰裁决与亚历山大裁决，圣胡安河水域的主权属于尼加拉瓜，但哥斯达黎加在该河上享有自由航行权。

2010 年 10 月，哥斯达黎加指称尼加拉瓜为连接圣胡安河与港头泻湖(Harbor Head Lagoon)，在哥方领土上开凿了一条人工水道（下称“2010 年水道”），并且派军队侵占了水道附近的哥方领土。但尼加拉瓜主张，该水道是存在多年的自然水道，尼方只是对其进行了疏浚，尼加拉瓜对该水道拥有主权，尼加拉瓜军队

¹ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), Judgement, I.C.J. Reports 2015, p. 665.

进入的地区也在尼方领土范围之内。2010 年 11 月 18 日，哥斯达黎加向国际法院提起诉讼，请求法院判定尼加拉瓜侵犯了哥斯达黎加的领土主权，且尼加拉瓜在边境地区疏浚水道的活动违反了国际法上的多项实体与程序义务。²

2010 年 12 月，哥斯达黎加开始沿圣胡安河修筑道路，并声称其筑路活动是为应对边境紧急状态而采取的措施。2011 年 12 月 22 日，尼加拉瓜也向国际法院提起诉讼，诉称哥斯达黎加的筑路活动对其造成了重大跨境损害，且哥方未履行环境影响评价、通知与磋商等义务。³

因哥斯达黎加诉尼加拉瓜案与尼加拉瓜诉哥斯达黎加案的事实基础和地理、历史背景相同，国际法院于 2013 年 4 月决定将两案合并审理。⁴

在案件审理期间，国际法院先后发出了两项临时措施命令。在 2011 年 3 月的第一项临时措施命令中，国际法院指示案件双方避免向争议领土派遣人员或采取任何可能恶化争端的行动。⁵ 但其后尼加拉瓜又在争议领土上开凿了两条新的水道，并在争议领土上建立了军事存在。2013 年 11 月，国际法院发出第二项临时措施命令，要求尼加拉瓜“不再在争议领土上开凿疏浚水道或进行任何其它活动”，并“将争议领土上的人员，包括平民、警察和安全人员，全部撤离争议领土”。⁶

2015 年 12 月 16 日，国际法院做出最终判决，判定争议领土属于哥斯达黎加，尼加拉瓜在争议领土上开凿水道及建立军事存在的行为侵犯了哥斯达黎加的领土主权，也违反了 2011 年 3 月法院临时措施命令要求尼加拉瓜履行的义务；但尼加拉瓜在本国境内疏浚水道的活动并没有违反国际法上的环境影响评价义务、通知与磋商义务和不造成重大跨境损害的义务。同时，法院判定哥斯达黎加在圣胡安河沿岸修筑道路的活动没有造成实际的重大跨境损害，但哥方没有及时履行环境影响评价义务。

² Judgement, p. 673, para. 1.

³ Judgement, p. 674, para. 9.

⁴ Judgement, p. 675, para. 19.

⁵ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 27, para. 86.

⁶ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua); *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013, p. 369, para. 59.

二、争议领土的主权归属

根据国际法院 2011 年 3 月临时措施命令的定义，尼加拉瓜与哥斯达黎加之间的“争议领土”是“争议水道右岸、圣胡安河右岸……与港头泻湖三者环绕的面积约 3 平方公里的湿地。”⁷ 其中“争议水道”即为“2010 年水道”。尼哥双方均未对“争议领土”的定义提出异议，且双方对争议领土的主张都以 1858 年边界条约、克利夫兰裁决及亚历山大裁决为依据。

1858 年边界条约第 II 条规定：“两国之间从北海开始的分界线，起点应为尼加拉瓜圣胡安河（San Juan de Nicaragua river）河口处卡斯蒂略海岬（Punta de Castilla）的末端，沿该河右岸而行，直至距老卡斯蒂洛（Castillo Viejo）三英里处的终点。”⁸

1888 年克利夫兰仲裁的结论是：“哥斯达黎加和尼加拉瓜之间的边界线，在大西洋一侧始于尼加拉瓜圣胡安河河口处的卡斯蒂略海岬末端，它们的地理位置以 1858 年 4 月 15 日的状态为准。卡斯蒂略海岬的添附归属于哪一方，应根据该事项应适用的法律来确定。”⁹

1896 年，尼加拉瓜和哥斯达黎加依据《帕切科—马图斯公约》（Pacheco-Matus Convention）建立了勘界委员会，并由美国总统指定亚历山大将军对勘界委员会的分歧进行终局裁决。亚历山大将军前后做出了五项相关裁决。¹⁰

在第一项裁决中，亚历山大指出这条边界线“必须沿被称为下圣胡安河的支流而行，穿过它的海港延伸到海洋。”¹¹ “在整个条约中，圣胡安河被当作或视为一个商业通道。这意味着它在通常状态下是可航行的。”¹² “它（边界线）的方向应当是从正东北到正西南，穿过沙洲，从加勒比海进入港头泻湖。抵达港头泻湖后，边界应当转向左侧，即东南方向，沿湖水边缘前行，直到抵达圣胡安河的第一条河道。然后边界线继续按照条约的指引，沿这条河道而上，即沿圣胡安

⁷ I. C. J. Reports 2011 (I), p. 19, para. 55.

⁸ Art. II of 1858 Treaty of Limits.

⁹ United Nations, Reports of International Arbitral Awards (RIAA), Vol. XXVIII, p. 209.

¹⁰ Art. II, RIAA, Vol. XXVIII, p. 212.

¹¹ RIAA, Vol. XXVIII, p. 217.

¹² RIAA, Vol. XXVIII, pp. 218-219.

河而上。”¹³ 该裁决附有一张描绘这段边界当时地理位置的草图。¹⁴ 在该图中，“第一条河道”是指当时流入港头泻湖的下圣胡安河支流。

第二项亚历山大裁决讨论了这样的可能性，即圣胡安河可能逐渐扩宽或缩窄，还可能发生整个河道的剧烈变化。亚历山大指出：“今天的边界线在未来肯定会受到渐进或突发的各种变化的影响。但这些变化的影响只能依据可适用的国际法原则，以个案分析的方式，根据具体情况来确定。现在的测界与勘界不影响上述原则的适用。”¹⁵

在第三项裁决中，亚历山大指出，“依据水道划定的边界可能会因这些水道河床的变化而发生变化。换句话说，影响边界变化的是河床，而非河水，无论这些河水是在河岸以内、以上或以下。”¹⁶ “圣胡安河必须被视为可航河流。因此我裁定，两国管辖范围的准确分割线应当是河水处于通常状态并且可供一般目的船舶航行时该河流的右岸。在这种状态下，河流中的全部河水都属于尼加拉瓜，河流右岸的全部土地都属于哥斯达黎加。”¹⁷

法院认为，根据 1858 年条约、克利夫兰裁决与亚历山大裁决，应当将 1858 年条约第 II 条与第 VI 条结合起来解读。第 II 条规定尼哥两国边界为“河流右岸”，而第 VI 条规定哥斯达黎加对从河口到距老卡斯蒂洛三英里处的河段拥有永久性的自由航行权。且根据亚历山大裁决的解释，1858 年条约将“通常水流状态下”的圣胡安河视为一个“商业通道”。因此法院认为，哥斯达黎加的航行权是与其对圣胡安河右岸领土的主权相关联的，构成两国边界的只能是圣胡安河可作为“商业通道”的某个航道的右岸。¹⁸

哥斯达黎加认为，圣胡安河目前没有自然河道通往港头泻湖，而且自亚历山大裁决以后，下圣胡安河主要航道的河床并无显著变化，2010 年尼加拉瓜为连接圣胡安河与港头泻湖而开凿的人工水道不应产生任何影响。¹⁹ 但尼加拉瓜辩称，作为争议领土地理形态自然变化的结果，“2010 年水道”即是亚历山大在其第一项裁决中提及的“第一条河道”，该水道已存在数年，现在它就是

¹³ RIAA, Vol. XXVIII, p. 220.

¹⁴ RIAA, Vol. XXVIII, p. 221.

¹⁵ RIAA, Vol. XXVIII, p. 224.

¹⁶ RIAA, Vol. XXVIII, p. 229.

¹⁷ RIAA, Vol. XXVIII, p. 230.

¹⁸ Judgement, p. 700, para. 76.

¹⁹ Judgement, p. 700, para. 77.

边界的标志；尼加拉瓜只是为了提高该水道的通航能力而在 2010 年对其进行疏浚。²⁰

为证明本国的主张，尼加拉瓜提供了卫星与航拍图片以及尼加拉瓜官员的书面陈述，但法院认为这些证据都不足以证明“2010 年水道”已存在数年。²¹ 尼加拉瓜还提供了两项地图证据。其中，哥斯达黎加地理机构 1949 年制作的一幅地图显示，在“2010 年水道”所在的位置，当年就曾有一条水道存在。该地理机构 1971 年出版的另一幅地图则显示了一条与尼加拉瓜现在主张的边界相近的边界线。然而，法院注意到上述地图证据与尼加拉瓜的一些官方地图相矛盾，特别是尼加拉瓜地图制作理事会 1967 年制作的地图，及尼加拉瓜领土研究院 2003 年出版的地图——在这些尼加拉瓜的官方地图上，争议领土都在哥斯达黎加的管辖范围之内。²²

法院还注意到，2010 年尼加拉瓜在开凿水道之前，曾清除河床上树龄相当长的大型树木，且该水道到 2011 年夏季就已不再连接圣胡安河与港头泻湖，这些事实足以证明，在这一位置曾有可航水道存在数年的主张是值得怀疑的。法院也认可了哥斯达黎加委任的首席专家的观点，即，如果“2010 年水道”曾是圣胡安河的一个支流，那么“冲积物应当已经填满了港头泻湖南部，或至少填充了其中一部分。”因此“2010 年水道”不大可能是前文中提到的“圣胡安河可作为‘商业通道’的某个航道”。²³

基于上述分析，最后法院判定：尼加拉瓜 2010 年开凿的水道的右岸不构成两国之间的边界；争议领土的主权属于哥斯达黎加；²⁴ 尼加拉瓜 2010 年后在争议领土上开凿水道和建立军事存在的活动侵犯了哥斯达黎加的领土主权。²⁵

三、环境影响评价义务

（一）尼加拉瓜是否违反了环境影响评价义务

哥斯达黎加诉称，尼加拉瓜 2006 年进行的“环境影响研究”不能支持“疏

²⁰ Judgement, pp. 700-701, para. 78.

²¹ Judgement, p. 701, para. 81.

²² Judgement, p. 702, para. 84.

²³ Judgement, p. 703, para. 90.

²⁴ Judgement, p. 703, para. 92.

²⁵ Judgement, p. 703, para. 93.

浚水道不会对科罗拉多河水流造成影响”的结论，且没有评估疏浚水道可能对湿地产生的影响，因此尼方没有适当履行环境影响评价义务。哥斯达黎加还援引2011年4月的《拉姆萨尔咨询工作组第72号报告》作为哥方观点的佐证。²⁶

尼加拉瓜辩称，其2006年的“环境影响研究”及相关文件全面论述了水道疏浚工程的潜在跨境影响，包括对哥斯达黎加环境的影响，及对科罗拉多河水流可能产生的减损效应。这项研究的结论是：疏浚水道没有造成重大跨境损害的风险，而且实际上会给圣胡安河及周围地区带来益处。至于《拉姆萨尔咨询工作组第72号报告》，尼加拉瓜认为它只是一份报告草案，尼加拉瓜向拉姆萨尔秘书处及时提交了对草案的评论，但秘书处至今没有完成最终报告，因此该报告不应在法院考虑范围之内。此外，尼加拉瓜提出，该报告的结论“尼加拉瓜没有分析疏浚水道对该地区水文的影响”是不正确的，且尼加拉瓜在提交给拉姆萨尔秘书处的评论中已就这一点作出了说明。²⁷

法院分四个层次分析了尼加拉瓜的环境影响评价义务：

首先，法院援引乌拉圭河纸浆厂案（Pulp Mills Case）的结论，指出每个国家都负有利用一切可能手段预防重大跨境损害的谨慎义务：²⁸

“预防损害原则是一项习惯国际法规则，它源自一国在本国内开展活动时应遵守的谨慎义务。‘每个国家皆有义务不在知情的情况下允许本国领土被用于有损他国权利的行为。’（*Corfu Channel (United Kingdom v. Albania)*, *Merits, Judgment*, *I. C. J. Reports 1949*, p. 22）国家有义务利用一切可能的手段来预防发生在本国领土内的行为或本国管辖下的行为给另一国的环境造成重大损害。”²⁹

紧接着，法院又援引乌拉圭河纸浆厂案的结论，重申环境影响评价义务是一般国际法上的一种要求：³⁰

“可将它视为一般国际法上的一种要求，即，在某计划采取的工业活动可能在跨境环境下造成重大负面影响时，特别是对共享资源而言，

²⁶ Judgment, pp. 705–706, para. 102.

²⁷ Judgment, p. 706, para. 105.

²⁸ Judgment, pp. 706–707, para. 104.

²⁹ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, *I. C. J. Reports 2010* (I), pp. 55–56, para. 101.

³⁰ Judgment, pp. 706–707, para. 104.

应当进行环境影响评价。”³¹

法院指出，乌拉圭河纸浆厂案结论中的基本原则普遍适用于所有可能在跨境环境中造成重大负面影响的行为。因此：

“为履行预防重大跨境环境损害的谨慎义务，一个国家在其行为有对它国环境造成负面影响的潜在可能时，应在行为前查明是否存在造成重大跨境损害的风险，一旦该风险存在，进行环境影响评价的要求即被触发。”³²

然后，法院援引乌拉圭河纸浆厂案的判决，重申环境影响评价的内容应由行为国依据其国内法、根据每个案件的具体情况来确定：³³

“应由各国依据本国的法律或项目批准程序，考虑计划项目的性质、规模及其可能造成的负面环境影响与谨慎实施环评的需要，来确定个案中环境影响评价的具体内容。”³⁴

最后，法院认定，尼加拉瓜的水道疏浚工程并无造成重大跨界损害的风险，因此尼加拉瓜并没有进行跨界环境影响评价的义务。哥斯达黎加主张的水道疏浚工程的主要风险是其对科罗拉多河水流的影响，以及因此对哥斯达黎加境内湿地产生的影响。2006 年，尼加拉瓜对水道疏浚工程对其国内环境可能造成的影响进行了一次评估，结论是该工程不会对科罗拉多河水流造成重大影响。这一结论得到了双方专家的证实。法院审阅了案件卷宗中的证据，包括双方专家提交的报告和证词，最后认定尼加拉瓜的水道疏浚工程对科罗拉多河水流和哥斯达黎加的湿地都没有造成重大跨境损害的风险。³⁵

（二）哥斯达黎加是否违反了环境影响评价义务

1. 哥斯达黎加是否违反了一般国际法上的环境影响评价义务

（1）哥斯达黎加的筑路活动是否存在造成重大跨境损害的风险

法院回顾了国家预防重大跨境损害的谨慎行为义务，并指出，根据这种义务的要求，

“国家在开展有可能对它国环境造成负面影响的活动以前，应当确

³¹ I.C.J. Reports 2010 (I), p. 83, para. 204.

³² Judgement, pp. 706-707, para. 104.

³³ Judgement, pp. 706-707, para. 104.

³⁴ I.C.J. Reports 2010 (I), p. 83, para. 205.

³⁵ Judgement, p. 707, para. 105.

认该项活动是否有导致重大跨境损害的风险。如果存在这种风险，则所涉国家必须进行环境影响评价。确认风险的义务应由行为国承担。”³⁶

因此法院认为，在本案中应由哥斯达黎加而非尼加拉瓜，在修筑道路之前，基于对所有相关情况的客观评估来确认导致重大跨境影响的风险是否存在。³⁷

在庭审中，哥斯达黎加的律师提出，该国曾在决定修筑道路之前进行过项目风险的初步评估，该评估考虑了项目的性质及其对河流可能造成的影响，得出的结论是该项目没有造成重大损害的风险。为支持这一主张，哥斯达黎加强调工程规模不大，修筑的道路并非高速公路，工程所在位置原本就有一些道路存在，唯一可能的风险是为已有大量沉积物的圣胡安河带来更多沉积物。法院认为，进行初步风险评估是国家确认其计划行为是否有造成重大跨境损害风险的途径之一。然而，哥斯达黎加并未提供证据证明它确实进行了该项初步评估。³⁸

那么，哥斯达黎加的筑路工程是否存在造成重大跨境损害的风险？为回答这一问题，法院考虑了该工程的性质、规模，以及开展该工程的环境。³⁹

首先，法院注意到，该工程的规模非常可观。它的长度近 160 千米，其中 108.2 千米沿河而行。近一半的道路为全新建设。

其次，法院注意到，该道路位于圣胡安河沿岸，它对周围环境造成的任何损害都很容易影响河流，并影响尼加拉瓜领土。道路沿圣胡安河而行的部分近一半位于距河岸 100 米的范围之内，而有约 18 千米道路在距河流 50 米的范围之内，有部分道路甚至距河岸不到 5 米。道路距河流如此之近，而且经常建于斜坡之上，因此存在增加河流泥沙沉积的风险。要评估因水土流失造成泥沙沉积的可能性，应当考虑的另一个相关因素是：近四分之一的道路建于曾有森林覆盖的区域。同样还应当考虑因飓风、热带风暴和地震在该地区造成自然灾害的可能性，因为这些自然灾害可能增加泥沙侵蚀的风险。

再次，法院认为必须考虑道路所在流域的地理条件。该道路要穿过哥斯达黎加领土上的一个重要湿地，而且与尼加拉瓜领土上的西尔维斯特圣胡安河湿地（Refugio de Vida Silvestre Río San Juan）非常接近。这两个湿地都位列《关于特别是作为水禽栖息地的国际重要湿地公约》（简称《国际湿地公约》，又称《拉

³⁶ Judgement, p. 720, para. 153.

³⁷ Judgement, p. 720, para. 153.

³⁸ Judgement, p. 720, para. 154.

³⁹ Judgement, pp. 720-721, para. 155.

姆萨尔公约》) 的国际重要湿地名录之中, 它们的存在进一步提升了筑路工程造成重大损害的风险, 因为这意味着工程承受的环境特别敏感。工程可能产生的主要损害是来自道路的大量泥沙淤积、因此给河流生态与水质带来的风险以及河流形态的改变。

综上, 法院认为哥斯达黎加的筑路工程有造成重大跨境损害的风险。⁴⁰

(2) 哥斯达黎加的环境影响义务是否因紧急状态而免除

哥斯达黎加主张其环境影响评价义务可以免除, 因为哥方修建道路可归因于尼加拉瓜占领争议领土所导致的紧急状态(emergency): 首先, 紧急状态可使一国免除进行环境影响评价的义务, 或者因为国际法在这个问题上指向国内法, 或者因为国际法自身包含这个例外; 其次, 筑路行为是对上述紧急状态的适当反应, 因为两国之间军事对抗造成的真实风险意味着哥斯达黎加随时可能要撤离圣胡安河右岸, 而筑路的目的正是为了便于通达该地区的岗哨和边远社区。哥斯达黎加据此提出, 它有权在没有进行环境影响评价的前提下开展筑路活动。⁴¹

尼加拉瓜则主张并不存在真正的紧急状态, 因为哥方所筑道路并不在国际法院 2011 年法令定义的“争议领土”附近, 且哥方宣布紧急状态是在筑路开始的七个月后。尼加拉瓜还提出, 在国际法上紧急状态并不是免除环境影响评价义务的理由, 哥斯达黎加根据国内法宣布紧急状态并据此为不履行国际法义务的行为辩解是不适当的。⁴²

为回答哥斯达黎加是否因紧急状态而免除其环评义务的问题, 法院首先回顾了自己援引乌拉圭河纸浆厂案判决作出的判定: “应由各国依据本国的法律或项目批准程序, 考虑计划项目的性质、规模及其可能造成的负面环境影响与谨慎实施环评的需要, 来确定个案中环境影响评价的具体内容。”⁴³ 就此法院指出:

“上文对国内法的提及与是否应当进行环境影响评价这一问题无关。因此, 在哥斯达黎加国内法上可能存在紧急状态豁免的事实并不影响哥斯达黎加进行环境影响评价的国际法义务。”⁴⁴

接下来, 法院考察了案件的具体情况, 判定并不存在某种紧急状态使哥斯达

⁴⁰ Judgement, p. 721, para. 156.

⁴¹ Judgement, p. 719, para. 148.

⁴² Judgement, p. 719, para. 150.

⁴³ I.C.J. Reports 2010 (I), p. 83, para. 205.

⁴⁴ Judgement, pp. 721-722, para. 157.

黎加有必要立刻开始筑路而不进行环评：

“实际上，该工程的完成需要数年，实际上也确实经历了数年。此外，在哥斯达黎加开始修路时，国际法院已在了解争议领土的情况并很快发出了临时措施命令。虽然哥斯达黎加坚持认为修路是为便于其人员撤离圣胡安河畔的哥方领土，但法院注意到这条道路只能为该地区的部分区域提供通道，因此只能在有限范围内构成对哥方主张的紧急状态的反应。而且，哥斯达黎加并未证明在道路穿过的地区存在军事对抗的紧迫威胁。最后，法院注意到，哥斯达黎加宣布紧急状态的行政法令颁布于 2011 年 2 月 21 日，是在筑路工程开始以后。”⁴⁵

因此法院认为哥斯达黎加主张的紧急状态并不存在，从而也无需裁决在国际法上紧急状态是否构成免除环境影响评价义务的理由。⁴⁶

（3）哥斯达黎加是否已履行其环境影响评价义务

法院注意到哥斯达黎加进行了数次环境研究，包括 2012 年 4 月制定的环境管理计划，2013 年 11 月进行的环境诊断评估，以及 2015 年 1 月进行的后续研究。这些研究评估了筑路活动对环境造成的负面影响，并提出了减少这些影响的对策建议。⁴⁷

法院援引乌拉圭河纸浆厂案判决，肯定了环境影响评价义务的持续性，即，如有必要，应当在工程的整个过程中持续监测工程对环境的影响。⁴⁸ 但法院强调，环境影响评价义务要求对造成重大跨境损害的风险进行事前评估，因此“环境影响评估必须在工程开始之前进行”。⁴⁹ 结合本案情况，法院认为哥斯达黎加有义务在其筑路工程开始之前进行环境影响评价，以确保工程的设计和和实施能让造成重大跨境损害的风险最小化；但哥斯达黎加的环境诊断评估及其它研究均是对已建道路造成的环境影响的事后评估，因此，就其筑路工程而言，哥斯达黎加没有履行一般国际法上的环境影响评价义务。⁵⁰

2. 哥斯达黎加是否违反了《生物多样性公约》中的环境影响评价义务

⁴⁵ Judgement, p. 722, paras. 159.

⁴⁶ Judgement, p. 722, paras. 159.

⁴⁷ Judgement, p. 722, para. 160.

⁴⁸ I.C.J. Reports 2010 (I), p. 83, para. 204.

⁴⁹ I.C.J. Reports 2010 (I), p. 83, para. 204.

⁵⁰ Judgement, pp. 722-723, paras. 161-162.

本案双方都是《生物多样性公约》缔约国。《公约》第 14 条规定：

“每一缔约国应尽可能并酌情：(a) 采取适当程序，要求就其可能对生物多样性产生重大不利影响的拟议项目进行环境影响评估，以期避免或尽量减轻这种影响，并酌情允许公众参加此种程序。”

尼加拉瓜认为该条款要求哥斯达黎加进行环境影响评价。但哥斯达黎加辩称，该条款只是关于就可能对生物多样性产生重大不利影响的拟议项目采取适当程序，而哥斯达黎加已经有了这种“适当程序”，只是这种程序并不适用于本案中涉及的筑路活动，因为该项目不可能对生物多样性造成重大不利影响。⁵¹

法院认为，《公约》第 14 条并没有创设这样一种义务，即在进行可能对生物多样性造成重大不利影响的的活动之前进行环境影响评价，因此哥斯达黎加并没有违反《公约》。⁵² 法院没有为这一结论说明理由，而是直接援引了《公约》第 14 条的条文，其依据应是对《公约》第 14 条的文本解释，即，按第 14 条字面意思，其对缔约国施加的义务是“采取适当程序，要求就……进行环境影响评估”，而非直接规定缔约国的环境影响评估义务。这种“适当程序”应当包括缔约国的国内立法和项目审批程序，也包括缔约国之间的具体协定。

（三）违反环境影响评价义务的救济措施

法院认为，宣布哥斯达黎加违反了进行环境影响评价的国际法义务即是对尼加拉瓜的适当救济措施。⁵³

尼加拉瓜请求法院命令哥斯达黎加“停止所有进行中的，影响或可能影响尼加拉瓜权利的国际不法行为。”但法院认为，哥斯达黎加对环境影响评价义务的违反目前并没有对尼加拉瓜的权利造成负面影响，也不可能在未来影响尼加拉瓜的权利，因此没有理由支持尼加拉瓜要求的救济措施。⁵⁴

尼加拉瓜还请求法院命令哥斯达黎加按道路修建以前的状况在可能范围内恢复原状，并对无法恢复原状的部分做出损害赔偿。法院认为恢复原状和损害赔偿都是对实际损害的救济措施；虽然哥斯达黎加没有履行环境影响评价义务，但不能认定筑路工程对尼加拉瓜造成了重大损害或违反了国际法上的任何实体义

⁵¹ Judgement, p. 723, para. 163.

⁵² Judgement, p. 723, para. 164.

⁵³ Judgement, pp. 738-739, para. 224.

⁵⁴ Judgement, p. 739, para. 225.

务，因此恢复原状和损害赔偿都不是违反环境影响评价义务的适当救济措施。⁵⁵

此外，尼加拉瓜要求法院裁定哥斯达黎加不进行适当的环境影响评价则不能再在边境地区进行任何开发，但法院认为，哥斯达黎加进行环境影响评价的义务仅适用于有造成重大跨境损害风险的活动，没有理由假设哥斯达黎加在该地区未来的活动中不会履行国际法上的义务，因此法院驳回了尼加拉瓜的这项请求。⁵⁶

四、通知与磋商义务

（一）尼加拉瓜是否违反了通知与磋商义务

本案当事双方都认同，依据一般国际法，如果一国计划进行的活动有产生重大跨境损害的风险，那么它有义务通知可能受到影响的国家并与之进行磋商。除此以外，哥斯达黎加提出，因为尼哥双方均为《拉姆萨尔公约》和《中美洲生物多样性与野生动物优先区域保护公约》的成员国，尼加拉瓜还负有条约法上的通知与磋商义务：其一，《拉姆萨尔公约》第3条第2款和第55条规定了通知与磋商义务；其二，《中美洲生物多样性与野生动物优先区域保护公约》第13条g款与第33条规定了关于可能损害生物资源的行为的信息分享义务。⁵⁷

尼加拉瓜不否认一般国际法上通知与磋商义务的存在，但它认为本案中这项义务受限于1858年条约，因为1858年条约构成程序义务的特别法。1858年条约没有规定关于开凿水道或任何其它“改善工程”的通知或磋商义务，所以国际习惯法或条约法上的通知与磋商义务都不适用于本案。此外，尼加拉瓜主张，《拉姆萨尔公约》第3条和第5条不适用于本案；《中美洲生物多样性与野生动物优先区域保护公约》并没有确立关于可能损害生物资源的行为的信息分享义务，最多它只是鼓励成员国进行这样的信息分享。⁵⁸

在前面讨论环境影响评价义务时，法院已明确指出通知与磋商是环评确认重大跨境损害风险后的后续义务：

“如果环境影响评价确认某项活动存在造成重大跨境损害的风险，
计划开展该项活动的国家为履行其预防重大跨境损害的谨慎义务，应当

⁵⁵ Judgement, p. 739, para. 226.

⁵⁶ Judgement, p. 739, para. 227.

⁵⁷ Judgement, pp. 705-706, para. 106.

⁵⁸ Judgement, p. 708, para. 107.

通知可能受影响的国家，并在必要时与其进行诚意磋商，以确定防止或减轻风险的适当措施。”⁵⁹

针对尼加拉瓜的主张，法院讨论了 1858 年条约对该义务的影响。法院认为，虽然 1858 年条约可能只规定了特定情形下有限的通知与磋商义务，但这一事实并不排除国际条约或习惯法上存在的关于跨境损害的任何其它程序义务。不过法院指出，因为尼加拉瓜疏浚水道的活动并无造成重大跨界损害的风险，所以根据一般国际法，尼加拉瓜并不承担通知和磋商义务。⁶⁰

然后法院分析了尼加拉瓜是否负有条约法上的通知与磋商义务。法院认为，《拉姆萨尔公约》第 3 条第 2 款的规定仅限于通知拉姆萨尔秘书处关于“湿地的生态特征”的变化或可能变化，但在本案中，没有证据显示尼加拉瓜疏浚水道的工程引起了或可能引起湿地生态特征的变化，除非该工程进一步扩大。因此法院判定，尼加拉瓜没有对拉姆萨尔秘书处进行通知的义务。⁶¹ 法院继而讨论了《拉姆萨尔公约》第 5 条的规定。法院认为该条款只规定了“就如何执行公约义务”进行磋商的一般义务，而并未规定就某项特定工程进行磋商的具体义务，因此在《拉姆萨尔公约》项下，尼加拉瓜并没有在启动水道开凿工程之前通知哥斯达黎加并与其磋商的义务。⁶² 此外，法院认为，《中美洲生物多样性与野生动物优先区域保护公约》中哥斯达黎加援引的两个条款都未规定有约束力的通知与磋商义务。⁶³ 所以尼加拉瓜在本案中并不负有任何条约法上的通知与磋商义务。

（二）哥斯达黎加是否违反了通知与磋商义务

尼加拉瓜诉称，哥斯达黎加的筑路活动存在造成重大跨境损害的风险，而哥方没有在活动开始之前通知尼方并与尼方磋商，违反了它基于国际习惯法、1858 年条约与《拉姆萨尔公约》应承担的国际义务。⁶⁴

但哥斯达黎加认为，本案中并不存在触发通知与磋商义务的“重大负面影响风险”；而且哥斯达黎加曾邀请尼加拉瓜进行磋商，但尼加拉瓜没有回应；此外，哥斯达黎加修筑道路的原因正是尼加拉瓜造成的紧急状态。⁶⁵

⁵⁹ Judgement, pp. 706-707, para. 104.

⁶⁰ Judgement, p. 708, para. 108.

⁶¹ Judgement, pp. 708-709, para. 109.

⁶² Judgement, p. 709, para. 110.

⁶³ Judgement, pp. 709-710, para. 111.

⁶⁴ Judgement, p. 724, para. 165.

⁶⁵ Judgement, p. 724, para. 167.

法院首先重申，在环境影响评价确认存在重大跨境损害风险的前提下，行为国负有一般国际法上的通知与磋商义务。但法院认为在本案中并不需要讨论哥斯达黎加是否履行了这项义务，因为法院已经确认哥斯达黎加没有在筑路工程开始以前履行其环境影响评价义务。⁶⁶

其次，针对尼加拉瓜认为哥斯达黎加没有履行 1858 年条约中通知义务的主张，法院认为 1858 年公约并不要求哥斯达黎加将其在自己领土上的活动提前通知尼加拉瓜。⁶⁷

最后，针对尼加拉瓜基于《拉姆萨尔公约》提出的主张，法院判定，尼加拉瓜没有证明哥斯达黎加的筑路活动改变了或有可能改变其领土上湿地的生态特征，而且哥斯达黎加曾将其穿过湿地的道路走向通知拉姆萨尔秘书处，因此哥斯达黎加没有违反《拉姆萨尔公约》第 3 条第 2 款；《拉姆萨尔公约》第 5 条则并没有要求成员国就某个正在进行的特定项目履行磋商义务。⁶⁸

五、不造成重大跨境损害义务

尼加拉瓜和哥斯达黎加都诉称对方违反了习惯国际法上不造成重大跨境损害的义务。经过审理，法院驳回了双方的诉求，延续了国际法院适用不造成重大跨境损害规则时一贯的谨慎风格。

（一）尼加拉瓜在下圣胡安河的疏浚活动是否造成了重大跨境损害

在本案判决的第一部分，法院已判定尼加拉瓜在哥斯达黎加领土上开凿水道等活动的违法性。法院还需要裁判尼加拉瓜在本国领土上的活动，即在下圣胡安河及其左岸的活动。⁶⁹

哥斯达黎加诉称，尼加拉瓜在下圣胡安河的疏浚工程对哥斯达黎加在圣胡安河右岸的领土以及科罗拉多河造成了跨境影响，违反了尼加拉瓜在习惯国际法上的义务及 1888 年克利夫兰裁决。⁷⁰ 尼加拉瓜辩称，疏浚工程并没有对包括科罗拉多河在内的哥斯达黎加领土造成任何损害，反而对下圣胡安河及其下游有国际重要性的湿地都有益处。尼加拉瓜还主张，疏浚工程是为了维持和改善圣胡安河

⁶⁶ Judgement, p. 724, para. 168.

⁶⁷ Judgement, p. 725, para. 171.

⁶⁸ Judgement, p. 725, para. 172.

⁶⁹ Judgement, p. 710, para. 113.

⁷⁰ Judgement, p. 710, para. 114.

状况，因此根据克利夫兰裁决中的特别规则，它即使对哥斯达黎加领土造成损害也并不违法。⁷¹

法院首先援引乌拉圭河纸浆厂案判决，重申了“不造成重大跨境损害”规则在国际习惯法上的地位以及该规则的内涵，即在国际习惯法上，

“国家有义务采取其可支配的一切手段来预防在其领土上或其管辖范围之内活动对其它国家的环境造成重大损害。”⁷²

案件双方在这里都援引了克利夫兰裁决，但法院认为没必要讨论 1858 年条约、克利夫兰裁决与国际习惯法规则之间的关系，因为尼加拉瓜在其本国领土上的活动并未对哥斯达黎加造成跨境影响。

法院指出，哥斯达黎加没有提供令人信服的证据证明河流中挖掘出的沉积物堆积在河流右岸，也没有证明疏浚工程对其湿地造成了损害。另据尼加拉瓜估算，疏浚工程对科罗拉多河水量的影响，不到该河总流入水量的 2%。哥斯达黎加没有提出更高的数字，且它委任的首席专家承认：“没有证据显示疏浚工程对科罗拉多河的水流造成了重大影响。”哥斯达黎加举证证明 2011 年 1 月到 2014 年 10 月间科罗拉多河水流剧减，但法院认为哥斯达黎加并没有证明河水减少与疏浚工程之间存在因果关系，而其它因素也可能与水流减少有关，特别是那段时间降雨的减少。法院还认定，不管科罗拉多河水流是否因疏浚工程而减少，这种影响都远不至于严重影响科罗拉多河的适航性，或对哥斯达黎加造成其它损害。⁷³

综上，法院判定尼加拉瓜在下圣胡安河的疏浚活动并没有违反国际习惯法上不造成重大跨境损害的义务。⁷⁴

（二）哥斯达黎加在圣胡安河沿岸的筑路活动是否造了重大跨境损害

尼加拉瓜诉称，哥斯达黎加修筑道路导致大量泥沙沉积物进入圣胡安河，特别是因为哥方忽略基本的工程原则，造成了严重的水土流失。⁷⁵哥斯达黎加则提出，泥沙沉积并非污染物，而且道路造成的泥沙沉积与圣胡安河既有的泥沙沉积

⁷¹ Judgement, p. 710, para. 115.

⁷² I.C.J. Reports 2010 (I), p. 56, para. 101; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), pp. 241-242, para. 29.

⁷³ Judgement, p. 712, para. 119.

⁷⁴ Judgement, p. 712, para. 120.

⁷⁵ Judgement, pp. 726-727, para. 177.

相比是微不足道的。⁷⁶

筑路工程究竟使圣胡安河泥沙沉积量增加了多少？双方委任的专家就水土流失区域和水土流失率提供了截然不同的关键数据，从而计算出完全不同的结果。法院认为没必要详细讨论双方专家不同估算方式在科学与技术方面的正确性，而是采用了哥方专家基于尼方专家提供的数据计算出的结果，即，筑路造成的泥沙沉积不超过圣胡安河泥沙沉积总量的 2%，这一结果也没有受到尼方质疑。

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基于这个判断，法院分四步讨论了筑路造成的沉积物是否对尼加拉瓜造成了重大跨境损害。

1. 含沙量增加导致的损害

尼加拉瓜认为，筑路造成的泥沙沉积不论准确数量为多少，它都污染了圣胡安河，从而对尼加拉瓜造成了重大损害；在衡量道路造成的影响时，还要考虑哥斯达黎加砍伐森林和不科学使用土地而造成圣胡安河泥沙沉积增加的情况。据尼方专家估算，现在圣胡安河的泥沙沉积量约为 13,700,000 吨/年。尼加拉瓜提出，圣胡安河可容纳的泥沙沉积量有一个最大限度，如果从道路冲刷进入圣胡安河的泥沙沉积在这个最大限度之外，那么对河流来说必然是有害的。⁷⁸

哥斯达黎加辩称，尼加拉瓜没有证明圣胡安河泥沙沉量容纳限度的存在，更没有证明现有沉积量已经超过该限度。哥斯达黎加认为法院应当回答的问题是，道路导致的沉积对圣胡安河沉积总量的相对影响是否导致了重大损害。哥斯达黎加指出，鉴于这一地区的地理状况，特别是圣胡安河干流与支流集水区的地震与火山喷发，圣胡安河在自然状态下就是一条多沙河流。据哥方估算，圣胡安河的沉积总量约为 12,678,000 吨/年，道路造成的沉积最多只占该数额的 0.6%，因此道路造成的沉积相较于河流沉积总量而言是无足轻重的。此外哥方提出，从其它来源进入圣胡安河的沉积量变化非常大，道路造成的沉积量很难确认；即使采用尼加拉瓜提供的数据，道路造成的沉积也仅占圣胡安河沉积总量的 1%到 2%，如此小的比例不可能导致重大损害。⁷⁹

尼加拉瓜进一步提出，根据国际法委员会《预防危险活动造成的跨界损害条

⁷⁶ Judgement, pp. 727-728, para. 179.

⁷⁷ Judgement, p. 729, para. 186.

⁷⁸ Judgement, pp. 729-730, para. 188.

⁷⁹ Judgement, p. 730, para. 189.

款草案》(Draft Articles on Prevention of Transboundary Harm from Hazardous Activities) 的评论, 筑路对圣胡安河的有害影响只要能够被测算, 就可以说是重大损害;⁸⁰ 既然双方专家都估算出了筑路造成的泥沙沉积量, 那么这个数量显然是可测算的。⁸¹

哥斯达黎加反驳称, 尼加拉瓜没有依据事实和客观标准证明重大损害的存在: 尼方本可以在筑路工程的上游和下游分别进行测量, 以确定筑路工程对圣胡安河沉积水平的影响, 但尼方并没有这样做。⁸²

法院认为, 圣胡安河有相当大的自然沉积量, 尼加拉瓜没有证明从哥斯达黎加新筑道路冲刷进入河流的沉积达到了会对河流造成损害的程度。此外, 圣胡安河泥沙沉积容纳限度并未确定, 因此本案并不涉及沉积物是否超过该限度的问题。因此, 法院并未认可筑路造成的河流沉积的绝对数量本身导致了重大损害。那么道路造成的沉积物对圣胡安河现有沉积总量的相对影响如何? 法院注意到圣胡安河的沉积总量并未确定。哥斯达黎加的首席专家根据科罗拉多河的测量结果估算圣胡安河的总沉积量约为 12, 678, 000 吨/年。尼加拉瓜没有提供河流沉积水平的直接测量值, 但其委任的专家认为圣胡安河的现有沉积总量应为大约 13, 700, 000 吨/年。根据法院看到的证据和双方专家对筑路导致的沉积量以及圣胡安河总沉积量的估算, 法院发现道路导致的沉积量最多只占圣胡安河总沉积量的 2%。基于这一结论, 并考虑到圣胡安河的沉积量有非常高的自然变化率, 法院认为不能确认重大损害的存在。⁸³

当事国提交给法院的实际测量结果仅有 2011 到 2012 年的报告。2011 年道路尚未修建, 2012 年道路在修建之中, 这两年测量值的比较显示, 圣胡安河的沉积量是处于变化中的, 而且沉积的主要来源是圣胡安河的支流, 特别是圣卡洛斯河与萨拉皮基河。这些数据不能证明筑路对河流泥沙沉积水平造成了重大影响。此外, 在道路坡度最大的地区埃尔卡斯蒂约 (El Castillo) 和上游博卡圣卡洛斯 (Boca San Carlos) 的测量结果也没有显示重大损害的存在。⁸⁴

⁸⁰ Text of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries Thereto, Arts. 7-9, *Yearbook of the International Law Commission (YILC)*, 2011, Vol. II, Part Two, p. 148, 157-61.

⁸¹ Judgement, p. 730, para. 190.

⁸² Judgement, p. 730, para. 191.

⁸³ Judgement, pp. 730-731, para. 192.

⁸⁴ Judgement, p. 731, para. 195.

因此法院判定，尼加拉瓜没有证明筑路导致圣胡安河含沙量增加这一事实本身和本质上导致了重大跨境损害。⁸⁵

2. 对圣胡安河形态、航运和尼加拉瓜疏浚工程的损害

尼哥双方大致都认可：如果假设在科罗拉多三角洲（Delta Colorado）圣胡安河 10%的河水流入下圣胡安河，那么圣胡安河中大约 16%的悬浮沉积物和 20%的粗沙沉积物将进入下圣胡安河。与水量较大的科罗拉多河不同，下圣胡安河缺乏输沙能力，因此粗沙沉积物就沉降在下圣胡安河的河床上。留在河床上的沉积物分布并不均匀，而是更多聚积于浅滩和沙洲，因此可能会阻碍航运，特别是在旱季。然而，更细小的悬浮沉积物是否也留在了河床上？沉积的程度如何？更广泛地说，筑路工程对下圣胡安河的悬浮沉积物影响如何？双方对这些问题存在分歧。⁸⁶

尼方专家认为，因筑路而进入下圣胡安河的所有粗沙沉积物和 60%的细沙悬浮沉积物都留在了河床上。为维持河流的适航性，尼加拉瓜不得不对下圣胡安河中累积的沉积物进行疏浚。对于下圣胡安河这样沉积物已经过多的河流而言，任何来自道路的额外沉积物都对尼加拉瓜造成了重大损害，因为它加重了尼加拉瓜的疏浚负担。此外，道路导致的沉积物累积还减少了注入下游湿地的淡水，从而影响这些湿地的生态平衡。⁸⁷ 尼加拉瓜还提出，从道路冲刷下的沉积物沿河道形成了“巨大的”三角洲，阻断了航运，从而对尼加拉瓜造成了重大损害。⁸⁸

哥斯达黎加依据其首席专家提供的证据辩称，下圣胡安河的泥沙淤积是不可避免的自然现象，与筑路无关，而且尼方专家夸大了道路造成的泥沙在下圣胡安河的沉积量：第一，只有粗沙沉积物聚集在下圣胡安河河床上，而绝大多数细沙沉积物被冲入了加勒比海；第二，没有证据证明道路造成的粗沙沉积物实际达到了下圣胡安河，因为沉积物沉降并不是线性过程，它在被冲往下游之前，往往会在某个河段停留数年；此外，双方的估算都是基于没有经过科学验证的假设的数字，比如，在“科罗拉多三角洲”圣胡安河的水量和沉积量分别进入科罗拉多河和下圣胡安河的比例就只是一种假设，尼加拉瓜主张下圣胡安河河床上累积的沉

⁸⁵ Judgement, p. 731, para. 196.

⁸⁶ Judgement, p. 732, para. 198.

⁸⁷ Judgement, p. 732, para. 199.

⁸⁸ Judgement, p. 732, para. 200.

积物必然需要疏浚，也是一种错误的假设。⁸⁹

法院注意到，尼加拉瓜没有提供筑路开始后下圣胡安河形态发生变化或航运能力恶化的直接证据。尼加拉瓜在这一点上的主张又是完全基于专家的建模与估算，而这些模型与估算并没有得到实际数据的证实。法院认为，从道路冲刷进入下圣胡安河并沉降在河床上的沉积物实际数量存在很大的不确定性。尼加拉瓜并没有提供科学证据证明在“科罗拉多三角洲”水流与沉积物的分配比例，而只是依据哥斯达黎加电力机构的一份报告做出估算，且这份报告的依据仅仅是在科罗拉多河进行的测量结果。⁹⁰

法院依据当事国提交的专家证据进一步认定，沉积物累积是下圣胡安河长期存在的自然特征，沉积物沿圣胡安河的输送并非线性过程。道路带来的沉积物只是可能影响下圣胡安河泥沙淤积的数个因素之一。因此法院认为，尼加拉瓜提供的证据没有证明下圣胡安河的任何形态改变是由筑路工程造成的。⁹¹

至于尼加拉瓜关于筑路工程加重其疏浚负担的主张，法院注意到，尼加拉瓜的疏浚活动始于筑路工程开始之前，尼方没有提供证据证明它因为筑路工程而增加了疏浚活动。法院再次回顾了它关于筑路最多造成河流沉积物增加 2% 的判断，注意到没有证据证明道路造成的沉积物比其它来源的沉积物更有可能沉降在河床上，由此得出结论：道路造成的沉积物最多占到尼加拉瓜在下圣胡安河疏浚的沉积物总量的 2%，不能认定筑路工程对下圣胡安河河床或尼加拉瓜的疏浚负担造成了重大影响。⁹²

关于沉积三角洲的问题，法院注意到，尼加拉瓜提出在道路坡度最大处存在八个“巨大的”三角洲，但并不能明确指出有几个三角洲是因筑路造成的；而且卫星影像显示在筑路开始之前有两个三角洲业已存在。不论这些三角洲是否因筑路而形成，法院注意到它们仅在哥斯达黎加一侧河岸占据了河道的边缘，因此法院认定，尼加拉瓜并未充分证明这些三角洲对河道的形态或航运能力造成了重大的负面影响。⁹³

综上，法院得出结论：尼加拉瓜没有证明道路导致的泥沙沉积对圣胡安河与

⁸⁹ Judgement, pp. 732-733, para. 201.

⁹⁰ Judgement, p. 733, para. 203.

⁹¹ Judgement, p. 733, para. 204.

⁹² Judgement, pp. 733-734, para. 205.

⁹³ Judgement, p. 734, para. 206.

下圣胡安河的河流形态或航运能力造成了重大损害，或显著加重了尼加拉瓜的疏浚负担。⁹⁴

3. 对圣胡安河水质和水域生态系统的损害

尼加拉瓜在其诉状中提出，筑路导致的河流泥沙沉积增加对河流中生活的鱼类、大型无脊椎动物和藻类都造成了重大损害；沉积物也造成了河流水质的恶化。尼方提供了一份专家报告作为证明水生生物和水质受到损害的重要依据。这份专家报告以圣胡安河 16 个三角洲所取样本为依据，得出的结论是：圣胡安河南岸大型无脊椎动物的物种多样性和丰度显著低于北岸。⁹⁵ 在庭审阶段，尼加拉瓜的主张从河流生态系统受到实际损害转变为有受到损害的风险。双方都承认，到目前为止尚没有相关调查可以证明圣胡安河内的鱼类是否易受泥沙沉积水平提高的影响，然而尼加拉瓜认为，根据哥斯达黎加的环境诊断评估及 2015 年 1 月由热带科学中心（Tropical Science Centre）进行的后续研究可以判断，哥方新修道路对圣胡安河支流内的大型无脊椎动物和水质有损害。热带科学中心在哥斯达黎加境内新建道路上游与下游的圣胡安河支流分别进行了水质监测，据其记录，道路下游的水质相对较差。在尼加拉瓜看来，这项研究的结果可以证明圣胡安河有受到损害的风险，因为这些支流都将汇入圣胡安河。⁹⁶

哥斯达黎加认为尼加拉瓜的证据不足。依其专家意见，哥方提出，圣胡安河内的生物很有可能正在适应泥沙沉积水平提高且不断变化的情况，并对这些情况有很高的容忍度。至于大型无脊椎动物和水质，哥斯达黎加认为它所做的环境诊断评估并没有显示道路产生的重大影响，并且这项研究的结果是基于哥斯达黎加境内小型支流的样本，并不能移植到比支流体量大得多的圣胡安河干流。⁹⁷

法院接受了哥斯达黎加的观点。它注意到尼加拉瓜没有提供关于圣胡安河鱼类受到实际损害的证据，也没有指明因筑路工程受到损害的鱼的具体种类。⁹⁸ 尼加拉瓜所依据的环境诊断评估及其后续研究仅仅显示，筑路工程对哥斯达黎加境内圣胡安河小型支流内的大型无脊椎动物种群和水质有区域性影响。法院并不认为上述结论可移植到平均宽度近 300 米的圣胡安河。对于尼加拉瓜提交的专家报

⁹⁴ Judgement, p. 734, para. 207.

⁹⁵ Judgement, pp. 734–735, para. 208.

⁹⁶ Judgement, p. 735, para. 209.

⁹⁷ Judgement, p. 735, para. 210.

⁹⁸ Judgement, p. 735, para. 211.

告，法院认为，很难将圣胡安河北岸与南岸大型无脊椎动物物种多样性和丰度的区别仅仅归因于筑路工程，而忽略集水区规模、水中养分含量等其它因素。⁹⁹

4. 其它损害

尼加拉瓜主张筑路工程对沿河居民社区的健康状况造成了负面影响，因为这些社区的健康依赖于河流本身的健康。尼加拉瓜还提出，道路对这一地区的自然景观造成了视觉上的负面影响，因此严重影响了该地区的旅游业发展潜力。除此以外，尼加拉瓜认为该道路有在未来进一步造成跨境损害的风险，因为如果危险物质经由该道路运输，可能会让有毒物质进入圣胡安河；道路的存在也可能导致圣胡安河右岸农业和商业活动的不断增加。¹⁰⁰

哥斯达黎加辩称，尼加拉瓜没有就道路对旅游业和沿河社区健康状况的实际影响给出任何证据，也没有解释其主张的法律依据；此外，尼加拉瓜提出有毒物质进入圣胡安河的风险纯属臆测，因为哥斯达黎加的国内法规已规定有害物质只能通过经批准的道路运输，而本案中涉及的道路并不在上述道路范围之内。¹⁰¹

法院认为尼加拉瓜没有证实其关于旅游业和健康问题的主张。关于道路在未来造成跨境损害的风险也仅是猜测，而没有证实可能存在的任何损害。因此法院没有支持尼加拉瓜的这些主张。¹⁰²

六、航行权问题

哥斯达黎加诉称尼加拉瓜侵犯了“哥斯达黎加根据 1858 年边界条约、1888 年克利夫兰仲裁裁决和 2009 年国际法院判决享有的在圣胡安河上的永久航行权”。¹⁰³

1858 年边界条约第 V 条规定：“尼加拉瓜共和国对圣胡安河从湖泊源头到大西洋入海口的河水拥有完全的所有权和统治权；但哥斯达黎加共和国对圣胡安河从河口到老卡斯蒂洛下游三英里处的河段享有商业目的永久自由航行权，无论是与尼加拉瓜通航还是与哥斯达黎加境内河流通航，这些河流包括圣卡洛斯河、萨拉皮基河及哥斯达黎加境内与圣胡安河该河段连接的任何其它水道。两国的船舶

⁹⁹ Judgement, pp. 735-736, para. 212.

¹⁰⁰ Judgement, p. 736, para. 214.

¹⁰¹ Judgement, p. 736, para. 215.

¹⁰² Judgement, p. 736, para. 216.

¹⁰³ Judgement, p. 714, para. 130.

都可以在该河段常用航道的任意一边河岸停泊，不用缴纳任何税赋，除非两国政府另有约定。”克利夫兰裁决援引了上述规定。¹⁰⁴

2009 年，国际法院曾就哥斯达黎加诉尼加拉瓜关于航行权与相关权利的争议做出判决，其中提到，“根据 1858 年条约第 VI 条，自由航行权涵盖两种私人航行：以商业交易为目的的货运船只航行，以及付费乘船的客运船只航行。”¹⁰⁵虽然 1858 年条约第 VI 条的措辞仅涉及商业航行，但法院认为：“在河岸构成两国边界的地段，考虑到当地的地理情况，1858 年条约的拟定者不可能有意剥夺河畔的哥斯达黎加居民为满足基本需求而使用河流的权利，即使他们的活动并非商业性质。”¹⁰⁶“为满足需要快速通勤的日常基本需求，圣胡安河河岸的哥斯达黎加居民有权在河岸的社区之间航行。”¹⁰⁷

哥斯达黎加称，它的航行权先后五次遭到侵犯。尼加拉瓜在强调这个数量微不足道的同时，没有否认其中两次事件的存在。第一次事件发生在 2013 年 2 月，一个在河畔居住的农民和他的叔叔在一个尼加拉瓜军事据点被拘留数小时并遭到羞辱对待。关于这次事件，哥斯达黎加提交了一份证言。第二次事件发生在 2014 年 6 月，尼加拉瓜官员阻止一位哥斯达黎加的产权所有人和一些当地农业合作组织的成员在圣胡安河航行。这次事件有五份证言证实。¹⁰⁸

尼加拉瓜没有为上述两次事件提供有说服力的辩护，因此法院判定，这两次事件表明尼加拉瓜侵犯了哥斯达黎加在圣胡安河的航行权。同时法院认为没有必要再讨论哥斯达黎加提到的其它事件。¹⁰⁹

七、本案的意义及其对国际水法发展的影响

（一）本案丰富和发展了跨境环境影响评价制度

1. 环境影响评价义务国际法地位的巩固

在乌拉圭河纸浆厂案中，对可能造成重大跨境影响的活动进行环境影响评

¹⁰⁴ Judgement, pp. 714-715, para. 133.

¹⁰⁵ *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), Judgement, I.C.J. Reports 2009, p. 245, para. 73.

¹⁰⁶ I.C.J. Reports 2009, p. 246, para. 79.

¹⁰⁷ I.C.J. Reports 2009, p. 270, para. 156 (1)(f).

¹⁰⁸ Judgement, p. 716, para. 135.

¹⁰⁹ Judgement, p. 716, para. 136.

价，被肯定为“一般国际法上的一种要求”。国际法院在本案中重申了这一结论：

“可将它视为一般国际法上的一种要求，即，在某计划采取的工业活动可能在跨境环境下造成重大负面影响时，特别是对共享资源而言，应当进行环境影响评价。”¹¹⁰

杜加尔德法官（Judge Dugard）在其特别意见中对“一般国际法”的确切含义展开了详细讨论。他认为，法院使用的“一般国际法”一词不能等同于国际法院规约第38条中的“一般法律原则”，而是包括一般法律原则和习惯国际法，也可能包括一般性国际公约，特别是那些编纂国际法原则的公约，以及被普遍接受的司法判决，特别是国际法院的判决。¹¹¹ 多诺雷法官（Judge Donogue）则更直截了当地认为，法院使用的“一般国际法”一词与“习惯国际法”的含义没有任何区别。¹¹²

2. 环境影响评价义务来源与法律基础的明确

在述及国家的环境影响评价义务之前，法院援引乌拉圭河纸浆厂判决，论证国家负有“预防造成重大跨境损害”的谨慎义务：

“预防损害原则是一项习惯国际法规则，它源自一国在本国内开展活动时应遵守的谨慎义务。‘每个国家皆有义务不在知情的情况下允许本国领土被用于有损他国权利的行为。’（*Corfu Channel (United Kingdom v. Albania)*, *Merits, Judgment*, *I. C. J. Reports 1949*, p. 22.）国家有义务利用一切可能的手段来预防发生在本国领土内的行为或本国管辖下的行为给另一国的环境造成重大损害。”¹¹³

法院在其结论中又再次强调，在行为前进行环境影响评价是“为履行预防重大跨境环境损害的谨慎义务”，从而指明了环境影响评价义务的来源与法律基础：

“因此，为履行预防重大跨境环境损害的谨慎义务，国家在其行为有对它国环境造成负面影响的潜在可能时，应在行为前确认是否存在造成重大跨境损害的风险，一旦该风险存在，进行环境影响评价的要求即

¹¹⁰ Judgment, pp. 706-707, para. 104, citing I.C.J. Reports 2010 (I), p. 83, para. 204.

¹¹¹ Dugard, J., sep. op., para. 16.

¹¹² Donoghue, J., sep. op., para. 2.

¹¹³ Judgment, pp. 706-707, para. 104, citing I.C.J. Reports 2010 (I), p. 56, para. 101.

被触发。”¹¹⁴

3. 环境影响评价义务适用范围的拓展

法院认为，乌拉圭河纸浆厂案关于一般国际法上环境影响评价义务的结论不仅适用于工业行为，而且适用于所有可能造成重大跨境损害的行为，从而拓展了环境影响评价义务的适用范围：

“虽然法院在乌拉圭河纸浆厂案中的论述仅指向工业行为，但其中的基本原则普遍适用于所有可能在跨境环境中造成重大负面影响的行为。”¹¹⁵

4. 环境影响评价内容决定权的确认与突破

在乌拉圭河纸浆厂案中，法院非常谨慎地指出：

“应由各国依据本国的法律或项目批准程序，考虑计划项目的性质、规模及其可能造成的负面环境影响与谨慎实施环评的需要，来确定个案中环境影响评价的具体内容。”¹¹⁶

在对哥斯达黎加诉尼加拉瓜案的判决中，法院重申了上述立场，再次确认了行为国对于环境影响评价内容的自主决定权。¹¹⁷

然而在尼加拉瓜诉哥斯达黎加案中，法院在认定哥斯达黎加没有进行初步风险评估后，自己承担起确认“重大跨境损害风险”的责任。法院为确认筑路工程是否有导致“重大跨境损害”的风险，考察了该工程的性质、规模以及开展该工程的环境。¹¹⁸ 这些考察内容明显参考了乌拉圭河纸浆厂案提及的环境影响评价应当考虑的内容。法院的做法证明，虽然环境影响评价的内容取决于行为国自身，但触发环境影响评价的“重大跨境损害风险”却可能会受到国际司法审查。

5. 环境影响评价义务适用方式的创新

在本案中，法院为判定当事国是否违反了环境影响评价义务和通知与磋商义务，论证了三项程序义务的序列关系，即：确认“重大跨境损害风险”——环境影响评价——通知与磋商。第一项义务与第二项义务之间构成触发机制，而第三项义务是第二项义务的后续义务。

¹¹⁴ Judgement, pp. 706-707, para. 104.

¹¹⁵ Judgement, pp. 706-707, para. 104.

¹¹⁶ I. C. J. Reports 2010 (I), p. 83, para. 205.

¹¹⁷ Judgement, pp. 706-707, para. 104.

¹¹⁸ Judgement, pp. 720-721, para. 155.

首先,法院认为:“为履行预防重大跨境环境损害的谨慎义务,一个国家在其行为有对它国环境造成负面影响的潜在可能时,应在行为前查明(ascertain)是否存在造成重大跨境损害的风险。”¹¹⁹ 换言之,习惯国际法上“预防重大跨境损害”的谨慎义务首先决定了行为国负有在行为前查明“重大跨境损害风险”的义务。这是一种预备性的风险查明义务。

紧接着,法院指出:“一旦查明存在造成重大跨境损害的风险,进行环境影响评价的要求即被触发。”¹²⁰ 即,通过预备性风险查明过程确认的“重大跨境损害风险”是环境影响评价义务的触发条件(threshold)。

最后,法院指出:“如果环境影响评价确认(confirm)某项活动存在造成重大跨境损害的风险,计划开展该项活动的国家为履行其预防重大跨境损害的谨慎义务,应当通知可能受影响的国家,并在必要时与其进行诚意磋商,以确定防止或减轻风险的适当措施。”¹²¹ 在这段论述中,触发通知与磋商义务的是环境影响评价正式确认的“重大跨境损害风险。这里“环境影响评价”与“通知与磋商义务”之间存在时序关系,通知与磋商义务成为环境影响评价的后续义务。

采用“触发条件”和“基于触发条件的程序义务序列”都不是本案的创新。多年以来,跨境损害制度一直以“重大跨境损害”为国家责任的触发条件。¹²² 将这一触发条件应用于程序义务,并加上“风险”一词,也并非独创。联合国国际法委员会在2001年的《预防危险活动造成的跨界损害条款草案》中即采用了“义务序列”概念。该草案规定了基于触发条件的两步程序:第一,由来源国对可能的跨界损害进行评估(包括环境影响评估);第二,如果该评估显示有重大损害风险,那么来源国有通知与磋商义务。¹²³

本案的创新之处在于:第一,把“重大跨境损害风险”视为环境影响评价义务的触发条件,将环境影响评价义务与预备性的风险查明义务明确区分开来。第二,将三步式义务序列作为习惯国际法规则予以采用。

¹¹⁹ Judgement, pp. 706-707, para. 104.

¹²⁰ Judgement, pp. 706-707, para. 104.

¹²¹ Judgement, pp. 706-707, para. 104.

¹²² See Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, pp.61-61 (2008), Cambridge University Press.

¹²³ Text of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries Thereto, Arts.7-9, *Yearbook of the International Law Commission (YILC)*, 2011, Vol. II, Part Two, p. 148, 157-61.

（二）本案体现和推动了国际水法的“程序化”趋势

继乌拉圭河纸浆厂案之后，国际法院对本案的判决再次肯定了沿岸国程序义务的重要性，体现和推动了国际水法“程序化”的发展趋势。

首先，国际水法的程序规则日益丰富和明确。国际水法上的程序义务包括合作义务、环境影响评价义务、通知与磋商义务等等。乌拉圭河纸浆厂案首次在司法判决中肯定“通知义务”与“环境影响评价义务”是一般国际法的要求。本案在此基础上，进一步阐释了环境影响评价义务及通知与磋商义务在习惯国际法上的地位、内涵与适用方式，体现了国际水法上程序规则内容的发展。

其次，国际水法程序规则在司法实践中的作用提升。国际法院在乌拉圭河纸浆厂案中判定乌拉圭未违反实体义务，但违反了“通知义务”；在本案中判定哥斯达黎加的行为未造成重大跨境损害，但违反了“环境影响评价义务”。这种处理方式传递了一种信号，即国际法院越来越倚重程序规则判断当事国行为的合法性。因为相较于实体规则，程序规则的可操作性更强、更适宜司法审查且对主权国家而言敏感度较低。

再次，国际水法程序规则对实体规则的支撑更加有力。如果某个沿岸国的活动造成了重大跨境损害，那么损害来源国是否遵守了环境影响评价、通知和磋商等程序规则就成为检验其是否履行了“预防跨境损害的谨慎义务”的关键要素。程序规则越发达，实体规则得到的支撑就越有力，从而不断增加规范的清晰度与可裁判性。从这个角度来看，“程序化”是国际水法日益成熟的标志。

最后，国际水法程序规则的独立价值日益突显。如乌拉圭河纸浆厂案与本案所体现的，程序义务可以独立存在——即使某项活动最终没有造成重大跨境损害，沿岸国在计划采取行动时，仍然必须遵循程序规则。“环境影响评价不仅保证预防损害原则的遵守，而且即使某项工程实施后确无损害，它也通过要求国家评估损害的风险，起到促进国家环境意识的作用。”¹²⁴

八、本案引发的值得讨论的问题

本案虽然较好地解决了当事国之间的争端，丰富和发展了国际法上的环境影响评价制度，是体现和推动国际水法“程序化”的重要案件，但也留下了一些悬

¹²⁴ Dugard, J., sep. op., para. 10.

而未决的问题。

（一）环境影响评价是否为习惯国际法上的独立义务？

乌拉圭河纸浆厂案和本案都肯定环境影响评价为“一般国际法上的一种要求”。这种表述与“习惯国际法上的一种要求”基本同义。但这一论断是否意味着习惯国际法上存在独立的环境影响评价义务？¹²⁵

关于这个问题，本案几位法官在其特别意见中给出了截然不同的解读。多诺雷法官和大和田法官（Judge Owada）认为预防重大跨境损害的谨慎义务是国际环境法上的首要行为义务，环境影响评价、通知与磋商都是履行这一义务的要求，而不是单独的法律义务。杜加尔德法官的意见正好相反，他认为谨慎义务源于预防损害原则，是实施预防损害原则的行为标准，环境影响评价、通知与磋商都必须遵循这一行为标准，但它们本身是独立的程序义务。特林达德法官（Judge Trindade）也将环境影响评价看作独立义务，但认为它根植于谨慎义务的要求。

大和田法官对比了乌拉圭河纸浆厂案判决、本案判决与国际海洋法法院的咨询意见，认为国际海洋法法院明确指出了环境影响评价义务既是《海洋法公约》上的直接义务，又是“习惯国际法上的一般义务”；¹²⁶ 而乌拉圭河纸浆厂案及本案的判决在这个问题上采取了“更细致的方法”，“限制了环境影响评价的范围和内容”，¹²⁷ 且本案判决强调项目实施之前、之中和之后环境影响评价过程的持续性，是将谨慎义务的履行视为一个“整体性过程”，因此“进行环境影响评价是源自国家预防或减轻重大跨境损害的谨慎义务的过程的一项重要构成要素，而非单独的和独立的一般国际法义务。”¹²⁸

杜加尔德法官的意见与之截然相反。他认为“国家的环境影响评价义务是一项独立义务，目的在于当重大跨境损害风险存在时预防这种损害。谨慎义务是国家为预防重大跨境损害而必须在任何阶段都遵循的行为标准。”¹²⁹ 为了论证环境影响评价义务的独立性，他指出《预防危险活动造成的跨界损害条款草案》（第7条）、《里约宣言》（第17原则）、《生物多样性公约》（第14条）和《跨境环境

¹²⁵ I. C. J. Reports 2010 (I), p. 83, para. 205.

¹²⁶ *Responsibilities and Obligations of States with respect to Activities in the Area. Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 49. Para. 145. See Owada, J., sep. op., para. 16.

¹²⁷ Owada, J., sep. op., para. 17.

¹²⁸ Owada, J., sep. op., para. 18.

¹²⁹ Dugard, J., sep. op., para. 9.

影响评价公约》（《埃斯波公约》）（第2条）等国际法律文件在描述环境影响评价义务时均未提及谨慎义务；乌拉圭河纸浆厂案判决虽然把谨慎义务视为环境影响评价义务的基础，但判决中也提及环境影响评价义务的内容应“考虑……谨慎实施环评的需要”，¹³⁰ 这意味着法院在判定当事国是否适当履行环评义务时要适用谨慎义务标准，因此“谨慎义务是进行环境影响评价必须遵循的标准，而不是环评义务本身。”¹³¹

杜加尔德法官还特别指出将谨慎义务视为环评义务之来源的弊端，即，这种解读将允许一国在事后辩称：因为在法律程序启动时没有证明损害存在，所以在项目计划时自己并不负有谨慎行为义务。他认为法院在哥斯达黎加诉尼加拉瓜边境活动案（Certain Activities Carried Out by Nicaragua in the Border Area）中就采取了这种“往回看”方式，才判定尼加拉瓜在项目计划时不负有环评义务。“如果环境影响评价义务被视为独立义务，那么明显一国在项目计划之时、实施项目之前，就必须查明风险。”¹³²

杜加尔德法官担心的情况并不符合事实，在这一点上他对法院的指责是不公平的。法院对尼加拉瓜边境活动风险的事实判断或有简单化的嫌疑，但法院在讨论尼加拉瓜义务时明确指出：“为履行预防重大跨境环境损害的谨慎义务，一个国家在其行为有对它国环境造成负面影响的潜在可能时，应在行为前查明是否存在造成重大跨境损害的风险，一旦该风险存在，进行环境影响评价的要求即被触发。”¹³³ 只是法院认为该案中触发环境影响评价义务的标准并未达到，所以尼加拉瓜才在项目计划时不负有环评义务。

事实上，将环境影响评价义务视为谨慎义务的构成要素或履行谨慎义务的方式并无不妥，但不能据此否认环境影响评价义务成为国际法上独立义务的可能性。要判断习惯国际法上独立的环境影响评价义务是否存在，应当依据判断习惯国际法规则是否形成的一般规则，即是否已“作为通例之证明而经接受为法律”，¹³⁴ 具体而言，即是否存在足够的国家实践和法律确信。

多诺雷法官虽然否认环评义务的独立性，但他关于谨慎义务与环评义务关系

¹³⁰ I. C. J. Reports 2010 (I), p. 83, para. 205.

¹³¹ Dugard, J., sep. op., para. 9.

¹³² Dugard, J., sep. op., para. 10.

¹³³ Judgement, pp. 706-707, para. 104.

¹³⁴ 《国际法院规约》第38条。

的论述是比较公允的。他认为谨慎义务作为习惯国际环境法上支配性的首要规范，是项目计划、影响评价、决定、实施和监测等各个阶段都适用的行为义务。¹³⁵ 他不否认习惯国际法上可能会有一些具体的程序和实体规则来实施谨慎行为义务，但他认为这些具体规则的存在与内容取决于国家实践和法律确信，¹³⁶ 而现有的国家实践和法律确信尚不足以证明习惯国际法上存在独立的环境影响评价规则：

“这一论断（指乌拉圭河纸浆厂案中关于环境影响评价国际法地位的论断，编者注）被普遍认为是一种宣告，即一般（或习惯）国际法规定了重大跨境损害风险存在时进行环境影响评价的特定义务。然而我并不确信，在基础性的谨慎行为义务以外，国家的实践和法律确信能够支持这一具体规则的存在。”¹³⁷

遗憾的是，多诺雷法官仅简单宣称“我不确信（confident）”环境影响评价规则的存在，而没有展开论证环境影响评价国家实践和法律确信的缺乏。在这一点上，杜加尔德法官为其所持的相反观点给出了更有说服力的论证。

杜加尔德法官认为：“毫无疑问在习惯国际法上存在一种义务，即当重大跨境损害风险存在时应当进行环境影响评价。”¹³⁸ 他从四个层面论证了这一观点。首先，国际海洋法法院海底争端分庭曾判定环境影响评价是“习惯国际法上的一般义务”。其次，国际法委员会在《预防危险活动造成的跨境损害条款草案》的评论中曾指出“要求环境影响评价的实践已经非常普遍”，它援引了部分发达国家包含环评义务的法律，并宣称 70 个发展中国家也有类似的立法。¹³⁹ 再次，越来越多的多边条约确认了环境影响评价义务，例如《埃斯波公约》、《关于环境保护的南极条约》（《南极议定书》）、《跨境水道和湖泊保护和利用公约》（第 6 条第 1 款 b 项）、《生物多样性公约》（第 14 条）和《海洋法公约》（第 206 条）。最后，国际法院判决强有力地支持了习惯国际法上环评义务的存在，例如乌拉圭纸浆厂案和本案判决都肯定环评是“一般国际法上的一种要求”。

习惯国际法上的环境影响评价制度仍在发展演变之中。环境影响评价一方面

¹³⁵ Donoghue, J., sep. op., para. 9.

¹³⁶ Donoghue, J., sep. op., para. 10.

¹³⁷ Donoghue, J., sep. op., para. 13.

¹³⁸ Dugard, J., sep. op., para. 17.

¹³⁹ Commentary on Article 7, para. 4, *YILC*, 2001, Vol. II, Part Two, p. 158.

具有以履行谨慎义务即“预防重大跨境损害”为目标的工具价值，另一方面还具有促进国家环境保护意识的独立价值，它在国际社会受到更加普遍的认同和重视是历史发展的趋势。虽然现在关于环评义务在习惯国际法上的地位还存在一些争议，但随着国家实践的普及和法律确信的增强，环境影响评价作为独立法律义务的地位必然日渐明确。同时，环境影响评价对于履行谨慎义务的重要性还将更加巩固。

（二）习惯国际法上是否存在关于环境影响评价的具体规则？

在乌拉圭河纸浆厂案中，法院声称一般国际法没有“确定环境影响评价的范围和内容”，因此“应由各国依据本国的法律或项目批准程序确定个案中环境影响评价的具体内容。”¹⁴⁰ 本案判决重申了这一观点。¹⁴¹ 但这种论述能否被解释为：习惯国际法上没有任何关于环境影响评价的具体规则，衡量行为国是否达到环评要求仅仅依靠向国内法的“反致（*revoi*）”？

杜加尔德法官认为，关于环评实施的某些事项确实必须由国内法决定，例如环评的责任机构、形式、时限和程序的确定，然而：

“有一些特定事项是环境影响评价本质属性的必然要求，需要考察环境影响评价是否真正构成，以及在环评准备中谨慎义务的要求是否满足。”¹⁴²

国际法委员会在《预防危险活动造成的跨界损害条款草案》评论中对环境影响评价的实施提出了一些具体要求：环境影响评价应当将活动涉及的风险与“该风险可能导致的可能损害”联系起来，应当包含“对活动可能产生的跨境有害影响的评估”，不仅应当包括对人和财产的影响评价，还应包括对他国环境的影响评价。¹⁴³

在本案中，法院确认的以下规则也属于环境影响评价本质属性的必然要求：

1. 环境影响评价必须在所涉活动开始以前进行。¹⁴⁴
2. 行为国必须在实施行为以前“基于对所有相关情况的客观评估”评价其行为造成重大跨境损害的风险。

¹⁴⁰ I. C. J. Reports 2010 (I), p. 83, para. 205.

¹⁴¹ Judgement, pp. 706-707, para. 104.

¹⁴² Dugard, J., *sep. op.*, para. 18.

¹⁴³ *YILC*, 2001, Vol. II, Part Two, pp. 158-159, paras. 6-8.

¹⁴⁴ Judgement, pp. 706-707, para. 104; p. 720, para. 153.

¹⁴⁵ 3. 证明环境影响评价已完成的举证责任由行为国承担。¹⁴⁶ 4. 评估环境影响评价的触发条件是否达到时,应当考虑特定环境的情况。¹⁴⁷ 5. 如果工程地点涉及《拉姆萨尔公约》规定的受保护湿地,那么重大损害风险会比较高,因为这意味着工程承受环境特别敏感。在这种情况下,触发环境影响评价的标准应当降低。¹⁴⁸ 6. 国家在进行环评时必须履行谨慎义务,考虑计划项目的性质、规模及其可能造成的负面环境影响。¹⁴⁹ 7. 在确定是否需要进行环评时,必须考虑造成损害的风险(risk),而非基于损害发生的可能性(likelihood/probability)。¹⁵⁰ 8. 即使事后证明某项行为没有造成重大跨境损害,也不能免除行为国因未在行为开始前进行环境影响评价而应承担的国际责任。¹⁵¹

杜加尔德法官认为,法院在尼加拉瓜诉哥斯达黎加筑路案(Construction of a Road in Costa Rica along the San Juan River)中正确适用了上述规则,但在哥斯达黎加诉尼加拉瓜边境活动中却采用了不一致的路径。在讨论哥斯达黎加的筑路活动时,法院表现得相当积极主动,考察了各种客观的、实证的和可以科学验证的因素和可能性,进行了详尽的事实和证据评估。但在讨论尼加拉瓜的水道疏浚活动时,法院仅粗略提及当事国提交的证据,便简单宣布了它对于事实的判断结论,而没有对它评估证据的方法进行任何解释或说明。¹⁵²

法院对于两案做法有明显的区别,这可能是由于《埃斯波公约》将筑路列为必须进行环境影响评价的风险活动之一,而疏浚水道则一般不被视为特别可能造成风险的活动。¹⁵³ 然而这只是解读者的猜测,我们有理由认为,法院应当为其评估风险的路径的区别更明确地说明理由;如果它确实参考了《埃斯波公约》,还应当特别阐明《埃斯波公约》的规定与国际习惯的关系。

(三) 环境影响评价和通知磋商之间是否存在时序关系?

本案判决确认了三项程序义务的序列关系,即:确认“重大跨境损害风险”

¹⁴⁵ Judgement, p. 720, para. 153.

¹⁴⁶ Judgement, p. 720, para. 154.

¹⁴⁷ Judgement, pp. 706-707, para. 104; pp. 720-721, para. 155.

¹⁴⁸ Judgement, pp. 720-721, para. 155.

¹⁴⁹ Judgement, pp. 706-707, para. 104; pp. 720-721, para. 155.

¹⁵⁰ Judgement, pp. 706-707, para. 104; p. 720, para. 153.

¹⁵¹ Dugard, J., sep. op., para. 19.

¹⁵² Dugard, J., sep. op., para. 34.

¹⁵³ Rumiana Yotova, The principles of due diligence and prevention in international environmental law, The Cambridge Law Journal, 75[2016], p. 448.

——环境影响评价——通知与磋商，但没有对其习惯国际法基础进行系统解释。“三步式义务序列”虽然清晰但有过度简化的嫌疑。

多诺雷法官在其个别意见中表达了他的怀疑：“本判决可能会被解读为，仅在一种情况下，跨境影响的来源国必须通知可能受到潜在影响的国家，——即仅在环境影响评价确认某项活动有造成重大跨境损害的风险的情况下。”¹⁵⁴ 多诺雷法官认为，最好不要将本判决解读为包含这种绝对的限制，因为在其它情况下，通知义务也可能会基于预防跨境损害的谨慎义务而产生。¹⁵⁵ 例如，潜在受损国提供的信息可能对来源国作出可靠的风险评估殊有必要，因此来源国需要在环境影响评价以前通知潜在受损国。作为环境影响评价领域的“最佳实践”代表，《埃斯波公约》（第3条）就要求在环境影响评价之前进行通知，以使潜在受损国可以参与环评。尼加拉瓜诉哥斯达黎加一案的事实也显示了在环评完成之前进行通知的重要性。因为尼加拉瓜享有对圣胡安河的主权，因此只有它可以对河流进行测量、取样，或授权哥斯达黎加进行这类活动。如果不提前通知尼加拉瓜以征得其帮助，哥斯达黎加很难充分完成环境影响评价。

多诺雷法官还论述了在环评完成前进行磋商的重要性。当事国在磋商中除了讨论如何预防或减轻重大跨境损害风险，还可以就其对受影响国家环境敏感性的不同看法交换意见，或讨论环境影响评价的程序细节，环评完成前的磋商因此可为当事国履行谨慎行为义务发挥重要作用。¹⁵⁶

杜加尔德法官特别指出，《湿地公约》第5条的磋商义务并不以环评证明重大跨境损害风险存在为前提条件。公约第5条的磋商义务是关于“如何履行公约义务”，结合第3条第1款的前半句“各缔约国应制定和执行规划，以促进对列入《目录》的湿地的保护”，应当把第5条理解为：只要为了履行“促进湿地保护”义务，就要进行磋商。¹⁵⁷ 换言之，必要时应当在环评之前进行磋商，甚至在环评证明项目不存在重大跨境损害风险的时候也要进行磋商。具体到本案，尼加拉瓜2006年的环境影响研究虽然得出工程不会造成重大跨境损害的结论，但在其完成后，至少应将副本提供给哥斯达黎加，以在确定规划之前征求哥方意见。

上述意见关于环评之前或环评得出无风险结论时通知与磋商重要性的论述

¹⁵⁴ Donoghue, J., sep. op., para. 21.

¹⁵⁵ Donoghue, J., sep. op., para. 24.

¹⁵⁶ Donoghue, J., sep. op., para. 23.

¹⁵⁷ Dugard, J., sep. op., paras. 41-42.

是非常有意义的。因此本案判决不宜被解读为“行为国仅在环境影响评价确认重大跨境损害风险存在时才负有通知与磋商义务。”事实上，法院描述的义务序列重在强调环评确认风险时必然触发通知与磋商义务，而并未将环评确认风险视为通知与磋商义务的唯一适用条件。环境影响评价义务和通知磋商义务的基础和来源都是国家预防重大跨境损害的谨慎义务，具体案件中当事国是否负有通知和磋商义务，以及通知和磋商的时间和内容细节，应当按照履行谨慎义务的要求，依案件的具体情况来确定。

（四）法院是否应当进一步说明环境影响评价义务的触发条件？

“跨境损害风险”达到什么程度才触发环境影响评价义务？法院没有给出评估方法和标准。有学者为此感到遗憾，认为在近年来各国对跨境影响评估的需求越来越迫切的背景下，法院没有把握这个机会给国家提供观念与操作方法上的指导。¹⁵⁸ 但法院不给出确定“触发条件”的具体方法，可能恰恰是关键性的“留白”，因为确定性不仅在技术上难以实现，而且可能会产生反效果。国际法委员会曾明确拒绝列出有重大跨境损害风险的行为清单，“因为可能无法穷尽，且科技发展将使其很快过时。”¹⁵⁹ 此外，保留触发条件的模糊性，还有可能会让行为国由于担心构成重大跨境损害的风险而在做出决定时更加谨慎。

¹⁵⁸ Jacob Katz Cogan, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), *The American Journal of International Law*, Vol. 110, No. 2 (April 2016), p. 326.

¹⁵⁹ Commentary on Article 1, *YILC*, 2001, Vol. II, Part Two, p. 149-50.

16 DÉCEMBRE 2015

ARRÊT

**CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA
DANS LA RÉGION FRONTALIÈRE**

(COSTA RICA c. NICARAGUA)

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

(NICARAGUA c. COSTA RICA)

**CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA
IN THE BORDER AREA**

(COSTA RICA v. NICARAGUA)

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

(NICARAGUA v. COSTA RICA)

16 DECEMBER 2015

JUDGMENT

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INTERNATIONAL COURT OF JUSTICE

YEAR 2015

**2015
16 December
General List
Nos. 150 and 152**

16 December 2015

**CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA
IN THE BORDER AREA**

(COSTA RICA *v.* NICARAGUA)

and

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

(NICARAGUA *v.* COSTA RICA)

Jurisdiction of the Court.

* *

Geographical and historical context and origin of the disputes.

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

* *

Issues in the Costa Rica v. Nicaragua case.

Sovereignty over the disputed territory — Definition of “disputed territory” — Description of boundary in 1858 Treaty, Cleveland and Alexander Awards — Articles II and VI of 1858 Treaty to be read together — Sovereignty over right bank of San Juan River as far as its mouth attributed to Costa Rica — Reference to “first channel met” in first Alexander Award — Satellite and aerial images insufficient to prove caño existed prior to dredging in 2010 — Affidavits of Nicaraguan State officials also insufficient — Significance of map evidence and effectivités limited — Effectivités cannot affect title to sovereignty resulting from 1858 Treaty and Cleveland and Alexander Awards — Existence of caño prior to 2010 contradicted by other evidence — Nicaragua’s claim would prevent Costa Rica from enjoying territorial sovereignty over the right bank of the San Juan as far as its mouth — Right bank of the caño not part of the boundary — Sovereignty over disputed territory belongs to Costa Rica.

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

*

Alleged violations of international environmental law.

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

Substantive obligations — Specific obligations concerning San Juan River in 1858 Treaty as interpreted by Cleveland Award — Customary law obligation to exercise due diligence to avoid

causing significant transboundary harm — No need to discuss relationship between these obligations because no harm established — No proof that dredging of Lower San Juan harmed Costa Rican wetland — Not shown that dredging programme caused significant reduction in flow of Colorado River — Any diversion of water due to dredging did not seriously impair navigation on Colorado River or otherwise cause harm to Costa Rica — Court concludes that no substantive obligations breached by Nicaragua.

*

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

*

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

*

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

* *

Issues in the Nicaragua v. Costa Rica case.

Procedural obligations.

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

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

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

*

Substantive obligations.

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

Alleged breaches of treaty obligations — No violation established.

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

*

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

JUDGMENT

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

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

between

the Republic of Costa Rica,

represented by

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

H.E. Mr. Edgar Ugalde Álvarez, Ambassador on Special Mission,

as Agent;

H.E. Mr. Sergio Ugalde, Ambassador of Costa Rica to the Kingdom of the Netherlands,
member of the Permanent Court of Arbitration,

as Co-Agent, Counsel and Advocate;

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

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

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

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

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

as Counsel and Advocates;

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

as Counsel;

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

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

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

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

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

as Assistant Counsel;

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

as Assistant,

and

the Republic of Nicaragua,

represented by

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

as Agent and Counsel;

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

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

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

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

as Counsel and Advocates;

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

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

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

as Counsel;

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

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

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

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

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

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

as Assistant Counsel;

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

Mr. Robin Cleverly, Geographical and Technical Consultant,

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

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

Ms Victoria Leader, Geographical and Technical Consultant,

as Scientific Advisers and Experts,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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

2. In its Application, Costa Rica invokes as a basis of the jurisdiction of the Court Article XXXI of the American Treaty on Pacific Settlement adopted at Bogotá on 30 April 1948 (hereinafter the “Pact of Bogotá”). In addition, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute,

as well as on the declaration which Nicaragua made on 24 September 1929 (and amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court.

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

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

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

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

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

8. By an Order of 5 April 2011, the Court fixed 5 December 2011 and 6 August 2012 as the respective time-limits for the filing in the case of a Memorial by Costa Rica and a Counter-Memorial by Nicaragua. The Memorial and the Counter-Memorial were filed within the time-limits thus prescribed.

9. By an Application filed in the Registry on 22 December 2011, Nicaragua instituted proceedings against Costa Rica in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (hereinafter referred to as the “*Nicaragua v. Costa Rica* case”). In that Application, Nicaragua stated that the case related to “violations of

Nicaraguan sovereignty and major environmental damages on its territory”, contending, in particular, that Costa Rica was carrying out major road construction works in the border area between the two countries along the San Juan River, in violation of several international obligations and with grave environmental consequences.

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

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

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

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

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

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

16. At a meeting held by the President with the representatives of the Parties on 19 September 2012, the Parties agreed not to request the Court's authorization to file a Reply and a Rejoinder in the *Costa Rica v. Nicaragua* case. At the same meeting, the Co-Agent of Costa Rica raised certain objections to the admissibility of the first three counter-claims contained in the Counter-Memorial of Nicaragua. He confirmed these objections in a letter of the same day.

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

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

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

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

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

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

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

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

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

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

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

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

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

28. At a meeting held by the President with the representatives of the Parties on 22 January 2014, Nicaragua requested the Court to authorize a second round of written pleadings in the *Nicaragua v. Costa Rica* case, while Costa Rica objected. By an Order of 3 February 2014, the

Court authorized the submission of a Reply by Nicaragua and a Rejoinder by Costa Rica, and fixed 4 August 2014 and 2 February 2015 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Costa Rica were duly filed within the time-limits so prescribed.

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

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

31. By a letter dated 15 October 2014, Nicaragua requested that the opening of the oral proceedings in the joined cases be postponed until May 2015. On the basis that Costa Rica had stated, in its letter of 14 August 2014 referred to in the previous paragraph, that the evidence submitted by the Parties “w[ould] be supplemented and completed” in Costa Rica’s Rejoinder in the *Nicaragua v. Costa Rica* case, Nicaragua expressed the view that it would be “inadequate and inequitable for [it] to have less than one month to analyze and respond to Costa Rica’s new scientific information and expert reports”. By letter of 20 October 2014, Costa Rica opposed this request, arguing in particular that any delay in the Court hearing and adjudging the *Costa Rica v. Nicaragua* case would prejudice Costa Rica, that Nicaragua had sufficient time to analyse the Rejoinder and formulate its response before the commencement of the hearings, and that Nicaragua’s request was belated. By letters dated 17 November 2014, the Registrar informed the Parties that the Court had decided to postpone the date for the opening of the oral proceedings in the joined cases until 14 April 2015.

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

33. In a letter dated 2 February 2015, which accompanied its Rejoinder in the *Nicaragua v. Costa Rica* case, Costa Rica raised the possibility of a site visit to the “location of the Road”. By a letter dated 10 February 2015, Nicaragua expressed its willingness to assist to the fullest possible extent in the organization “of such a visit at the location of the road and the San Juan de Nicaragua River”. It also reiterated its proposal that the Court appoint an expert (see paragraph 30 above) to

assess the construction of the road, and suggested that the expert be included in the Court's delegation for any site visit. By a letter dated 11 February 2015, Costa Rica commented on Nicaragua's letter of 10 February 2015, stating in particular that the appointment of an expert by the Court was unnecessary. By a letter dated 25 February 2015, the Registrar informed the Parties that the Court had decided not to carry out a site visit.

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

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

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

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

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

cross-examination of each of the experts called by the other Party, which they did by letters dated 30 March and 2 April 2015. By letters dated 10 April 2015, the Registrar communicated to the Parties the detailed schedule for the examination of the experts, as adopted by the Court.

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

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

40. By a letter dated 13 April 2015, Costa Rica requested that Nicaragua file a copy of the report of Ramsar Advisory Mission 72 in relation to Nicaragua's *Refugio de Vida Silvestre Río San Juan* (San Juan River Wildlife Refuge). By a letter dated 16 April 2015, Nicaragua indicated that it was in possession only of a draft report, in Spanish, which it enclosed with its letter. Subsequently, under cover of a letter dated 24 April 2015, Nicaragua transmitted to the Court the comments it had submitted on 30 November 2011 on the draft report of the Ramsar Advisory Mission (original Spanish version and English translation of certain extracts), as well as the reply from the Ramsar Secretariat dated 19 December 2011 (original Spanish version only). The Parties later provided the Court with English translations of the documents submitted in Spanish by Nicaragua.

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

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

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

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

In the *Costa Rica v. Nicaragua* case,

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

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

In the *Nicaragua v. Costa Rica* case,

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

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

45. In the *Costa Rica v. Nicaragua* case, Costa Rica called Mr. Thorne as an expert during the public hearing of 14 April 2015 (afternoon). Later, during the public hearing of 17 April 2015 (morning), Nicaragua called the following experts: Mr. van Rhee and Mr. Kondolf. In the *Nicaragua v. Costa Rica* case, Nicaragua called the following experts during the public hearings of

20 April 2015 (morning and afternoon): Mr. Weaver, Mr. Kondolf, Mr. Andrews and Mr. Sheate. Costa Rica called Mr. Cowx and Mr. Thorne as experts during the public hearing of 24 April 2015 (morning). A number of judges put questions to the experts, to which replies were given orally.

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

* *

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

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

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

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

- (g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;
- (h) the obligations under the Ramsar Convention on Wetlands;
- (i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica's territorial integrity under international law."

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

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

On behalf of the Government of Costa Rica,

in the Memorial:

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

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

- (a) the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards;
- (b) the prohibition of use of force under Article 2 (4) of the United Nations Charter and Articles 1, 19, 21 and 29 of the Charter of the Organization of American States;
- (c) the obligation of Nicaragua under Article IX of the 1858 Treaty of Limits not to use the San Juan to carry out hostile acts;
- (d) the rights of Costa Rican nationals to free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the Cleveland Award and the Court's Judgment of 13 July 2009;
- (e) the obligation not to dredge, divert or alter the course of the San Juan, or conduct any other works on the San Juan, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights in accordance with the Cleveland Award;

(f) the obligation to consult with Costa Rica about implementing obligations arising from the Ramsar Convention, in particular the obligation to co-ordinate future policies and regulations concerning the conservation of wetlands and their flora and fauna under Article 5 (1) of the Ramsar Convention; and

(g) the Court's Order for Provisional Measures of 8 March 2011;

and further to adjudge and declare that Nicaragua is:

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

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

(a) withdraw any presence, including all troops and other personnel (whether civilian, police or security, or volunteers) from that part of Costa Rica known as Isla Portillos, on the right bank of the San Juan, and prevent any return there of any such persons;

(b) cease all dredging activities on the San Juan in the area between the point of bifurcation of the Colorado River and the San Juan and the outlet of the San Juan in the Caribbean Sea ('the area'), pending:

(i) an adequate environmental impact assessment;

(ii) notification to Costa Rica of further dredging plans for the area, not less than three months prior to the implementation of such plans;

(iii) due consideration of any comments of Costa Rica made within one month of notification;

(c) not engage in any dredging operations or other works in the area if and to the extent that these may cause significant harm to Costa Rican territory (including the Colorado River) or its environment, or to impair Costa Rica's rights under the Cleveland Award.

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

On behalf of the Government of Nicaragua,

in the Counter-Memorial:

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

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

(2) *adjudge and declare* that:

- (i) Nicaragua enjoys full sovereignty over the *caño* joining Harbor Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards;
- (ii) Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards;
- (iii) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River; and,
- (iv) in so doing, Nicaragua is entitled as it deems suitable to re-establish the situation that existed at the time the 1858 Treaty was concluded;
- (v) the only rights enjoyed by Costa Rica on the San Juan de Nicaragua River are those defined by said Treaty as interpreted by the Cleveland and Alexander Awards.”

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

On behalf of the Government of Costa Rica,

at the hearing of 28 April 2015:

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

(1) reject all Nicaraguan claims;

(2) *adjudge and declare* that:

(a) sovereignty over the ‘disputed territory’, as defined by the Court in its Orders of 8 March 2011 and 22 November 2013, belongs to the Republic of Costa Rica;

(b) by occupying and claiming Costa Rican territory, Nicaragua has breached:

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

- (ii) the prohibition of the threat or use of force under Article 2 (4) of the Charter of the United Nations and Article 22 of the Charter of the Organization of American States;
 - (iii) the prohibition to make the territory of other States the object, even temporarily, of military occupation, contrary to Article 21 of the Charter of the Organization of American States; and
 - (iv) the obligation of Nicaragua under Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;
- (c) by its further conduct, Nicaragua has breached:
- (i) the obligation to respect Costa Rica's territory and environment, including its wetland of international importance under the Ramsar Convention '*Humedal Caribe Noreste*', on Costa Rican territory;
 - (ii) Costa Rica's perpetual rights of free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the 1888 Cleveland Award and the Court's Judgment of 13 July 2009;
 - (iii) the obligation to inform and consult with Costa Rica about any dredging, diversion or alteration of the course of the San Juan River, or any other works on the San Juan River that may cause damage to Costa Rican territory (including the Colorado River), its environment, or Costa Rican rights, in accordance with the 1888 Cleveland Award and relevant treaty and customary law;
 - (iv) the obligation to carry out an appropriate transboundary environmental impact assessment, which takes account of all potential significant adverse impacts on Costa Rican territory;
 - (v) the obligation not to dredge, divert or alter the course of the San Juan River, or conduct any other works on the San Juan River, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights under the 1888 Cleveland Award;
 - (vi) the obligations arising from the Orders of the Court indicating provisional measures of 8 March 2011 and 22 November 2013;
 - (vii) the obligation to consult with Costa Rica on the implementation of obligations arising from the Ramsar Convention, in particular the obligation to co-ordinate future policies and regulations concerning the conservation of wetlands and their flora and fauna under Article 5 (1) of the Ramsar Convention; and

- (viii) the agreement between the Parties, established in the exchange of notes dated 19 and 22 September 2014, concerning navigation on the San Juan River by Costa Rica to close the eastern *caño* constructed by Nicaragua in 2013;
 - (d) Nicaragua may not engage in any dredging operations or other works if and to the extent that these may cause damage to Costa Rican territory (including the Colorado River) or its environment, or which may impair Costa Rica's rights under the 1888 Cleveland Award, including its right not to have its territory occupied without its express consent;
- (3) to order, in consequence, that Nicaragua must:
- (a) repeal, by means of its own choosing, those provisions of the Decree 079-2009 and the Regulatory Norms annexed thereto of 1 October 2009 which are contrary to Costa Rica's right of free navigation under Article VI of the 1858 Treaty of Limits, the 1888 Cleveland Award, and the Court's Judgment of 13 July 2009;
 - (b) cease all dredging activities on the San Juan River in the vicinity of Delta Costa Rica and in the lower San Juan River, pending:
 - (i) an appropriate transboundary environmental impact assessment, which takes account of all potential significant adverse impacts on Costa Rican territory, carried out by Nicaragua and provided to Costa Rica;
 - (ii) formal written notification to Costa Rica of further dredging plans in the vicinity of Delta Costa Rica and in the lower San Juan River, not less than three months prior to the implementation of any such plans; and
 - (iii) due consideration of any comments made by Costa Rica upon receipt of said notification;
 - (c) make reparation in the form of compensation for the material damage caused to Costa Rica, including but not limited to:
 - (i) damage arising from the construction of artificial *caños* and destruction of trees and vegetation on the 'disputed territory';
 - (ii) the cost of the remediation measures carried out by Costa Rica in relation to those damages, including but not limited to those taken to close the eastern *caño* constructed by Nicaragua in 2013, pursuant to paragraph 59 (2) (E) of the Court's Order on Provisional Measures of 22 November 2013;
- the amount of such compensation to be determined in a separate phase of these proceedings;
- (d) provide satisfaction so to achieve full reparation of the injuries caused to Costa Rica in a manner to be determined by the Court;

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

On behalf of the Government of Nicaragua,

at the hearing of Wednesday 29 April 2015:

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

- (a) dismiss and reject the requests and submissions of the Republic of Costa Rica;
- (b) adjudge and declare that:
 - (i) Nicaragua enjoys full sovereignty over the *caño* joining Harbor Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards;
 - (ii) Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards;
 - (iii) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River;
 - (iv) the only rights enjoyed by Costa Rica on the San Juan de Nicaragua River are those defined by said Treaty as interpreted by the Cleveland and Alexander Awards."

*

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

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

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

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

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

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

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

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

On behalf of the Government of Nicaragua,

in the Memorial:

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

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

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

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

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

- (i) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River to remove sedimentation and other barriers to navigation; and,
- (ii) in so doing, Nicaragua is entitled to re-establish the conditions of navigation that existed at the time the 1858 Treaty was concluded;

- (iii) that the violations of the 1858 Treaty and under many rules of International Law by Costa Rica, allow Nicaragua to take appropriate counter measures including the suspension of Costa Rica's right of navigation in the San Juan de Nicaragua River.

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

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

in the Reply:

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

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

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

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

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

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

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

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

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

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

On behalf of the Government of Costa Rica,

in the Counter-Memorial:

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

in the Rejoinder:

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

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

On behalf of the Government of Nicaragua,

at the hearing of 30 April 2015:

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

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

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

- (i) cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua;
- (ii) inasmuch as possible, restore the situation to the *status quo ante*, in full respect of Nicaragua’s sovereignty over the San Juan de Nicaragua River, including by taking the emergency measures necessary to alleviate or mitigate the continuing harm being caused to the River and the surrounding environment;

- (iii) compensate for all damages caused insofar as they are not made good by restitution, including the costs added to the dredging of the San Juan de Nicaragua River, with the amount of the compensation to be determined in a subsequent phase of the case.

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

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

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

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

On behalf of the Government of Costa Rica,

at the hearing of 1 May 2015:

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

*

* *

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

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

I. JURISDICTION OF THE COURT

54. With regard to the *Costa Rica v. Nicaragua* case, the Court recalls that Costa Rica invokes, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the declarations by which the Parties have recognized the compulsory jurisdiction of the Court under paragraphs 2 and 5 of Article 36 of the Statute (see paragraph 2 above). It notes that Nicaragua does not contest its jurisdiction to entertain Costa Rica's claims.

The Court finds that it has jurisdiction over the dispute.

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

The Court finds that it has jurisdiction over the dispute.

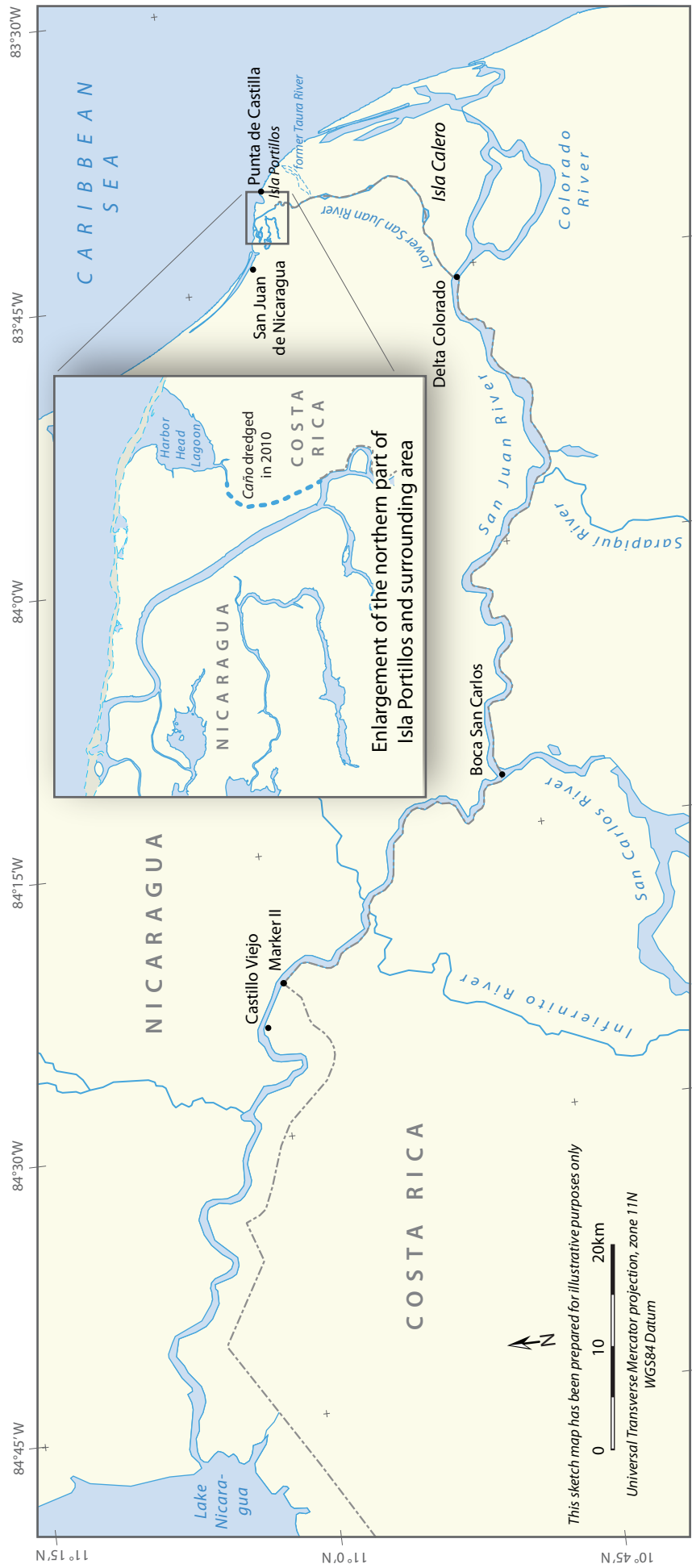
II. GEOGRAPHICAL AND HISTORICAL CONTEXT AND ORIGIN OF THE DISPUTES

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

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

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

Sketch-map No. 1:
Geographical context



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

60. Following challenges by Nicaragua on various occasions to the validity of the 1858 Treaty, Costa Rica and Nicaragua signed another instrument on 24 December 1886, whereby the two States agreed to submit the question of the validity of the 1858 Treaty to the President of the United States, Grover Cleveland, for arbitration. In addition, the Parties agreed that, if the 1858 Treaty were found to be valid, President Cleveland should also decide “upon all the other points of doubtful interpretation which either of the parties may find in the treaty”. On 22 June 1887, Nicaragua communicated to Costa Rica 11 points of doubtful interpretation, which were subsequently submitted to President Cleveland for resolution. The Cleveland Award of 1888 confirmed, in its paragraph 1, the validity of the 1858 Treaty and found, in its paragraph 3 (1), that the boundary line between the two States on the Atlantic side “begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858”. The Cleveland Award also settled the other points of doubtful interpretation submitted by Nicaragua, such as the conditions under which Nicaragua may carry out works of improvement on the San Juan River (para. 3 (6), quoted in paragraph 116 below), the conditions under which Costa Rica may prevent Nicaragua from diverting the waters of the San Juan (para. 3 (9), quoted in paragraph 116 below), and the requirement that Nicaragua not make any grants for the purpose of constructing a canal across its territory without first asking for the opinion of Costa Rica (para. 3 (10)) or, “where the construction of the canal will involve an injury to the natural rights of Costa Rica”, obtaining its consent (para. 3 (11)).

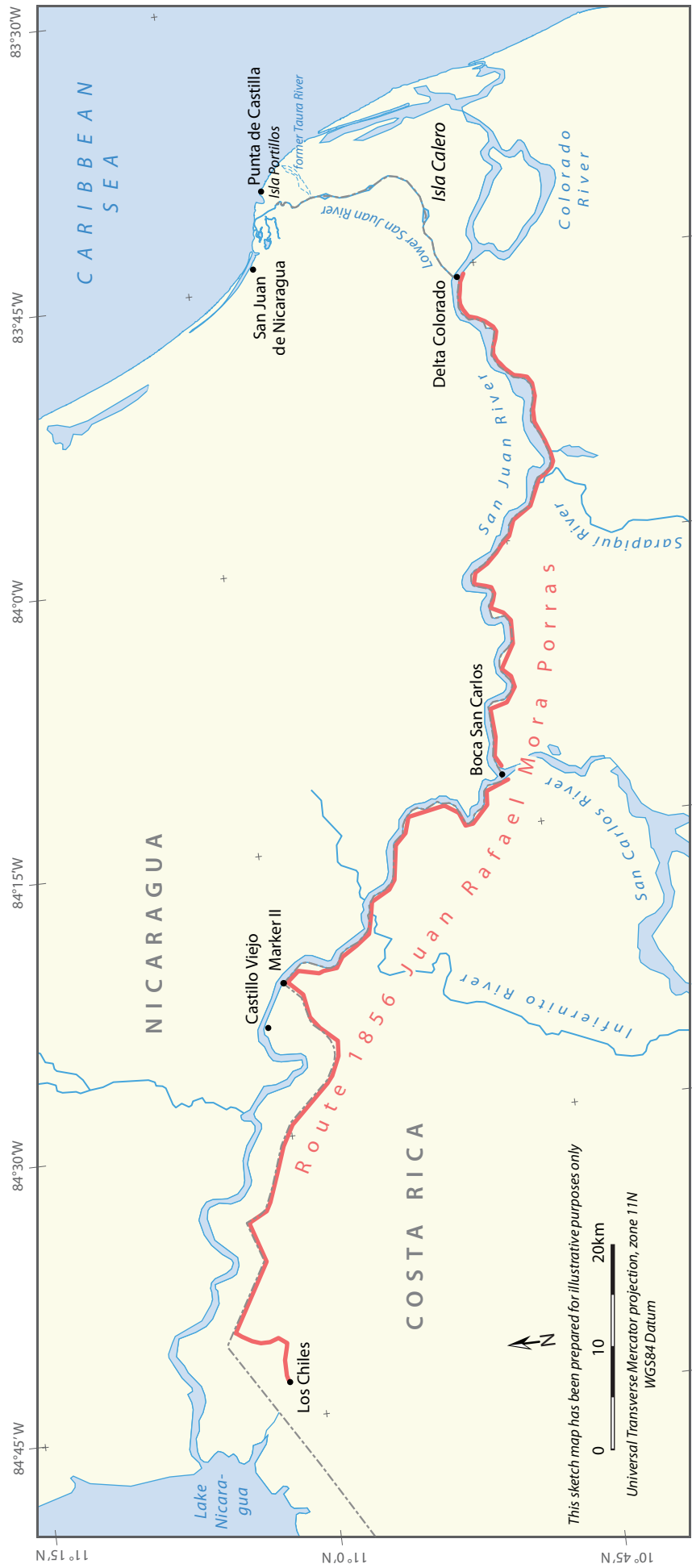
61. Subsequent to the Cleveland Award, Costa Rica and Nicaragua agreed in 1896, under the Pacheco-Matus Convention on border demarcation, to establish two national Demarcation Commissions, each composed of two members (Art. I). The Pacheco-Matus Convention further provided that the Commissions would include an engineer, appointed by the President of the United States of America, who “shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final” (Art. II). United States General Edward Porter Alexander was so appointed. During the demarcation process, which began in 1897 and was concluded in 1900, General Alexander rendered five awards, the first three of which are of particular relevance to the *Costa Rica v. Nicaragua* case (see paragraphs 73-75 below).

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

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

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

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



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

A. Sovereignty over the disputed territory and alleged breaches thereof

65. Costa Rica submits that Nicaragua breached “the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards” (final submissions, para. 2 (b) (i)). This claim is based on the premise that “[s]overeignty over the ‘disputed territory’, as defined by the Court in its Orders of 8 March 2011 and 22 November 2013, belongs to the Republic of Costa Rica” (*ibid.*, para. 2 (a)). In its final submissions Costa Rica requested the Court to make a finding also on the issue of sovereignty over the disputed territory.

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

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

68. Nicaragua does not contest that it dredged the three *caños*, but maintains that “Nicaragua enjoys full sovereignty over the *caño* joining Harbor Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards” (final submissions, para. (b) (i)). Nicaragua further submits that “Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards” (*ibid.*, para. (b) (ii)).

69. Since it is uncontested that Nicaragua conducted certain activities in the disputed territory, it is necessary, in order to establish whether there was a breach of Costa Rica’s territorial sovereignty, to determine which State has sovereignty over that territory. The “disputed territory” was defined by the Court in its Order of 8 March 2011 on provisional measures as “the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon” (*I.C.J. Reports 2011 (I)*, p. 19, para. 55). The *caño*

referred to is the one which was dredged by Nicaragua in 2010. Nicaragua did not contest this definition of the “disputed territory”, while Costa Rica expressly endorsed it in its final submissions (para. 2 (a)). The Court will maintain the definition of “disputed territory” given in the 2011 Order. It recalls that its Order of 22 November 2013 indicating provisional measures specified that a Nicaraguan military encampment “located on the beach and close to the line of vegetation” near one of the *caños* dredged in 2013 was “situated in the disputed territory as defined by the Court in its Order of 8 March 2011” (*I.C.J. Reports 2013*, p. 365, para. 46).

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

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

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

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

“The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858. The ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject.” (United Nations, *Reports of International Arbitral Awards* (RIAA), Vol. XXVIII, p. 209.)

73. When the Commissions on demarcation were established by the Pacheco-Matus Convention, one member, to be designated by the President of the United States of America, was given the power to “resolve any dispute between the Commissions of Costa Rica and Nicaragua

arising from the operations” (see paragraph 61 above). According to this Convention, the said person “shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final” (Art. II, *RIAA*, Vol. XXVIII, p. 212). On this basis, General Alexander, who had been duly designated to this position, rendered five awards concerning the border. In his first Award he stated that the boundary line:

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

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

He observed that:

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

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

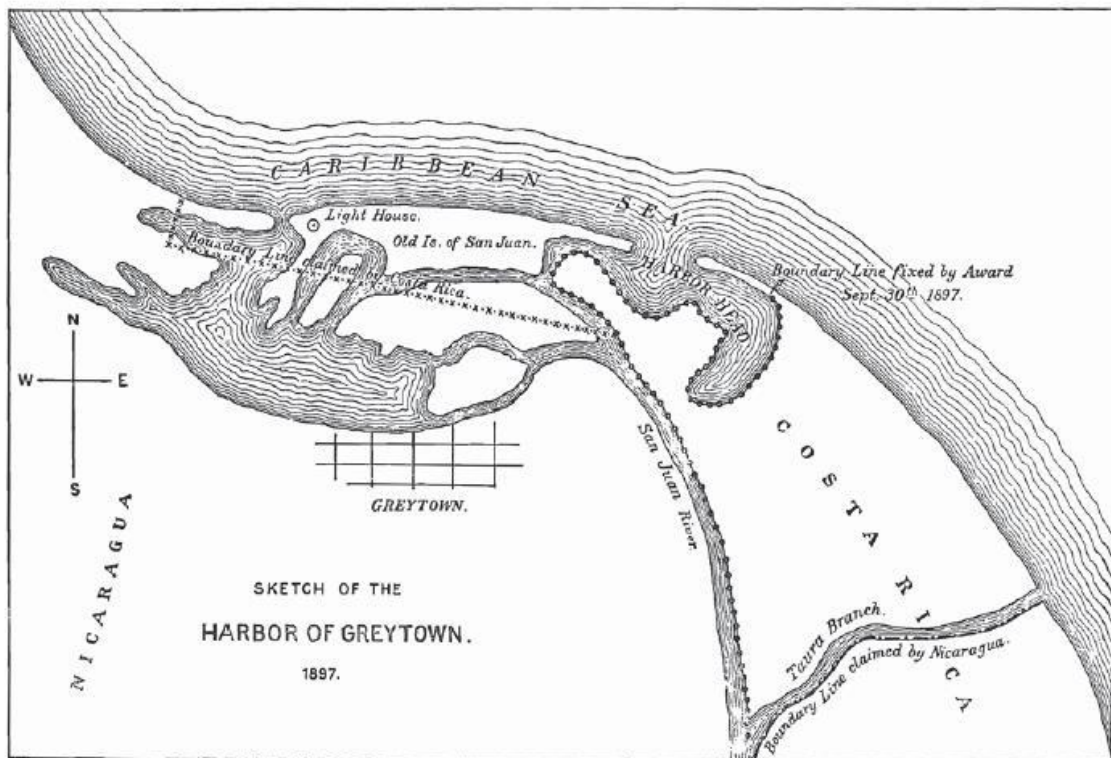
“The exact spot which was the extremity of the headland of Punta de Castillo [on] April 15, 1858, has long been swept over by the Caribbean Sea, and there is too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it from the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

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

Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass, at its nearest point, 300 feet on the northwest side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the left, or southeastward, and shall follow the water’s edge around the harbor until it reaches the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty.” (*Ibid.*, p. 220.)

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

Sketch-map No. 3: Printed sketch-map attached to Alexander's First Award



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

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

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

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

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

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

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

78. Nicaragua argues that, as a result of natural modifications in the geographical configuration of the disputed territory, the “first channel” to which General Alexander referred in his first Award is now a channel connecting the river, at a point south of the Harbor Head Lagoon, with the southern tip of that lagoon. The channel in question, according to Nicaragua, is the *caño* that it dredged in 2010 only to improve its navigability. Relying on the alleged existence of this *caño* over a number of years and contending that it now marks the boundary, Nicaragua claims sovereignty over the whole of the disputed territory.

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

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

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

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

83. The Court recalls that “[i]n determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, para. 196). Affidavits will be treated “with caution”, in particular those made by State officials for purposes of litigation (*ibid.*, paras. 196-197, referring to *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007 (II)*, p. 731, para. 244). In the present case, the Court finds that the affidavits of Nicaraguan State officials, which were prepared after the institution of proceedings by Costa Rica, provide little support for Nicaragua’s contention.

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

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

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

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

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

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

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

90. The Court notes that the existence over a significant span of time of a navigable *caño* in the location claimed by Nicaragua is put into question by the fact that in the bed of the channel there were trees of considerable size and age which had been cleared by Nicaragua in 2010. Moreover, as was noted by Costa Rica’s main expert, if the channel had been a distributary of the San Juan River, “sediment would have filled in, or at a minimum partially-filled, the southern part

of the lagoon”. Furthermore, the fact that, as the Parties’ experts agree, the *caño* dredged in 2010 no longer connected the river with the lagoon by mid-summer 2011 casts doubt on the existence over a number of years of a navigable channel following the same course before Nicaragua carried out its dredging activities. This *caño* could hardly have been the navigable outlet of commerce referred to above (see paragraph 76).

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

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

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

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

95. Costa Rica’s final submission 2 (b) (iv) asks the Court to adjudge and declare that Nicaragua breached its obligation “not to use the San Juan River to carry out hostile acts” under Article IX of the 1858 Treaty. This provision reads as follows:

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

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

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

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

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

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

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

B. Alleged violations of international environmental law

100. The Court will now turn to Costa Rica's allegations concerning violations by Nicaragua of its obligations under international environmental law in connection with its dredging activities to improve the navigability of the Lower San Juan River. Costa Rica's environmental claims can be grouped into two broad categories. First, according to Costa Rica, Nicaragua breached the

procedural obligations to carry out an appropriate transboundary environmental impact assessment of its dredging works, and to notify, and consult with, Costa Rica regarding those works. Secondly, Costa Rica alleges that Nicaragua breached the substantive environmental obligation not to cause harm to Costa Rica's territory. The Court will consider Costa Rica's allegations in turn.

1. Procedural obligations

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

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

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

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

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

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

Furthermore, the Court concluded in that case that “it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource” (*I.C.J. Reports 2010 (I)*, p. 83, para. 204). Although the Court’s statement in the *Pulp Mills* case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context. Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.

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

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

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

105. The Court notes that the risk to the wetlands alleged by Costa Rica refers to Nicaragua’s dredging activities as a whole, including the dredging of the 2010 *caño*. The Court recalls that the dredging activities carried out in breach of Costa Rica’s territorial sovereignty have been considered previously. Accordingly, the Court will confine its analysis to ascertaining whether Nicaragua’s dredging activities in the Lower San Juan carried a risk of significant transboundary harm. The principal risk cited by Costa Rica was the potential adverse impact of those dredging activities on the flow of the Colorado River, which could also adversely affect Costa Rica’s

wetland. In 2006, Nicaragua conducted a study of the impact that the dredging programme would have on its own environment, which also stated that the programme would not have a significant impact on the flow of the Colorado River. This conclusion was later confirmed by both Parties' experts. Having examined the evidence in the case file, including the reports submitted and testimony given by experts called by both Parties, the Court finds that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica's wetland. In light of the absence of risk of significant transboundary harm, Nicaragua was not required to carry out an environmental impact assessment.

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

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

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

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

109. As to the alleged existence of an obligation to notify and consult in treaties binding on the Parties, the Court observes that both Costa Rica and Nicaragua are parties to the Ramsar Convention and the Convention for the Conservation of Biodiversity and Protection of Priority Wildlife Areas in Central America. The Court recalls that Article 3, paragraph 2, of the Ramsar Convention provides that:

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

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

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

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

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

111. As to the Convention for the Conservation of Biodiversity and Protection of Priority Wildlife Areas in Central America, the Court sees no need to take its enquiry further, as neither of the two provisions invoked by Costa Rica contains a binding obligation to notify or consult.

(c) Conclusion

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

2. Substantive obligations concerning transboundary harm

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

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

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

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

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

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

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

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

118. As the Court restated in the *Pulp Mills* case, under customary international law, “[a] State is . . . obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State” (*I.C.J. Reports 2010 (I)*, p. 56, para. 101; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29).

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

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

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

C. Compliance with provisional measures

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

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

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

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

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

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

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

128. The Court’s Order of 22 November 2013 required the following measures from Nicaragua: to “refrain from any dredging and other activities in the disputed territory”; to “fill the trench on the beach north of the eastern *caño*”; to “cause the removal from the disputed territory of any personnel, whether civilian, police or security”; to “prevent any such personnel from entering the disputed territory”; and to “cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control” (*I.C.J. Reports 2013*, p. 369, para. 59). No allegations of subsequent breaches of any of these obligations were made by Costa Rica, which only maintained that some of Nicaragua’s activities after this Order were in breach of its obligation not to aggravate the dispute, which had been stated in the 2011 Order. The Court does not find that a breach of this obligation has been demonstrated on the basis of the available evidence.

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

D. Rights of navigation

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

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

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

133. Article VI of the 1858 Treaty provides that:

“The Republic of Nicaragua shall have exclusive *dominium* and *imperium* over the waters of the San Juan River from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo, [*con objetos de comercio*], whether with Nicaragua or with the interior of Costa Rica by the rivers San Carlos or Sarapiquí or any other waterway starting from the section of the bank of the San Juan established as belonging to that Republic. The vessels of both countries may land indiscriminately on either bank of the section of the river where navigation is common, without paying any taxes, unless agreed by both Governments.” (Translation from the Spanish original as reproduced in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 236, para. 44: “*La República de Nicaragua tendrá exclusivamente el dominio y sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico; pero la República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica, por los ríos de San Carlos ó Sarapiquí, ó cualquiera otra vía procedente de la parte que en la ribera del San Juan se establece corresponder á esta República. Las embarcaciones de uno ú otro país podrán indistintamente atracar en las riberas del río en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, á no ser que se establezcan de acuerdo entre ambos Gobiernos.*”)

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

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

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

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

In the operative part of the same Judgment, the Court found that:

“the inhabitants of the Costa Rican bank of the San Juan River have the right to navigate on the river between the riparian communities for the purposes of the essential needs of everyday life which require expeditious transportation” (*ibid.*, p. 270, para. 156 (1) (f)).

134. Costa Rica includes among the alleged breaches of its rights of navigation the enactment by Nicaragua of Decree 079-2009 of 1 October 2009, concerning navigation on the San Juan River. The interpretation of this decree is controversial between the Parties: Costa Rica considers that the decree is of general application, whereas Nicaragua contends that it applies only to tourist boats. While it is clear that the decree should be consistent with Article VI of the 1858 Treaty as interpreted by the Court, the Court observes that none of the instances of interference with Costa Rica’s rights of navigation specifically alleged by Costa Rica relates to the application of Decree 079-2009. The Court is therefore not called upon to examine this decree.

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

136. The Court finds that Nicaragua did not provide a convincing justification with regard to Article VI of the 1858 Treaty for the conduct of its authorities in these two incidents concerning navigation by inhabitants of the Costa Rican bank of the San Juan River. The Court concludes that

the two incidents show that Nicaragua breached Costa Rica's rights of navigation on the San Juan River pursuant to the 1858 Treaty. Given this finding, it is unnecessary for the Court to examine the other incidents invoked by Costa Rica.

E. Reparation

137. Costa Rica requests the Court to order Nicaragua to "repeal, by means of its own choosing, those provisions of the Decree 079-2009 and the Regulatory Norms annexed thereto of 1 October 2009 which are contrary to Costa Rica's right of free navigation under Article VI of the 1858 Treaty of Limits, the 1888 Cleveland Award, and the Court's Judgment of 13 July 2009" and to cease all dredging activities in the San Juan River pending the fulfilment of certain conditions (final submissions, para. 3 (a) and (b)).

Costa Rica moreover asks the Court to order Nicaragua to:

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

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

138. In view of the conclusions reached by the Court in Sections B and D above, the requests made by Costa Rica in its final submissions under paragraph 3 (a) and (b), concerning the repeal of the Decree 079-2009 on navigation and the cessation of dredging activities respectively, cannot be granted.

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

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

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

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

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

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

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

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

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

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

A. The alleged breach of procedural obligations

1. The alleged breach of the obligation to carry out an environmental impact assessment

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

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

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

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

150. In reply, Nicaragua argues that there was no *bona fide* emergency. It states that the road is not located near the disputed territory, as defined by the Court's Order of 8 March 2011, and that the emergency was declared several months after the beginning of the construction works. Nicaragua further argues that there is no emergency exemption from the international obligation to

carry out an environmental impact assessment. It points out that Costa Rica improperly seeks to rely on a declaration of emergency made under its domestic law to justify its failure to perform its international law obligations.

151. Finally, Nicaragua points out that the environmental impact studies produced by Costa Rica after the bulk of the construction work had been completed do not constitute an adequate environmental impact assessment. As a consequence, it asks the Court to declare that Costa Rica should not undertake any future development in the area without an appropriate environmental impact assessment.

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

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

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

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

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

First, the Court notes that, contrary to Costa Rica's submission, the scale of the road project was substantial. The road, which is nearly 160 km long, runs along the river for 108.2 km (see sketch-map No. 2 above). Approximately half of that stretch is completely new construction.

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

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

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

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157. The Court now turns to the question of whether Costa Rica was exempted from its obligation to evaluate the environmental impact of the road project because of an emergency. First, the Court recalls its holding that "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact

assessment required in each case”, having regard to various factors (see paragraph 104 above, quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010 (I)*, p. 83, para. 205). The Court observes that this reference to domestic law does not relate to the question of whether an environmental impact assessment should be undertaken. Thus, the fact that there may be an emergency exemption under Costa Rican law does not affect Costa Rica’s obligation under international law to carry out an environmental impact assessment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

170. For Costa Rica, Nicaragua's reference to the 1858 Treaty is misplaced, since the Treaty does not impose on Costa Rica an obligation to notify Nicaragua if Costa Rica undertakes infrastructure works on its own territory.

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

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

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

any future development in the area, including further construction works on the road. The Court also notes Nicaragua's commitment, made in the course of the oral proceedings, that it will co-operate with Costa Rica in assessing the impact of such works on the river. In this connection, the Court considers that, if the circumstances so require, Costa Rica will have to consult in good faith with Nicaragua, which is sovereign over the San Juan River, to determine the appropriate measures to prevent significant transboundary harm or minimize the risk thereof.

B. Alleged breaches of substantive obligations

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

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

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

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

177. Nicaragua claims that the construction works resulted in the dumping of large quantities of sediment into the San Juan River, in particular because Costa Rica's disregard of basic engineering principles led to significant erosion. For example, Costa Rica carried out extensive deforestation in areas adjacent to the river and earthmoving activities that led to the creation of unstable cuts and fills in the river's proximity. Moreover, the road builders left piles of earth exposed to rainfall and failed to construct proper drainage systems and stream crossings so as to avoid erosion. Furthermore, Nicaragua maintains that the stretch of road along the San Juan River

is situated too close to the river — nearly half of it was built within 100 metres of the river, and parts of it even within 5 metres of the river bank — or on steep slopes, thereby increasing the delivery of sediment to the river. Nicaragua's main expert opined that erosion is particularly severe in the 41.6 km stretch of the road containing the steepest sections, situated between a point denominated "Marker II" (the western point from which the right bank of the San Juan marks the boundary with Nicaragua) and Boca San Carlos (at the junction of the San Juan and San Carlos Rivers; see sketch-map No. 2 above).

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

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

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

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

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

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

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

184. Costa Rica further points out that the most direct and reliable method for measuring the road's impact on sediment concentrations in the San Juan River would have been for Nicaragua, which is sovereign over the river, to carry out a sampling programme. Yet Nicaragua has not provided measurements of sedimentation and flow levels in the river. The only empirical data before the Court are two reports of the Nicaraguan Institute of Territorial Studies (INETER), which contain measurements of flow rates and suspended sediment concentrations taken at various locations along the San Juan River in 2011 and 2012. Costa Rica argues that neither set of measurements shows any impact from the road.

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

186. The Court notes that it is not contested that sediment eroded from the road is delivered to the river. As regards the total volume of sediment contributed by the road, the Court observes that the evidence before it is based on modelling and estimates by experts appointed by the Parties. The Court further observes that there is considerable disagreement amongst the experts on key data

such as the areas subject to erosion and the appropriate erosion rates, which led them to reach different conclusions as to the total amount of sediment contributed by the road. The Court sees no need to go into a detailed examination of the scientific and technical validity of the different estimates put forward by the Parties' experts. Suffice it to note here that the amount of sediment in the river due to the construction of the road represents at most 2 per cent of the river's total load, according to Costa Rica's calculations based on the figures provided by Nicaragua's experts and uncontested by the latter (see paragraphs 182 to 183 above and 188 to 191 below). The Court will come back to this point below (see paragraph 194), after considering further arguments by the Parties.

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

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

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

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

189. Costa Rica responds that Nicaragua has not shown that the San Juan River has a maximum sediment capacity that has been exceeded. For Costa Rica, the question before the Court is whether the relative impact of the road-derived sediment on the total load of the San Juan River caused significant harm. Costa Rica claims that it did not. According to Costa Rica, the San Juan River naturally carries a heavy sediment load, which is attributable to the geology of the region, and in particular to the occurrence of earthquakes and volcanic eruptions in the drainage area of the river and its tributaries. The volume of sediment contributed by the road is insignificant in the context of the river's total sediment load (estimated by Costa Rica at 12,678,000 tonnes per year), of which it represents a mere 0.6 per cent at most. The road-derived sediment is also indiscernible

considering the high variability in the river's sediment loads deriving from other sources. Costa Rica adds that, even if Nicaragua's figures were to be adopted, the sediment contribution due to the construction of the road would still only represent a small proportion, within the order of 1-2 per cent, of the total load transported by the San Juan. In Costa Rica's view, this amount is too small to have any significant impact.

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

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

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

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

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

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

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

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

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

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

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

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

201. Costa Rica responds, relying on the evidence of its main expert, that the aggradation of the Lower San Juan is an inevitable natural phenomenon that is unrelated to the construction of the road. For Costa Rica, Nicaragua's experts also dramatically overestimate the amount of road-derived sediment that is deposited in the Lower San Juan. First, in Costa Rica's view, only coarse sediment accumulates on the riverbed, whereas most of the fine sediment is washed into the Caribbean Sea. Secondly, Costa Rica argues that there is no evidence that coarse sediment from the road has actually reached the Lower San Juan. Sediment deposition is not a linear process; in particular, sediment tends to accumulate in stretches of the river called "response reaches" and may stay there for years before it is transported further down the channel. Moreover, Costa Rica points out that the Parties' estimates are based on a number of untested assumptions, including estimates of the split of flow and sediment loads between the Colorado River and the Lower San Juan at "Delta Colorado". Costa Rica further argues that Nicaragua's case on harm rests on the mistaken assumption that sediment accumulating on the bed of the Lower San Juan will necessarily need to be dredged.

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

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

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

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

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

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

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

208. The Court will now consider Nicaragua's contention concerning harm to water quality and the aquatic ecosystem. In its written pleadings, Nicaragua alleged that the increased sediment concentrations in the river as a result of the construction of the road caused significant harm to fish species, many of which belong to families that are vulnerable to elevated levels of sediments, to macro-invertebrates and to algal communities in the river. Furthermore, according to Nicaragua, the road's sediment caused a deterioration in the water quality of the river. To prove harm to aquatic organisms and water quality, Nicaragua relied *inter alia* on an expert report based on sampling at 16 deltas in the river, which concluded that both species richness and abundance of macro-invertebrates were significantly lower on the south bank than on the north bank.

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

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

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

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

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

(iv) Other alleged harm

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

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

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

(c) Conclusion

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

2. Alleged breaches of treaty obligations

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

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

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

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

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

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

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

C. Reparation

224. Nicaragua requests the Court to adjudge and declare that, by its conduct, Costa Rica has breached its obligation not to violate Nicaragua's territorial integrity; its obligation not to damage Nicaraguan territory; and its obligations under general international law and the relevant environmental treaties (final submissions, para. 1; see paragraph 52 above).

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

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

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

226. Thirdly, Nicaragua requests the Court to order Costa Rica to restore to the extent possible the situation that existed before the road was constructed, and to provide compensation for the damage caused insofar as it is not made good by restitution (*ibid.*, para. 2 (ii) and (iii)).

The Court recalls that restitution and compensation are forms of reparation for material injury. The Court notes that, although Costa Rica did not comply with the obligation to conduct an environmental impact assessment, it has not been established that the construction of the road caused significant harm to Nicaragua or was in breach of other substantive obligations under international law. As such, restoring the original condition of the area where the road is located would not constitute an appropriate remedy for Costa Rica's breach of its obligation to carry out an environmental impact assessment (see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports 2010 (I), p. 104, para. 271). For the same reasons, the Court declines to grant Nicaragua's claim for compensation.

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

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

228. To conclude, the Court notes that Costa Rica has begun mitigation works in order to reduce the adverse effects of the construction of the road on the environment. It expects that

Costa Rica will continue to pursue these efforts in keeping with its due diligence obligation to monitor the effects of the project on the environment. It further reiterates the value of ongoing co-operation between the Parties in the performance of their respective obligations in connection with the San Juan River.

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229. For these reasons,

THE COURT,

(1) By fourteen votes to two,

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

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

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

(2) Unanimously,

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

(3) Unanimously,

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

(4) Unanimously,

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

(5)

(a) Unanimously,

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

(b) Unanimously,

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

(c) By twelve votes to four,

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

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

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

(6) Unanimously,

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

(7) By thirteen votes to three,

Rejects all other submissions made by the Parties.

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

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

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

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President YUSUF appends a declaration to the Judgment of the Court; Judge OWADA appends a separate opinion to the Judgment of the Court; Judges TOMKA, GREENWOOD, SEBUTINDE and Judge *ad hoc* DUGARD append a joint declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge DONOGHUE appends a separate opinion to the Judgment of the Court; Judge BHANDARI appends a separate opinion to the Judgment of the Court; Judge ROBINSON appends a separate opinion to the Judgment of the Court; Judge GEVORGIAN appends a declaration to the Judgment of the Court; Judge *ad hoc* GUILLAUME appends a declaration to the Judgment of the Court; Judge *ad hoc* DUGARD appends a separate opinion to the Judgment of the Court.

(Initialled) R. A.

(Initialled) Ph. C.
