

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2013

Public sitting

held on Tuesday 5 November 2013, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2013

Audience publique

tenue le mardi 5 novembre 2013, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

* Reissued for technical reasons — Nouveau tirage pour raisons techniques.

Present: President Tomka
 Vice-President Sepúlveda-Amor
 Judges Owada
 Abraham
 Keith
 Bennouna
 Skotnikov
 Cañado Trindade
 Yusuf
 Greenwood
 Xue
 Donoghue
 Gaja
 Sebutinde
 Bhandari
Judges *ad hoc* Guillaume
 Dugard

Registrar Couvreur

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

M. Couvreur, greffier

The Government of Nicaragua is represented by:

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as Agent and Counsel;

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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,

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

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

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H.E. Mr. Jorge Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Sergio Ugalde, Senior Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica, Member of the Permanent Court of Arbitration,

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

Ms Ana Marcela Calderón, Minister Counsellor at the Costa Rican Embassy in the Kingdom of the Netherlands,

Ms Katherine Del Mar, Ph.D., Graduate Institute of International and Development Studies, Geneva,

Mr. Rowan Nicholson, Research Assistant, Lauterpacht Centre for International Law, University of Cambridge,

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comme conseillers.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today, pursuant to Article 74, paragraph 3, of the Rules of Court, to hear the observations of the Parties on the Request for the indication of provisional measures submitted by Nicaragua in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. This case was joined with the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, by two separate Orders of the Court dated 17 April 2013.

Each of the Parties in the present case, the Republic of Nicaragua and the Republic of Costa Rica, has availed itself of the possibility afforded to it by Article 31 of the Statute of the Court to choose a judge *ad hoc*. Nicaragua chose Mr. Gilbert Guillaume and Costa Rica chose Mr. Bruno Simma. By a communication dated 17 April 2013, Mr. Simma informed the Court of his decision to resign from his functions, further to the aforementioned joinder of proceedings.

It is recalled that, in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Costa Rica chose Mr. John Dugard and Nicaragua, Mr. Gilbert Guillaume. Judges Guillaume and Dugard were each installed as judge *ad hoc* in 2011, during the phase of that case devoted to the Request for the indication of provisional measures submitted by the Republic of Costa Rica on 18 November 2010, and continue to sit for the purposes of all phases of the joint proceedings.

*

I shall now briefly recall the procedure so far followed in the *Nicaragua v. Costa Rica* case — case relating to *Construction of a Road in Costa Rica along the San Juan River*. On 22 December 2011, the Government of Nicaragua filed in the Registry of the Court an Application instituting proceedings against the Government of Costa Rica for “violations of Nicaraguan sovereignty and major environmental damages on its territory”, contending, in particular, that Costa Rica was carrying out major works along most of the border area between the two countries along the San Juan River, namely the construction of a road, with grave environmental consequences.

By an Order of 23 January 2012, the Court fixed 19 December 2012 and 19 December 2013, in light of the agreement reached between the Parties, as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Costa Rica. Nicaragua's Memorial was filed within the time-limit thus prescribed.

On 11 October 2013, Nicaragua filed in the Registry a Request for the indication of provisional measures in the present case. Nicaragua clarified that it was not seeking the modification of the Order of 8 March 2011, but rather "the adoption of new provisional measures linked with the *Nicaragua v. Costa Rica* case".

The Registrar immediately communicated a copy of the said request to the Government of Costa Rica.

Nicaragua, in outlining the facts which led it to bring the present request, states that "Costa Rica has repeatedly refused to give Nicaragua appropriate information on the road works" and "has denied that it has any obligation to prepare an Environmental Impact Assessment or to provide such a document to Nicaragua". Nicaragua contends that,

"[a]s the rainy season enters into its heaviest stage washing even greater quantities of sediment and run-off into the river's waters, Costa Rica has still not provided the necessary information to Nicaragua, nor has it taken the necessary actions along the 160 km road to avoid or mitigate the irreparable damage that is being infl[i]cted on the river and its surrounding environment, including on navigation and the health and wellbeing of the population living along its margins".

I shall now ask the Registrar to read out the passage from the Request specifying the provisional measures which the Government of Nicaragua is asking the Court to indicate.

Monsieur le Greffier, vous avez la parole.

The REGISTRAR: Merci.

"Nicaragua, therefore, respectfully requests the Court, as a matter of urgency to prevent further damage to the River and to avoid aggravation of the dispute, to order the following provisional measures:

(1) that Costa Rica immediately and unconditionally provides Nicaragua with the Environmental Impact Assessment Study and all technical reports and assessments on the measures necessary to mitigate significant environmental harm to the River;

(2) that Costa Rica immediately takes the following emergency measures:

(a) Reduce the rate and frequency of road fill failure slumps and landslides where the road crosses the steeper hill slopes, especially in locations where failed or

eroded soil materials have been or could potentially be delivered to the Río San Juan.

- (b) Eliminate or significantly reduce the risk of future erosion and sediment delivery at all stream crossings along Route 1856.
 - (c) Immediately reduce road surface erosion and sediment delivery by improving dispersion of concentrated road runoff and increasing the number and frequency of road drainage structures.
 - (d) Control surface erosion and resultant sediment delivery from bare soil areas that were exposed during clearing, grubbing and construction activities in the last several years.
- (3) Order Costa Rica not to renew any construction activities of the road while the Court is seised of the present case.”

The PRESIDENT: Merci. According to Article 74 of the Rules of Court, a request for the indication of provisional measures shall have priority over all other cases and the Court, if it is not sitting, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency. The Parties were informed that the date for the opening of the oral proceedings contemplated in Article 74, paragraph 3, of the Rules of Court, during which they could present their observations on the Request for the indication of provisional measures, had been set at 5 November 2013, at 10 a.m.

I note the presence at the hearing of the Agents, counsel and Advocates of both Parties. In accordance with the arrangements on the organization of the procedure decided by the Court, the hearings will comprise a first and a second round of oral argument. Each Party will have one full session of three hours for the first round and a session of one-and-a-half hours for the second round. These are of course maximum speaking times, that the Parties ought not to use if not necessary.

Nicaragua will present its first round of oral observations on its request for the indication of provisional measures this morning. Costa Rica will present its first round of oral observations on that request on Wednesday 6 November, at 10 a.m.

Nicaragua will then present its second round of oral observations on Thursday 7 November at 10 a.m., for a maximum speaking time of one-and-a-half hours. Costa Rica will then present its second round of oral observations on Friday 8 November at 10 a.m., also for a maximum speaking time of ninety minutes.

The PRESIDENT:

Before giving the floor to His Excellency Ambassador Carlos Argüello Gómez, Agent of Nicaragua, I shall draw the attention of the Parties to Practice Direction XI, which states, *inter alia*, that Parties should:

“[i]n the oral pleadings on requests for provisional measures . . . limit themselves to what is relevant to the criteria for the indication of provisional measures as indicated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose.”

So the purpose of this hearing is to provide an opportunity to the Parties to address the request of Nicaragua to indicate provisional measures in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. The Court has already closed the arguments on the request of Costa Rica for the indication of provisional measures in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, on 17 October 2013 and it is in an advanced stage of its deliberation. You will shortly hear from the Registrar of the Court and the Parties will be convened to this Great Hall for the purpose of the delivery of the Order by the Court in that case. I shall now give the floor to His Excellency Ambassador Carlos Argüello Gómez, Agent of Nicaragua. You have the floor, Sir.

Mr. ARGÜELLO GÓMEZ:

1. Mr. President, Distinguished Members of the Court. Good morning. As always it is a great honour to address you on behalf of my country.

2. I should add at the start that I would have preferred to have had this honour of addressing Nicaragua’s request for provisional measures that is now under consideration, during the previous hearings of last October. This is not to say that we do not understand the reasons for having separate hearings, particularly in view of the fact that Nicaragua introduced its request at a late stage.

3. This deserves an explanation. This was no last moment add-on. During the previous request for provisional measures filed by Costa Rica, Nicaragua presented a letter to the Court on 10 October 2013 accepting the facts as generally claimed and indicating that the situation had been

immediately stopped once the President of Nicaragua became aware of it, and that steps had been taken to avoid any recurrence of these events.

4. Our view of the situation was that with this explanation the request for new provisional measures requested by Costa Rica had become moot and that it might be withdrawn. It was only after Costa Rica rejected as insufficient the statement by Nicaragua and insisted that the hearings continue that we determined to file our own petition for provisional measures with the intention that they be pleaded during those hearings. The reason of joining Nicaragua's request to that of Costa Rica was due to the fact that Nicaragua wanted to avoid the expense and inconvenience for the Members of the Court of having separate public hearings. As can be appreciated from a brief summary of the procedural history in the short review below, Nicaragua had already made several attempts to obtain some form of protection of its rights without going through the formal process of public hearings.

5. Unfortunately this has not been possible and we must inevitably tax the Court's time.

Effect of the joinder of the two cases

6. Mr. President, the present hearings involve in one way or another two cases presently before the Court that have been joined by the Order of 17 April 2013. One case was brought by Costa Rica against Nicaragua (the *Certain Activities* case) by means of an Application filed by Costa Rica on 18 November 2010¹ and the other case was brought by Nicaragua against Costa Rica (the *Construction of a Road* case) by means of an Application filed on 22 December 2011².

7. For this reason, please allow me to reiterate the statement made in our letter of 11 October 2013 requesting the provisional measures now under consideration. This letter stated:

“Nicaragua would like to point out that although it has filed a case against Costa Rica for the construction of a Road (Road 1856)³, the damage done to the River by the construction of this road also constitutes an independent aggravation of the dispute under consideration in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. The damages caused by the road are an inextricable part of the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, as explained in Nicaragua's

¹Available at <http://www.icj-cij.org/docket/files/150/16279.pdf>.

²Available at <http://www.icj-cij.org/docket/files/152/16917.pdf>.

³See the *Application of the Republic of Nicaragua instituting Proceedings against the Republic of Costa Rica*, 21 December 2011.

pleadings, Costa Rica's road works have caused a surge in the San Juan River's sediment load requiring Nicaragua to take active efforts, including dredging, to maintain the quality and quantity of the river's waters."⁴

8. This was also the reason why in my Agent's speech during the hearings for Costa Rica's request for new provisional measures in the *Certain Activities* case on 15 October last⁵, I pointed out the damages caused by the roadwork and the need to put a stop to this day-to-day destruction of the river system. What I stated in that speech is equally applicable during these hearings for provisional measures in what Nicaragua understands are joined cases.

Background of the dispute

***Certain Activities* case: territorial dispute**

9. In the *Certain Activities* case, Costa Rica claims sovereignty over a wetland of approximately 250 hectares located at the mouth of the San Juan de Nicaragua River which Nicaragua also considers part of its sovereign territory.

10. The area in dispute was demarcated in the first Alexander Award⁶. In the pertinent part the Arbitrator declares that the initial line of the boundary was to run as follows:

“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, three hundred (300) feet on the northwest side from the small hut now standing in the vicinity.”

11. On the screen [tab 1] we can observe that this line crosses the sand bank already in existence since that time, leaving sovereignty over it on the Nicaraguan side, and then the line runs into Harbor Head Lagoon, from where, the Award states:

“the boundary line shall turn to the left, or south eastward, 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.”

12. For Nicaragua this means that the first channel or *caño* is located inside Harbor Head Lagoon and from there it runs into the river proper. For Costa Rica the first channel runs out to the sea and not into the river.

⁴Letter from the Republic of Nicaragua to the International Court of Justice, dated 11 October 2013, Ref: HOL-EMB-196.

⁵Available at <http://www.icj-cij.org/docket/files/150/17588.pdf>.

⁶First Award by the Umpire E.P. Alexander rendered on 30 September 1897 in San Juan del Norte, Nicaragua, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 220 (MCR, Vol. II, Ann. 9, p. 69).

13. This difference of opinion crystallized into the territorial dispute over the 250 hectares of swampland [tab 1 off].

Certain Activities case: dredging and cleaning of the San Juan and its channels

14. The other claim of Costa Rica in that case is that Nicaragua should cease any dredging activities in the last 30 kilometers before the river reaches the sea, and to cease all activity in any other part of the river that could cause damage to Costa Rican territory.

15. This question has been at the heart of most disputes with Costa Rica over the San Juan River for over 150 years. At present, approximately 90 per cent of the waters of the Nicaraguan San Juan River find their outlet to the sea through the branch of the Colorado River that runs entirely in Costa Rican territory. Nicaragua's position is that the Jerez-Cañas Treaty of 1858 and the Cleveland Award of 1888 make clear that Nicaragua has a right to dredge the river and its channels to maintain the situation in place in 1858.

Provisional measures

16. As a corollary to its Application instituting proceedings against Nicaragua, Costa Rica also filed a request for provisional measures. The Court decided to order certain measures on 8 March 2011. One of these measures was that

“Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”

Construction of a Road case

17. After this Order on provisional measures was given, Costa Rica embarked on the construction of an extremely damaging and environmentally destructive road, which its President hastily authorized by emergency decree. In building the road, Costa Rica bypassed its normal vetting processes, and failed to carry out an Environmental Impact Assessment. The inevitable result was shoddy design and construction — condemned by Costa Rica's own Association of Engineers and Architects⁷ — amounting to an environmental nightmare. What I want to emphasize

⁷See Ann. 4 to the Memorial of the Republic of Nicaragua in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 19 December 2012.

is that the damages to the San Juan River and its protected wetlands caused by the roadwork prompted Nicaragua to bring a case against Costa Rica before the Court on 22 December 2011.

18. The construction of this road was justified, according to Costa Rica, for security reasons subsequent to the activities in the disputed territory. On the basis of an emergency decree this road was constructed without environmental impact assessment and without any elementary environmental precautions or regard for good neighbourliness.

19. In fact the reckless and unfriendly construction of the road was largely a product of spite. This is exemplified by the statement of the second Vice-President of Costa Rica, Alfio Piva, who indicated that since the new road being constructed made the river unnecessary for Costa Ricans, he called upon Nicaraguans to “eat the San Juan [River]”⁸.

20. The fact that the road was designed and executed without any environmental considerations, or concern for the risks to the contiguous territory of Nicaragua, has been acknowledged by the highest authorities of Costa Rica. On 13 December 2011, the President of Costa Rica, Ms Laura Chinchilla, declared that Costa Rica “issued an emergency decree due to national necessity and it is on that basis that we have developed the projects. We are not taking even one step back.”⁹ Accordingly, President Chinchilla concluded, Costa Rica has “no reason to offer explanations to the Government of Nicaragua”¹⁰.

21. Foreign Minister of Costa Rica, Minister Castillo, stated also with Olympian disregard that his country is not obligated to give any kind of explanation, “nor to suspend its work being carried out as a consequence of an emergency provoked by Nicaragua” and declared: “This is a sovereign project we are carrying out under a decree that exempts us from environmental impact studies, that is why we owe no explanations”, confirming that behind these projects there is no study for mitigating environmental damage in the zone¹¹.

⁸*El Nuevo Diario*, Nicaragua, “Costa Rican Vice-President suggests eating the San Juan”, 23 January 2012 (CMN, Vol. III, Ann. 102).

⁹Memorial of the Republic of Nicaragua in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Ann. No. 24, *El País*, Costa Rica “Chinchilla defends highway criticized by Nicaragua, rejects dialogue”, Wednesday 14 December 2011. (Source: EFE / 13 December 2011.)

¹⁰*Ibid.*

¹¹*Ibid.*

Impact of the road

22. The road was cut parallel and perilously close to the right margin of the San Juan River without any consideration of the environmental consequences even inside Costa Rica, and even in violation of Costa Rica's internal law that prohibits such constructions within 50 meters of a river. This disregard of all caution and legal obligations has been confirmed by Costa Rica's Administrative Environmental Court¹² and the reports issued by Costa Rica's Association of Engineers and Architects (CFIA) and Costa Rica's National Laboratory (LANAMME) among others issued by Costa Rica's institutions and international experts¹³. If no regard was taken of the Costa Rican environment on the basis of a decree of a dubious national emergency, then what regard could be expected for Nicaraguan territory and environment?

23. For example, Costa Rica's Association of Engineers and Architects have indicated that the destruction of the vegetation along the right bank of the river, together with the creation of unstable, unprotected slopes and a lack of proper drainage, result in both increased land collapse, and excessive erosion and sediment run-off into the San Juan de Nicaragua River which aggravate the obstacles to navigating the river, and concluded that the road construction project may negatively impact the ability of Costa Ricans to navigate the river¹⁴. This is Costa Rica's Association of Engineers and Architects.

24. The reports of these independent Costa Rican institutions contrasts entirely with the self-serving conclusions of the reports of the governmental institutions filed by Costa Rica yesterday and on which we will comment shortly.

25. The Court has already had an opportunity of viewing some of the images taken from the roadwork. A short reminder is on screen [tab 2]. [Tab 2 off]

¹²Costa Rica's Administrative Environmental Court confirmed excessive felling of trees and found clearings that were more than eight times the established width of the road. See more at *El País*, Costa Rica, "Environmental Court Confirmed Excessive Felling for Construction of 1856 Trail", 15 July 2012. (MN, Vol. II, Ann. 37.)

¹³See e.g. the Costa Rican Environmental Management Plan, April 2012, pp. 22-23 (MN, Vol. II, Ann. 2), CFIA Report DRD-INSP-0299-2012, 8 June 2012, pp. 15-17 (noting the existence of high, nearly vertical slopes without protection of any kind) (MN, Vol. II, Ann. 4) and LANAMME Report, pp. 49 & 51 (MN, Vol. II, Ann. 3), "First Kondolf Report", July 2012, Sect. 2.14 (App. 1 to the Counter-Memorial of Nicaragua (CMN) in the dispute concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*), Kondolf Report, e.g., Sect. 6 (MN, Vol. II, Ann. 1). See also Kondolf Report "Confirmation of Urgent Measures to Mitigate Erosion & Sediment Delivery from Rte 1856, Costa Rica, into the Río San Juan, Nicaragua, 12 October 2013" and Kondolf Report "Planning & Geography, University of California, Berkeley Continued Impacts of Erosion from Rte 1856, Costa Rica to the Río San Juan, Nicaragua, 30 October 2013".

¹⁴Memorial of the Republic of Nicaragua in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, para. 4.15

26. The consequences of this reckless disregard of the environment and of the territory of its neighbour is noted in the report of Professor Kondolf, that points out that,

“The poor siting of the road across steep, unstable hill slopes and in close proximity to the river, was compounded by poor construction practices, which in the United States and Europe were used in the 1950s but have been illegal for decades.”¹⁵

27. In Spanish we have a saying “para muestra un boton” that loosely translated into English might read “as an example a button is enough”. On the screen we will shortly see an incident that occurred 10 days ago that evidences the poor construction practices pointed out by Professor Kondolf. The incident involves not a small button but a large culvert that was washed away into the San Juan River after an average rainfall. The persons you will see on the screen collecting the debris and breaking it up for transportation are personnel from MARENA, the environmental agency of Nicaragua. The place where the destroyed culvert was found was not immediately in the area where it had been located. It was some distance from its original emplacement. On screen we have a short version of the cleaning up of the culvert debris [tab 3].

28. You must have noted that the remainder of the culvert shown on the screen was not home-made, like many that have been placed along the route (for example, adapted truck containers), but it was a regular custom-made culvert and that it was washed out quite a distance from its original emplacement after only a normal rainfall. [Tab 3 off] What would happen to the more numerous home-made versions during the frequent tropical storms that beset the region? In any case there are not many left to test the issue. As reported in the Costa Rican news media,

“The evidence that the bridges and culverts were improperly built is that almost all of them do no longer exist.”¹⁶

Actions taken by Nicaragua to preserve its rights

29. Mr. President, the mechanisms open for a State to attempt to preserve its rights when it is faced by illegal activities of another State are not only those contemplated in Articles 41 of the Statute and 73 of the Rules of Court, even if the preservation of its rights are a matter of urgency

¹⁵Kondolf Report “Continued Impacts of Erosion from Rte 1856, Costa Rica to the Río San Juan, Nicaragua, 30 October 2013”, p. 1.

¹⁶See “Another bridge collapsed on the Trail Parallel to the San Juan River, Noticia Contacto, 15 July 2013”, available at <http://www.radiosantaclara.org/article/se-desplomo-otro-puente-en-la-trocha-paralela-al-r/#sthash.cckqFqXf.dpuf>.

and could result in irreparable prejudice. There are bilateral procedures, requests addressed to international organizations and also the possibility for the Court itself to take action *proprio motu*.

30. Nicaragua has tried all of these approaches before deciding to request these measures through the formal mechanisms involved in these hearings.

Bilateral measures

31. Since the magnitude of the roadwork first became evident, Nicaragua has been requesting that Costa Rica furnish it with an Environmental Impact Assessment.

32. On 29 November 2011, the acting Foreign Minister of Nicaragua sent a Note to his Costa Rican counterpart requesting information on the road under construction and pointing out,

“(a) that all projects of this nature should have an Environmental Impact Assessment due to their characteristics”¹⁷.

33. This Assessment has never been furnished to Nicaragua. According to the statements cited above by the President of Costa Rica and the Foreign Minister, the environmental impact assessment was never even made. This is recognition of a violation of Costa Rica’s international obligations.

Communications to international organizations

34. In view of this blatant disregard by Costa Rica of its international obligations not only stemming from general principles of international law but also on specific Conventions to which it is a party, Nicaragua took the steps it had ready at hand to try to obtain Costa Rican compliance with its obligations. As indicated in Nicaragua’s Memorial¹⁸, it proceeded to inform the Secretariats of these several Conventions about the major environmental threats due to the activities underway in Costa Rica. Nicaragua sent Notes to Unesco, since it relates to a Biosphere Reserve recognized by that entity, the RAMSAR Secretariat since it also relates to wetlands recognized under this Convention, as well as to the United Nations Environmental Program (UNEP) and the regional Central American Commission on Environment and Development

¹⁷Memorial of the Republic of Nicaragua in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Ann. No. 14, Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs of Costa Rica, Ref: MRE/DVM/AJST/500/11/11, Managua, 29 November 2011.

¹⁸Memorial of the Republic of Nicaragua in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, para. 2.34-2.37.

(CCAD), since Nicaragua has the obligation of informing them about the damage and imminent threats to our natural patrimony in the biosphere reserve at Río San Juan¹⁹. These Notes also request these international organizations to send an investigative mission to visit the affected area and assess on the ground the harms and potential harms caused by Costa Rica's violations of the applicable Conventions²⁰.

Requests to the Court for ordering measures on the basis of its statutory powers

35. Since this had no effect, Nicaragua proceeded to request to the Court to order measures on the basis of its statutory powers. When Nicaragua filed its Application instituting proceedings against Costa Rica for the roadwork on 22 December 2011, it accompanied a Note that stated,

“(a) In its Application Nicaragua has made clear that Costa Rica is carrying out major construction works along most of the border area with Nicaragua with grave environmental consequences without producing and communicating to Nicaragua an Environmental Impact Assessment (EIA) that would permit an evaluation of the works.

(b) For this reason, Nicaragua has requested that the Court on the basis of its statutory powers order that Costa Rica produce and communicate to Nicaragua such document. Given the evident importance of the EIA in the circumstances of this case, Nicaragua considers that the exercise of these powers by the Court at this time would be amply justified.”

36. Again, when Nicaragua filed its Memorial on 19 December 2012, in the submissions it requested 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 Articles 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.”

37. In a Note dated 19 December 2012 accompanying its Memorial, Nicaragua explained that it considered,

¹⁹*Ibid.*, Anns. Nos. 18, 19 and 21. Notes sent from the Minister of Environment of Nicaragua and Natural Resources (MARENA), to the United Nations Environmental Program (UNEP), Central American Commission on Environment and Development (CCAD) and Unesco, on the 10 December 2011.

²⁰*Ibid.*, Ann. No. 20. Note from the Minister of Environment of Nicaragua and Natural Resources (MARENA), to the Secretary General, RAMSAR Convention, 28 November 2011.

“that the Court has been provided with the necessary information in order to decide ‘*proprio motu* whether the circumstances of the case require the indication of provisional measures’, without having to go through the costly and lengthy exercise of public hearings”.

38. The attempts by Nicaragua to avoid time-consuming and expensive formal hearings came to an end when it received a communication dated 11 March 2013 from the Registrar informing that the Court was of the view that the circumstances of the 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*.

39. Even after this rejection Nicaragua made one further attempt to avoid formal hearings by using the request made by Costa Rica on 23 May 2013 for the modification of the Order of 8 March 2011. In its written observations to this request of 14 June 2013, Nicaragua asked the Court to reject Costa Rica’s request and at the same time requested that the Court adapt its Order of 8 March 2011 in order to embrace the situation of the joined cases and particularly to take into account the situation created by the roadwork.

40. In its Order of 16 July 2013 the Court rejected Nicaragua’s request indicating that:

“even if the situation invoked in the *Nicaragua v. Costa Rica* case were to justify the indication of provisional measures, the appropriate method of securing that is not the modification of the Order [of 8 March 2011] made in the *Costa Rica v. Nicaragua* case”²¹.

41. With this communication it became clear to Nicaragua that the Court would only consider Nicaragua’s request for provisional measures, if this was made in a formal request on the basis of Article 41 of the Statute and 73 of the Rules of Court.

Renewal of the roadwork

42. Apart from all other procedural doors being closed to Nicaragua’s attempt to avoid prejudice to its rights, another perilous situation came looming again. That is the fact that public announcements have been made by Costa Rican authorities that the roadwork would be continued at the end of this year. This announcement, coupled to the fact that there will be general elections in Costa Rica in February 2014, and that repeated statements have been made by the Costa Rican Government that it intends to finish its term of office with the roadwork finished or in full process

²¹Order of 16 July 2013 regarding the *Request for the Modification of the Order of 8 March 2011 indicating Provisional Measures*, p. 9, para. 28, available at: <http://www.icj-cij.org/docket/files/150/17500.pdf>.

of construction before the new Government is sworn in on May 2014, convinced Nicaragua that it could not wait any longer for requesting provisional measures.

43. The details of the renewal of the roadwork will be expounded by Mr. Reichler, but for the moment I would bring to the attention of the Court that the information given here has been amply and joyfully confirmed by the Minister of Communication of Costa Rica, Mr. Carlos Roverssi, who stated just last week on Monumental press that: “construction of the Borderline Trail will continue to a priority piece of work until termination by the current government and anticipates that it will also be (a priority) for the next (government)”²².

44. In addition, he emphasized that “the works will continue forward even though this does not please Nicaragua”²³.

Question of awaiting the decision on the merits

45. There is an important element that Nicaragua has taken into consideration carefully. This is the question of what further damage could happen between the filing of this request for provisional measures and the possible dates for the judgment on the merits to be given by the Court. This date is very difficult to anticipate. First of all, the unforeseeable agenda of the Court that is subject to urgent requests for advisory opinions and other urgent measures by State parties.

46. Nicaragua has already experienced the impact of these circumstances on the agenda of the Court in the proceedings in its case against Colombia that made it one of the longest lasting cases in the history of the Court. Apart from these unforeseeable requests that could disrupt the agenda of the Court, it is not possible to anticipate if there is to be a second round of written pleadings in this case. But even in the most optimistic circumstances, it is not possible for the judgment on the merits to be read before the works on the road are restarted as announced by the Government of Costa Rica.

47. So, does Nicaragua have to wait at least one more year, after the end of another rainy season and after the restart of the roadwork without any environmental impact assessment, for a

²²Country Expects to Demonstrate that Trail construction did not damage the San Juan River, Hearings in The Hague begin on 5 November Roverssi warns that trail works will continue even it displeases Nicaragua, 28 October 2013 available at: <http://www.monumental.co.cr/noticia/pais-espera-demostrar-que-construccion-de-la-trocha-no-dano-el-rio-san-juan>.

²³*Ibid.*

decision on the merits in order to put a stop to the trampling of its rights? In that case, Article 41 of the Statute would be redundant.

48. In the case of the *Great Belt*, the projected bridge would not cause the foreseen damage until it was completed and this was not anticipated to happen before the judgment on the merits. The Court indicated that its decision on the merits might imply tearing down the structure and that was a risk the respondent had to assume. In the present case, the roadwork so far constructed is causing damage every day of the year and, as indicated in Professor Kondolf's report, "[i]f work continues on Rte 1856, its impact will be devastating to the areas directly affected and to downstream receiving waters"²⁴. That is to say, to Nicaraguan waters.

Expert reports filed by Costa Rica

49. Costa Rica has filed more than 300 pages of documents containing technical reports that were not prepared for these oral hearings since they date from before the request for the measures presently under consideration was made. These documents mostly date from January to August of this year and could have been furnished earlier and not at the last moment to the inconvenience of the staff of the Registry and of the other Party. Naturally, Nicaragua does not have the time, in the three hours of pleadings presently allotted to it, to respond to these documents on which it has heard no argument yet. Nonetheless, Professor Mccaffrey will address some comments.

50. After tomorrow's pleadings in which Costa Rica will presumably explain these documents and base arguments on them, Nicaragua will have an overnight opportunity to address this issue in the one-and-a-half hours allotted to it for argument. It is obviously not possible for Nicaragua in one-and-a-half hours to analyse and address these extensive documents that have been prepared during months under careful scrutiny of the Costa Rican representatives.

51. These documents were evidently prepared for filing with the Costa Rican Counter-Memorial and reflect this purpose in many ways. They look to the past and not the future which is the preventive objective of provisional measures. Thus, they have absolutely no comments on the impact of the future continuation of the roadwork; they have no indication that any environmental impact assessment has been prepared for this renewal of the roadwork; they

²⁴Kondolf Report "Continued Impacts of Erosion from Rte 1856, Costa Rica to the Río San Juan, Nicaragua, 30 October 2013", p. 1.

make no attempt to foresee the consequences that would ensue after the next tropical storm inevitably hits the area. In fact, their only objective is to try to minimize the amount of damages so far caused by the roadwork.

52. Due to the nature of these documents, Nicaragua reserves its rights to comment and respond fully to them and the arguments based on them, until it has an opportunity to plead on the merits, be they written or oral pleadings.

Mr. President, Members of the Court, this finishes my presentation. Thank you for your kind attention. I will continue, simply indicating the order and general subject to be addressed by the speakers, which is as follows:

- Professor Stephen McCaffrey will address the irreparable harm caused by the roadwork and the aggravation of the renewal of the works;
- Mr. Paul Reichler will address the urgent need of the provisional measures requested;
- And Professor Alain Pellet will address the specific standards for granting provisional measures.

Mr. President, I ask you to call Professor McCaffrey, please.

The PRESIDENT: Thank you very much, Ambassador Argüello Gomez. And I now invite Professor Stephen McCaffrey to address the Court. You have the floor, Sir.

Mr. McCAFFREY: Thank you very much, ~~Mr. Chairman~~, Mr. President.

IRREPARABLE PREJUDICE TO NICARAGUA'S RIGHTS

Mr. President, distinguished Members of the Court, it is a great honour and privilege to appear before you again on behalf of the Republic of Nicaragua.

1. Mr. President, Members of the Court, this case can fairly be described as one of death by a thousand cuts: death of the Lower San Juan River by accretion, by the slow but steady changes wrought by sedimentation. The changes may be gradual, but they are no less inevitable, and no less threatening to past, present and future uses of the river by Nicaragua. The change may be incremental, but it is no less cumulative. It is accomplished by a continuing incursion into

Nicaragua's sovereign territory, one that results in what amounts to an ever-increasing occupation of that territory and a slow but inexorable strangulation of the river.

2. That such a result may have been the intent of Costa Rica's road project all along is indicated by the name that Costa Rica chose to give to the road—Juan Rafael Mora Porras, Route 1856—an appellation apparently calculated to insult Nicaragua, because it refers to the Costa Rican *invasion and occupation* of Nicaraguan territory—including the San Juan River and Lake Nicaragua—during the period when Nicaragua was fully engaged with fighting off the invasions of William Walker²⁵.

3. Mr. President, this continuing trespass in blatant violation of Nicaragua's sovereign rights must be stopped. Nicaragua has tried to stop it through diplomatic channels—as the Agent chronicled for you—but to no avail. Costa Rica has still not so much as provided Nicaragua with plans or an environmental impact assessment, whether domestic or transboundary, concerning the project. Nevertheless, as my friend and colleague Mr. Paul Reichler will discuss, Costa Rica now appears bent on resuming road construction activities in the very near future. Nicaragua therefore looks to the Court to halt this ongoing insult, so that by the time the Court is able to render its judgment there will be something left to remedy.

4. My task today, Mr. President, is to address the implications of the fact that Costa Rica's road project is contributing significantly, and on a daily basis, to the filling in of the Lower San Juan, to the conversion of those reaches of the watercourse from a river to land and impassable wetlands and shallows. In particular, I will show that the effects of the road have caused, and particularly in view of the imminent resumption of work on the road, threaten to continue to cause, irreparable prejudice to Nicaragua's rights. Mr. Reichler will then show why provisional measures are urgently necessary.

Requirements for provisional measures

5. Mr. President, Members of the Court, allow me to turn first to the conditions for the ordering of provisional measures, which are of course well known. The Court recalled these conditions in its Order of 8 March 2011 in the *Certain Activities* case: first, that irreparable

²⁵See CMN in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Vol. I, 6 Aug. 2012, paras. 2.25-2.27.

prejudice be caused to rights of the parties that are the subject of the judicial proceedings; and second, that there be urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision²⁶.

6. Finally, the rights requiring protection from irreparable prejudice must be plausible.

7. Mr. President, these requirements are easily satisfied in the present case. The factual basis for Nicaragua's Request is the urgent situation arising from Costa Rica's reckless and unplanned construction of a road along the right bank of the San Juan de Nicaragua River and the imminent resumption of work on it. The unengineered road construction has given rise to a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision. This risk will be aggravated greatly by the impending resumption of work on the road by Costa Rica.

Rights of Nicaragua that are prejudiced by Costa Rica's road project

8. Mr. President, Members of the Court, the rights of Nicaragua that are breached by Costa Rica's road project are set forth fully in Nicaragua's Memorial in the case concerning the road (*Construction of a Road in Costa Rica along the San Juan River*)²⁷. I will not repeat the list of rights of Nicaragua that are being prejudiced, many irreparably, but will focus here on three of the most important of them in the context of these provisional measures hearings: first, Nicaragua's rights of territorial sovereignty and integrity; second, Nicaragua's right to be free from transboundary harm; and, third, Nicaragua's right to receive a transboundary environmental impact assessment from Costa Rica, together with associated information and consultations. I will illustrate the concrete manifestations of the actual and threatened prejudice with recent slides and observations. This prejudice will only be magnified by Costa Rica's imminent resumption of work on the project.

²⁶*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, p. 16, paras. 63-64 (citations omitted). See also, e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 129, paras. 61-62; *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 17, para. 23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003, p. 107, para. 22.

²⁷MN, Vol. I, chaps. 4 and 5.

a. Nicaragua's rights of territorial sovereignty and integrity

9. First and foremost, Mr. President, the road project is causing irreparable prejudice to Nicaragua's sovereign rights, prejudice that will be aggravated if work on the road is permitted to resume. Nicaragua is, as the Court knows, sovereign over the whole of the San Juan River. This point is not disputed by Costa Rica.

10. Mr. President, Members of the Court, the images you now see on your screens, which are at tab 4 of your folders and were taken just last week, are emblematic of all that is wrong with Costa Rica's road project and of the project's effects on Nicaraguan sovereign territory. You have in this slide arrows pointing to the remains of a culvert and there is something green there, in the background, that turns out to be erosion control fabric when you look more closely. It seems to have failed to achieve its objective because it is washing down this channel into the San Juan River. The observations by Dr. Matthias Kondolf during his field visit late last month are reflected in his most recent report, filed with the Court. They indicate that these effects will in all likelihood continue, and that they will only be made worse by Costa Rica's impending resumption of work on the road²⁸.

11. Dr. Kondolf has shown that the road was constructed so sloppily, and in such haste, that no amount of superficial make-up can save it. In his report on his recent field visit, Dr. Kondolf states: "It is urgent that . . . real, substantive measures be taken to repair and relocate the road . . . These measures will not be trivial, but will require removal of large volumes of fill and their transport to a stable disposal site . . ."²⁹ Yet it appears, Mr. President, that that is what Costa Rica has been doing recently, in other words, precisely the kind of trivial measures Dr. Kondolf indicates will be ineffective: trying to camouflage a massive, virtually irreparable scar along the right bank of the San Juan by attempting to make it look better on the surface, when the problems go far deeper, both literally and figuratively. The fundamental problems with the manner in which the road was constructed have been catalogued in detail by the University of Costa Rica's National

²⁸G. Mathias Kondolf, Ph.D., "Continued Impacts of Erosion from Rte 1856, Costa Rica to the Río San Juan, Nicaragua", 30 Oct. 2013 (hereafter "Kondolf Report").

²⁹*Ibid.*, p. 2.

Laboratory and Costa Rica's Federation of Engineers and Architects, as shown in Nicaragua's Memorial in the *Road* case³⁰, and referred to earlier by the Agent.

12. Dr. Kondolf's field visit late last month updates these findings. His report states, for example: "Our field observations in October 2013 (last month) clearly showed that erosion is actively occurring along multiple parts of the road, and that erosion control and drainage works have been ineffective in addressing the serious erosion and slope stability problems."³¹

13. It is evident that the culvert itself was not designed and installed according to accepted engineering standards, which are described and illustrated in Section 3.1.3 of the Kondolf Report, entitled "Stream Crossings"³². If this culvert washed out, which it appears to have done, all of the earthen fill material depicted in the sketch in figure 2 at page 6 of Dr. Kondolf's report in all probability washed out with it and was carried into the San Juan. Dr. Kondolf and his colleagues estimate that between 87,000 and 109,000 cubic meters of sediment are delivered into the San Juan from the road project annually under what he calls "normal" conditions, and that "the rates would be at least 10-100 times higher during the intense rains associated with hurricanes or tropical storms, which pass through the region frequently"³³. Thus, while the image of the rogue culvert in the river is impressive, it is but a tiny part of the figurative tip of the iceberg of sediment and other debris that is constantly deposited in the river by the road project. The image of the damaged culvert in the San Juan is emblematic of the incursions into Nicaraguan sovereign territory by the road project. But it is only a tell-tale sign of the much larger invasion by coarse and fine sediment from the road.

14. And, Mr. President, it should be borne in mind that the rains can be heavier than they have been this year. Dr. Kondolf observes: "The fact that so much fresh erosion is visible (and a culvert has washed out) after a season with less than exceptional rains demonstrates how prone the landscape is to intense rains."³⁴

³⁰See MN, Vol. I, Chap. 3.

³¹Kondolf Report, *op. cit. supra*, p. 2.

³²*Ibid.*, pp. 5-7.

³³*Ibid.*, pp. 1-2.

³⁴*Ibid.*, p. 9.

15. These trespasses upon Nicaraguan territory by sediment and other debris from Costa Rica's road project constitute constant, and irreparable, prejudice to Nicaragua's rights of sovereignty and territorial integrity — prejudice which, again, will only be multiplied many-fold with the resumption of work. The prejudice is irreparable because neither Costa Rica, nor even this Court, can un-ring the bell of a violation of sovereignty and territorial integrity. There can be no *restitutio in integrum* for such violations. Moreover, each day brings a fresh assault on Nicaragua's territory, and thus on its rights of sovereignty and territorial integrity. These assaults must stop pending the delivery of the Court's judgment.

b. Nicaragua's right to be free from transboundary harm

16. Second, Mr. President, Members of the Court, Nicaragua's right to be free from harm emanating from Costa Rica's territory is suffering irreparable prejudice on an ongoing basis. The right of a State to be free from transboundary harm originating in another State is venerable and widely recognized by authorities too numerous to list comprehensively here. I will therefore mention only a few.

17. In its unanimous Partial Award of 18 February 2013, the seven-member Court of Arbitration in the *Indus Waters Kishenganga Arbitration*, chaired by a former President of this Court, noted the recognition of this principle in the 1941 Award in the *Trail Smelter* arbitration³⁵. It also referred to what it called “[a] broader restatement of the duty to avoid transboundary harm” in Principle 21 of the 1972 Stockholm Declaration,

“pursuant to which States, when exploiting natural resources, must ‘ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction’”³⁶.

The principle was stated as early as Max Huber's 1928 Award in the *Island of Palmas* case³⁷, and again in this Court's 1949 Judgment in the *Corfu Channel* case³⁸. It was reaffirmed by this Court

³⁵In the Matter of *The Indus Waters Kishenganga Arbitration*, Partial Award, 18 February 2013, p. 169, para. 448, available at http://www.pca-cpa.org/showpage.asp?pag_id=1392.

³⁶*Ibid.*; emphasis added.

³⁷Arbitral Award, 4 April 1928, *Island of Palmas (Netherlands v. United States of America)*, UNRIIAA, Vol. II, p. 839.

³⁸*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C. J. Reports 1949*, p. 4.

in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*³⁹ in a passage that was quoted with approval by the Court in the *Gabčíkovo-Nagymaros Project* case⁴⁰. In the *Kishenganga* case, the Court of Arbitration concluded:

“*There is no doubt* that States are required under contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State.”⁴¹

18. Mr. President, Members of the Court, in a moment you will see images on your screens showing that Nicaragua’s right to be free from harm emanating from Costa Rica’s territory is suffering irreparable prejudice on an ongoing basis. Costa Rica’s road project is affecting the San Juan, and in particular the Lower San Juan, every day. The existing sedimentation from the road project will be very difficult, if not impossible, for Nicaragua to remove with its small dredgers. More delay in taking protective measures will make it virtually impossible for Nicaragua to remedy the situation. And the present sedimentation of the river threatens to be exacerbated considerably by the impending resumption of work, as will be discussed by Mr. Reichler.

19. Mr. President, Members of the Court, you now see on your screens images that show serious erosion and related problems along the course of the road. [narrative of images of erosion along road]. We begin with sketches from Dr. Kondolf’s report which, in graphic form, demonstrate some of the problems that can arise with the construction of roads on slopes. You see the natural situation in sketch A, a natural hill slope, you see groundwater flowing downhill, of course, infiltration of water from precipitation into the ground. Then in sketch B you see what the effect *is* of cutting that slope, creating what is known as a cut slope, I’ve learnt — the water still has to go somewhere — and what happens is that it goes down into the road and can undermine, without proper engineering, the fill prism which you see happening in this photograph, which also shows some failed erosion control fabric, or perhaps it is plastic sheeting.

The slide now on the screen shows cut slope failures, those are the upper side of the road and a road that I certainly would not want to drive on, the fill slope also is failing because of erosion. It

³⁹*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.

⁴⁰Case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment, I.C.J. Reports 1997*, p. 41, para. 53.

⁴¹*Indus Waters Kishenganga Arbitration, op. cit. supra*, p. 169, para. 449; emphasis added.

appears that roughly a half of the road surface has been removed by this erosion. Again we see an image illustrating different styles of cut bank failure and lots of erosion. This context view shows that this is a complex site with multiple cuts and failures, both cut slopes and fill slopes. This slide displays active failures of cut slopes and fill slopes as well as failing stream fill and please note the fallen trees where the soil has eroded out from under them. This site has a massive valley fill, about 20 to 25 metres high, perched just above a house. This fill is failing through a complex set of rotational slumps and gullies. There is an under-sized culvert, it is visible in the gully to the right of the house. It is impressive to see the degree of instability and the severity of erosion that has occurred in response to the modest rains experienced since construction.

Again we have multiple active deltas forming from erosion from road material, forming along the San Juan, associated with ongoing fill slope failures and concentrated road run-offs. You can see the eroding cut slope above leading to that delta, as they call that fan-shaped piece of sediment on the lower left of the image.

Three years after road construction across steep inner gorge hill slopes we have major fill slope failures continuing to occur. This slide shows pervasive slope instabilities along Route 1856, which continue to impact the Rio San Juan. And here, again, large poorly constructed cut slopes and fill slopes are actively failing, resulting in large volumes of sediment delivery to the San Juan, Route 1856 in the background there with large, actively forming deltas along the river, delivering significant quantities of poor sediment to the river. And I should emphasize Mr. President, that when you see these deltas above water you do not see the rest of the iceberg, as it were, underwater. So there is a projection of that same delta, perhaps four to six metres, according to Dr. Kondolf and his colleagues, underwater.

This is another large delta. And significant erosion which results in massive amounts of sediment delivery to the river.

Thank you all for your kind attention to those images. Mr. President, these images document invasions of sovereignty and territorial integrity of Nicaragua.

20. Mr. President, Members of the Court, as Mr. Reichler will show, Costa Rica has indicated that it will resume work on the road very soon. Here's what Dr. Kondolf's report has to say about this prospect:

“If work continues on Rte 1856, its impact will be devastating to the areas directly affected and to downstream receiving waters. Already we see extensive, severe environmental damage, with only ‘normal’ rains. There is no question that when intense rains associated with tropical storms and hurricanes occur, the damage will be widespread and severe. *These effects will be irreversible* in that there will be no way to recover the prior environmental values and intact ecosystem, nor to reverse the massive transfers of sediment from uplands to the river and other wetlands. The land and waters will be permanently altered for the worse, with an environmental legacy that could be likened the effects of massive mining, such as seen in California in the mid-19th century or extensive logging such as occurred in the Pacific Northwest of the US in the 1950s and 1960s. The landscapes are still attempting to recover from these traumas, and many important species (notably salmon) have not, and never will recover.”⁴²

21. Mr. President, Members of the Court, resumption of work on the road must be stopped in order to prevent these “irreversible” — that is, irreparable — environmental effects.

22. Mr. President, in the documents it filed yesterday morning, Costa Rica makes much of what it holds out as mitigation measures on the road project. Unfortunately, these measures are but a band-aid on an open wound. They do little if anything to stem the tide of sediment and other debris flowing into the San Juan. In fact, the measures appear to be designed to preserve the road-bed more than to prevent sedimentation of the river, as Dr. Kondolf observed in his report. With your permission, Mr. President, I would like to read a rather lengthy pair of quotes from his report that you will find at tab 7 of your folders:

“Our field observations in October 2013 clearly showed that . . . erosion control and drainage works have been ineffective in addressing the serious erosion and slope stability problems. Roughly half of the road above Boca San Carlos has now been covered in gravel, a technique designed to reduce the rate of surface erosion of the road. However the fill slopes below the road surface are largely unprotected, and are being actively eroded by water running off the road.

The most common erosion control measure employed along Rte 1856 has been black plastic sheeting, but most of this has already failed. Many drainage culverts appear to be undersized, and we observed one that completely washed out and ended up in the river.”⁴³

I assume that is the one we have already seen this morning.

“.....

In our field visit of May 2013, we observed some surface and gully erosion control measures had been installed (since October 2012) at some actively eroding sites. [Then Dr. Kondolf describes some of these measures] . . . While these measures may reduce surface and gully erosion from the few treated areas during

⁴²Kondolf Report, *op cit supra*, p. 2; emphasis added.

⁴³*Ibid.*, p. 2.

small and moderate rains, they will do nothing to prevent massive failures of fill prisms [that is the part on the downhill side of the road] and cut slopes with unfavorable rock type and geologic structural orientation, and associated with poorly designed and constructed fill slopes. Moreover, the erosion control measures we observed were deployed only to mostly protect the road surface; *they did nothing to safely manage the concentrated runoff from the roads*. In fact, we observed one of these sites immediately after an intense rain, and we observed road runoff being directed from a new concrete drain into the fill slope, eroding the fill slope itself, which is the foundation for the road . . .”⁴⁴

23. Mr. President, you now see on your screens figure 4, a photo of Route 1856 from the San Juan River taken on 22 May 2013 showing a concrete-lined ditch discharging flow into road fill, which is the foundation of the road, as Dr. Kondolf explains⁴⁵. This would seem to make the sedimentation of the river worse, not better.

24. You now see on your screens ~~[[further narrative from slides]]~~ an impressive looking concrete-lined trench leading, apparently under the road, although it looks like it leads to the top of the road, but let us assume it leads to a culvert passing under the road. Now the larger context of that picture showing that this trench does nothing to alleviate the erosion of the cut slope above the road.

25. But, Mr. President, there is more involved here than filling up a river bed with sediment from a badly-constructed road. There are living things in the river. These are affected by this sediment.

26. The report of Dr. Kondolf shows that there is a serious risk of irreparable harm to species and the ecosystem itself from the delivery of coarse and fine sediment into the river from the road. In addition to his findings already quoted concerning what he describes as the “irreversible” impacts of work on the road upon ecosystems and the environment, Dr. Kondolf states that:

“[i]ncreased delivery of coarse sediment to rivers can result in significant changes to river processes, causing aggradation [or build-up] of the river channel . . . Aggradation results in burial of important aquatic habitats and consequent loss of native species, impacts that have been documented to persist for decades.”⁴⁶

⁴⁴Kondolf Report, *op cit supra*, pp. 9-10; emphasis added.

⁴⁵*Ibid.*, p. 10.

⁴⁶*Ibid.*, p. 7.

27. Ecological sampling conducted in late May of this year and reported at page 13 of Dr. Kondolf's report confirms the "negative ecological effects of sediment eroded from Route 1856 upon the Rio San Juan"⁴⁷.

28. These consequences can be quite serious, and there is a clear, scientifically-based risk that they will be with respect to the ecosystems of the San Juan. Dr. Kondolf notes that the effects of the delivery of large quantities of sediment into rivers has been "especially well-document[ed] in North America . . . where logging roads were once constructed using exactly the same practices we have document[ed] on Route 1856. (These practices are now outlawed in North America.)"

Dr. Kondolf concludes:

"The increased sediment loads to rivers are documented to have caused the loss of aquatic vegetation, macroinvertebrates, amphibians, and valued fish species, as well as degraded water quality. These effects have been documented in multiple sites around the globe in a wide range of ecosystems."⁴⁸

29. Mr. President, Nicaragua has a right to ecosystems within its sovereign territory that are undisturbed by conduct and resulting events in Costa Rica. As Dr. Kondolf's report demonstrates on the basis of well-documented experience, this right is subject to a serious and imminent risk of suffering irreparable prejudice before the Court has given its final decision in the case, all the more if Costa Rica is permitted now to resume work on the road.

30. And, Mr. President, Members of the Court, it should not be forgotten that the territory surrounding the road includes more than four different protected areas within both countries. In 2001, the San Juan River itself was designated a wetland of international importance under the Ramsar Convention⁴⁹, of which we have heard so much from Costa Rica. According to Ramsar, the San Juan River Wildlife Refuge and the adjoining Indio Maíz Reserve form part of "one of the two most extensive biological nuclei of the Mesoamerican Biological Corridor"⁵⁰. The river's wetlands support 303 bird species, 26 mammals, and 23 fish species, in addition to a great diversity

⁴⁷*Ibid.*, p. 13.

⁴⁸*Ibid.*

⁴⁹Convention on Wetlands of International Importance especially as Waterfowl Habitat, concluded at Ramsar, Iran, 2 February 1971, United Nations, *Treaty Series (UNTS)*, Vol. 996, Reg. No. 14583, 17 February 1976.

⁵⁰See Summary Description of *Refugio de Vida Silvestre Río San Juan* Ramsar site on Ramsar official website, available at: http://www.ramsar.org/cda/fr/ramsar-news-archives-2002-nicaragua-announces-7/main/ramsar/1-26-45-87%5E17907_4000_1 (last visited 4 December 2012).

of plant-life⁵¹. Many of these animal species are threatened with extinction. There are no less than 46 endangered species inhabiting the Refuge, including the rare manatee⁵². Mr. President, Members of the Court, interim measures are necessary to protect these species from irreparable harm pending the Court's judgment in the case.

(c) *Nicaragua's right to receive a transboundary environmental impact assessment on the road project from Costa Rica*

31. Mr. President, allow me now to turn to a third right of Nicaragua whose continuing breach threatens irreparable prejudice, and I refer here to the right to receive a transboundary environmental impact assessment on the road project from Costa Rica.

32. Mr. President, preparation of an environmental impact assessment, or EIA, prior to beginning work on a project that may have a significant impact on the environment is now common practice internationally. The domestic laws of many, if not most, States require that an EIA be prepared, and this is true of Costa Rica. Unfortunately, one was not prepared prior to the commencement of work on the project, which was embarked upon without any plans or preparatory studies, pursuant to the emergency decree referred to by the Agent. What was the supposed emergency? The cleaning of a small *caño* by Nicaraguan labourers using hand tools, work that is now the subject of the *Certain Activities* case. What is the relationship of the road to the *caño* cleaning? That is far from clear, especially since the road stops at the Colorado branch of the San Juan River, well short of the "area in dispute" in the *Certain Activities* case.

33. Thus we have, Mr. President, a very curious situation: Costa Rica, which holds itself out as a paragon of environmentalism, responds to Nicaragua's actions along a narrow strip of some 1,500 m in the vicinity of Harbor Head Lagoon⁵³ by despoiling some 160 km of its own territory, 120 of which are along the Rio San Juan⁵⁴. And it does this without any prior study, let alone notification of Nicaragua.

⁵¹See MARENA, *The San Juan River Wildlife Refuge Management Plan*, 2005, p. 37 (Ann. 40 to the Rejoinder of Nicaragua (RN) in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 15 July 2008); see also pp. 119-128 (*ibid.*, Ann. 1) for a table of the numerous animal species found in the San Juan River Wildlife Refuge.

⁵²See *ibid.*, p. 39.

⁵³CMN (*Certain Activities* case), Vol. I, p. 44, para. 2.60.

⁵⁴See MN, Vol. I, p. 150, para. 5.3.

34. If preparation of a domestic EIA is advisable⁵⁵, preparation of a transboundary EIA is now required by customary international law, as this Court is well aware, because you made this obligation clear in the *Pulp Mills* case when you said,

“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”⁵⁶.

35. In fact, Costa Rica itself has insisted on this requirement in the *Certain Activities* case, in which its Memorial underscores “[t]he necessity of a proper environmental impact assessment in order to prevent or minimize transboundary harm”, emphasizing that this “is now a well-recognized requirement of general international law . . .”⁵⁷.

36. Costa Rica however breached the requirement to prepare a transboundary EIA and thus breached Nicaragua’s rights. Among the rights of Nicaragua that Costa Rica has breached by this failure are the rights to notification and consultation concerning the potential transboundary impact of the proposed activity⁵⁸. Without this information, Nicaragua is left entirely in the dark about Costa Rica’s intentions, and cannot prepare to protect itself, to the extent that this is at all possible. This is a continuing breach and a ripe subject of a provisional measures order. At the very least, Costa Rica must be ordered to prepare a proper transboundary EIA and share it with Nicaragua before it is allowed to resume any road construction activities.

Conclusion

37. Mr. President, Members of the Court, it is easy to discount the seriousness of Costa Rica’s conduct and its effects on Nicaragua because of the human tendency to think of rivers as “a convenient sink into which to dump wastes”⁵⁹, in the words of a United Nations report, which

⁵⁵Principle 17 of the Rio Declaration requires such domestic EIAs: “Environmental impact assessment, as a national instrument, *shall be undertaken* . . .” (Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development, Rio de Janeiro, 14 June 1992, 31 *ILM* 874 (1992), Principle 17; emphasis added). For a full discussion of Costa Rica’s actions in this regard on the national level, see CMN (*Certain Activities* case), Vol. 1, pp. 152-165.

⁵⁶*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010 (I)*, p. 83, para. 204.

⁵⁷MCR (*Certain Activities*), para. 5.23.

⁵⁸See, e.g., the Convention on Environmental Impact Assessment in a Transboundary Context, 25 Feb. 1991, Espoo, Finland, 1989 *UNTS* 309, 30 *ILM* 800 (1991). For a discussion, see MN (the *Road* case), Vol. 1, pp. 169-171, paras. 5.37-5.39.

⁵⁹*Comprehensive Assessment of the Freshwater Resources of the World*, World Meteorological Organization/Stockholm Environment Institute 1997, United Nations doc. A/CN.17/1997/9, 4 Feb. 1997.

humans have done, unfortunately, “[f]or millennia”⁶⁰. It is not hard to understand why: you put something in a river, and it goes away, as if by magic.

38. The problem for Nicaragua is twofold: first, the river is indisputably Nicaragua’s territory. If we were dealing with a land boundary, it would be as if Costa Rica sent 5,000 dump trucks full of sediment — 5,000 being the number of trucks it would take to carry the average quantity of sediment Dr. Kondolf’s team estimates to be delivered into the river annually⁶¹ — and had these trucks dump this waste over the border into and onto Nicaraguan land. No country or court would tolerate this.

39. Yet when the incursion is invisible, as compared with dumping across a land boundary, there was historically no comparable sense of urgency or outrage. Our modern understanding of the dangers of water pollution has changed this. But conceptually, the problem of the “wet trespass” persists: a territorial violation by dumping into a river somehow may not seem as grave as the same violation on land, because the material is hidden by the very water it is polluting. Nicaragua trusts that the Court will recognize the violation as being equally serious, if not more so due to the multiple ecosystems affected.

40. The second aspect of the problem is precisely that where Nicaragua is concerned, the waste does not “go away”. It settles in the already slow-moving Lower San Juan River, creating further impediments to navigation, causing irreparable harm to ecosystems, and further occluding the mouth of the river.

41. Nicaragua trusts that the Court will recognize the violations of its sovereignty and territorial integrity that have occurred, are occurring, and — particularly with Costa Rica’s imminent resumption of work on the road, as Mr. Reichler will presently show — will occur, and that the Court will see fit to grant its request for provisional measures to protect its river, its sovereign territory, from further irreparable prejudice. Nicaragua’s territorial integrity has been,

⁶⁰*Ibid.*

⁶¹As indicated earlier, Dr. Kondolf’s team estimates that between 87,000 and 109,000 cubic meters of sediment are delivered into the river annually by the road project under “normal” precipitation conditions. The typical dump truck holds a maximum of 20 cubic meters of material (MN, para. 3.79). Thus it would take 5,000 fully-loaded dump trucks to haul some 100,000 cubic meters of sediment.

and continues to be violated by Costa Rica. Nicaragua relies on the Court to bring this continuing violation to a stop, at least pending its judgment in the case.

42. Mr. President, distinguished Members of the Court, that concludes my intervention this morning. Thank you for your kind attention. Mr. President, I would be grateful if you would now call my friend and colleague Mr. Reichler to come to the podium, perhaps after a break.

The PRESIDENT: Thank you very much, Professor McCaffrey. The Court will now take a 15-minute break and after that I shall give the floor to Mr. Reichler. For planning purposes, in view of the few minutes I took to open the proceedings, Nicaragua may take a few minutes after 1 o'clock, if needed; certainly not beyond 10 minutes past 1 p.m.

The sitting is adjourned.

The Court adjourned from 11.25 a.m. to 11.40 a.m.

The PRESIDENT: Please be seated. Mr. Reichler, it is now your turn. You have the floor, Sir.

Mr. REICHLER:

THE URGENT NEED FOR THE MEASURES REQUESTED BY NICARAGUA

1. Mr. President, Members of the Court, good morning. I will speak today about urgency, specifically: why the need for the provisional measures Nicaragua has requested is urgent.

2. The Court may be asking itself: if the need for these measures is so urgent, why didn't Nicaragua ask for them earlier? Nicaragua has had almost two years to do so. It filed its Application in December 2011. As the Application stated, construction of the road had already begun, and it had already begun to harm the San Juan River, in violation of Nicaragua's sovereign rights. Nicaragua expressly reserved the right to request provisional measures to stop further construction, especially if Costa Rica continued to refuse to inform Nicaragua about its activities, refused to consult with it about possible transboundary harm to the river and its environs, and refused to furnish it with an Environmental Impact Assessment addressed to that issue.

3. Nearly two years have passed since the Application was filed. Throughout this entire period, Costa Rica has never informed Nicaragua about any of its road construction plans or activities, never consulted with Nicaragua about ways to mitigate harm to the river or its environs, and never furnished Nicaragua with an Environmental Impact Assessment. And, during this entire period, Costa Rica has caused significant volumes of sediments and road construction debris to continue to be deposited into the river.

4. So why has Nicaragua chosen *now* to request provisional measures? What makes them urgent *now*?

5. The answer is this: first, since filing its Application Nicaragua has exhausted every other avenue available to it, before a variety of international organizations and forums, in its effort to cause Costa Rica to comply with its international obligations in regard to notice, consultation, Environmental Impact Assessment, and the avoidance of harm to Nicaragua's sovereign territory. As Ambassador Argüello explained, Nicaragua had hoped that these efforts would avoid the need to impose on the Court the burden of holding these hearings. But they have all been unsuccessful, leaving the Court as Nicaragua's last recourse to protect its sovereign rights, and to prevent further harm to the San Juan River.

6. Second, after two years of ongoing discharges into the river, the sediments and construction debris are accumulating to dangerous levels that have already harmed the river irreparably, and threaten to cause further irreparable harm if they are allowed to continue. Professor McCaffrey has explained this.

7. Third, and this is what most underscores the urgency and immediacy of Nicaragua's request, Costa Rica has recently announced that it will redouble its road construction activities before the end of this year, so that it can complete construction between October and December of 2014, which is very likely before the Court will have had a chance to issue its judgment in this case⁶².

⁶²Government of Costa Rica, Minister for Public Works and Transportation, "National Route 1856: Action Plan for Completion", available at <http://www.presidencia.go.cr/index.php/prensa/prensa-presidencia/2123-gobierno-firme-en-desarrollo-integral-de-cordon-fronterizo-norte> (hereinafter "Action Plan for Completion"); President of Costa Rica, *Government Strong on Comprehensive Development of the Boundary Strip Guarantees Conclusion of Route 1856*, March 2013, available at <http://www.presidencia.go.cr/index.php/prensa/prensa-presidencia/2123-gobierno-firme-en-desarrollo-integral-de-cordon-fronterizo-norte> (NPM-2).

8. Mr. President, it had appeared that Costa Rica had decided not to complete construction of the road. In fact, in the middle of 2012, Costa Rica suspended all new construction activities on the road⁶³. At the time, only the first phase of construction had been completed. None of the five sections was finished, and work on some of them had not even started. Since then, for more than a year, there has been no significant new road construction, only efforts to remediate or mitigate the harmful consequences of the first phase of construction activities. Contracts to complete construction of the road were cancelled⁶⁴. The need for provisional measures, therefore, was less urgent.

9. Until now, that is. Costa Rica has now announced that it is resuming full-scale construction, and that it will complete the project by the end of 2014⁶⁵. Here is the construction schedule publicly announced by Minister of Public Works Dr. Pedro Luis Castro Fernandez⁶⁶. [Graphic]. These are slides from the Minister's powerpoint presentation, available on the Internet. They are at tab 10 of your judges' folder, in both the original Spanish and English translation.

According to the schedule, Section 1 is to be constructed between September 2013 and October 2014; Section 2, the construction is to be completed between September 2013 and October 2014; Section 3, construction is to be completed by December 2014; Section 4 by December 2014 and Section 5 by October 2014.

10. There appears to have been some delay in restarting the works, resulting from administrative challenges to the process by which contracts for road design and construction were awarded, pushing the start-date for the "construction phase" beyond September⁶⁷. But Costa Rica

⁶³"Contracts Entered Into with Companies Involving Route 1856 Suspended Due to Irregularities." *El País*, 9 May 2012, available at http://elpais.cr/frontend/noticia_detalle/1/66735 (NPM-7); Guerrero, Eugenio. "Completion of Route 1856 Works Will be Undertaken with Five Bids", *CRHoy*, 22 Oct. 2012, available at <http://www.crhoy.com/finalizacion-de-obras-de-la-ruta-1856-se-hara-con-cinco-licitaciones/> (NPM-5).

⁶⁴*Ibid.*

⁶⁵Government of Costa Rica, Minister for Public Works and Transportation, "National Route 1856: Action Plan for Completion", available at <http://www.presidencia.go.cr/index.php/prensa/prensa-presidencia/2123-gobierno-firme-en-desarrollo-integral-de-cordon-fronterizo-norte> (hereinafter "Action Plan for Completion"); President of Costa Rica, *Government Strong on Comprehensive Development of the Boundary Strip Guarantees Conclusion of Route 1856*, March 2013, available at <http://www.presidencia.go.cr/index.php/prensa/prensa-presidencia/2123-gobierno-firme-en-desarrollo-integral-de-cordon-fronterizo-norte> (NPM-2)

⁶⁶"Action Plan for Completion."

⁶⁷Azofeifa, Mariela. "Once Again, CONAVI's Carelessness Leaves Route 1856 Without a Redesign" *El Guardián*, 20 Sept. 2013, available at http://www.elguardian.cr/es/Nacionales/Descuido_del_CONAVI_deja_otra_vez_sin_redise%C3%B1o_a_la_Trocha_1856/ (NPM-15). See also, Herrera, Luis M. "Stretch from Pocusul up to Delta Costa Rica: MOPT will Tender New Designs for the Trail Works" *La Nación*, 22 July 2013, available at http://www.nacion.com/nacional/MOPT-licitara-nuevos-disenos-trocha_0_1355264515.html (NPM-9).

has very recently publicly reiterated its commitment to resume construction activities before the end of this year; that is, by next month at the latest, and to complete the project by the end of next year⁶⁸.

11. It is the imminence of Costa Rica's resumption of new road construction activities that gives particular urgency to Nicaragua's Request. Professor McCaffrey has explained that irreparable harm to Nicaragua's rights and the San Juan River has already been — and is still being — caused by Costa Rica's hasty and slipshod road construction in 2011 and early 2012, as well as the unfinished and unprotected conditions in which the partially performed works were left for the past year and a half. Even more importantly for present purposes, the evidence leaves little doubt that even greater irreparable harm to the river and its environs is likely if construction is allowed to resume. That new construction is now imminent. It will go forward, very soon, if provisional measures are not ordered. Costa Rica has given Nicaragua no notice about its start-up plans. But its senior officials have spoken loudly and clearly about them to their domestic audience.

12. Costa Rica did not stop constructing the road in mid-2012 because of Nicaragua's protest, or because of the Application in this case. The reasons were given in public statements by Costa Rica's highest officials, including its President. Two reasons were stated. First, the funds appropriated for the project had been exhausted. It could not be completed without additional financing⁶⁹. Second, Costa Rica announced that the first phase of the project had been plagued by corruption⁷⁰. The Minister of Public Works and Transport, who was in charge of the project, was forced to resign⁷¹. Criminal indictments were issued against others⁷².

⁶⁸Colombari, Stefanía. "Country Expects to Demonstrate that Trail Construction Did Not Damage the San Juan River", *Monumental*, 28 Oct. 2013, available at <http://www.monumental.co.cr/noticia/pais-espera-demostrar-que-construccion-de-la-trocha-no-dano-el-rio-san-juan> (NPM-14).

⁶⁹"Contracts Entered Into with Companies Involving Route 1856 Suspended Due to Irregularities." *El País*, 9 May 2012 (NPM-7); Ruiz Ramón, Gerardo. "Two Charged for Trail Case Freed this Friday", *La Nación*, 11 Oct. 2013, available at http://www.nacion.com/sucesos/juicios/Trocha_Fronteriza-imputados-Poder_Judicial_0_1371463067.html (NPM-13) Herrera, Luis M. "MOPT Invested ¢33.000 Million on Three Deficient Road Works", *La Nación*, 6 Sept. 2013, available at http://www.nacion.com/nacional/MOPT-invirtio-millones-proyectos-malogrados_0_1364463543.html (NPM-11).

⁷⁰Ruiz Ramón, Gerardo, "Two Charged for Trail Case Freed this Friday", *La Nación*, 11 Oct. 2013 (NPM-13); "Contracts Entered Into with Companies Involving Route 1856 Suspended Due to Irregularities", *El País*, 9 May 2012, (NPM-7)

⁷¹Ruiz Ramón, Gerardo, "Two Charged for Trail Case Freed this Friday", *La Nación*, 11 Oct. 2013 (NPM-13).

⁷²*Ibid.*

13. I point this out not to embarrass Costa Rica, which deserves credit for exposing and condemning the corruption of its officials, but because of the implications for the state of the works at the time they were suspended. With contracts being inappropriately issued, and contractors buying their way out of proper management and supervision of their performance, it is not surprising that the road was constructed so shoddily, and without regard for environmental risks, as shown by Professor McCaffrey, and as fully elaborated in Nicaragua's Memorial.

14. Nicaragua was sufficiently troubled by the ongoing harm to the river caused by the partially completed works, and by Costa Rica's continuing refusal to give notice about future plans for the road, or to provide Nicaragua with a transboundary EIA, that it wrote to the Court on 19 December 2012 suggesting that the Court might wish *proprio motu* to indicate provisional measures to protect the San Juan River from further harms. Nicaragua did not then wish to burden the Court with oral hearings, at a time when new construction activities had been suspended. Costa Rica assured the Court in June 2013 that it was then engaged only in remediating problems from earlier construction, not in any new construction⁷³.

15. But all that has now changed. We are in a new situation. Costa Rica has publicly announced that it will resume road construction before the end of the year, that is, in a matter of weeks⁷⁴. Maybe sooner. Only Costa Rica knows for sure. It still refuses to provide any information to Nicaragua about its activities, to consult about transboundary harm and what can be done to avoid it, or to produce an EIA addressed to the harms and risks posed by the road to the San Juan River. Nicaragua is forced to rely exclusively on public statements by senior Costa Rican officials, as reported in the media and on government websites. But these have been clear enough. The resumption of road construction activities is imminent. And so is the aggravation of the irreparable harm to the San Juan River and its environs that will inevitably result.

16. Mr. President, let me be clear about what Nicaragua seeks to prevent. It does not ask the Court to stop Costa Rica from taking appropriate steps to remediate the problems caused by its

⁷³Written Observations on the Request by Nicaragua for the Modification of the Court's Order of 8 March 2011 on Provisional Measures in the Case Concerning Certain Activities Carried out by Nicaragua in the Border Area, p. 16, para. 40 (20 June 2013).

⁷⁴"Action Plan for Completion"; President of Costa Rica, *Government Strong on Comprehensive Development of the Boundary Strip Guarantees Conclusion of Route 1856*, Mar. 2013 (NPM-2).

earlier construction activities. To the contrary, based on Dr. Kondolf's analysis, there are specific remediation measures that should be undertaken immediately to prevent further irreparable harm to Nicaragua. These are the object of the second set of measures requested by Nicaragua, which Professor Pellet will discuss shortly. What Nicaragua seeks to prevent is a resumption of new construction activities, aimed at building or completing the road. This is the substance of the third provisional measure that has been requested.

17. Only by preventing these activities now, before they restart, can the threatened aggravation of the environmental and other harms to the river — and to Nicaragua's rights in regard to it — be prevented. The situation is urgent because the threat to Nicaragua's rights is imminent, and the harm cannot be undone by the Court's final judgment. By that time, the road construction activities will have been completed. Costa Rica itself says that its goal is to complete the road between October and December 2014⁷⁵. We still don't know whether there will be a second round of written pleadings in this case. But even if there is not, the Court has yet to set oral hearings and it is unlikely that the Court could hold them *and* issue its judgment before the road is completed. By that time, it will be a *fait accompli*. The need for provisional measures is urgent because irreparable harm to the river has already occurred, and additional and even greater irreparable harm is imminent, and cannot be prevented or reversed by the Court's judgment.

18. In its Order of 8 March 2011, the Court addressed the meaning of "urgency" in the context of a request for provisional measures: "the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision"⁷⁶. Mr. President, that is the situation we have here. The risk of further irreparable prejudice, in the form of violation of Nicaragua's sovereignty and harm to the San Juan River and its protected environment, is real. It is imminent, as well, because Costa Rica is planning to resume its harmful activities imminently. And the harm to Nicaragua's rights, in the form of continued

⁷⁵"Action Plan for Completion".

⁷⁶*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. 21, para. 64; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 152-153, para. 62.

construction of the road until its completion next year, will be caused before the Court has given its final decision.

19. In the *Nuclear Tests* case⁷⁷ New Zealand demonstrated that irreparable harm was real and imminent because France had already carried out a series of atmospheric tests, had refused to give assurances that it would conduct no further tests, and had made official pronouncements from which it appeared that further tests were envisioned⁷⁸. The Court indicated provisional measures, finding that there was “an immediate possibility of a further . . . test being carried out by France in the Pacific” and that “for the purpose of the present proceedings it suffices to observe that information submitted to the Court . . . does not exclude the possibility that damage to New Zealand might be shown to be caused”⁷⁹.

20. In the present case, Costa Rica has likewise refused to give assurances that it will engage no further in its harmful activity. To the contrary, it has publicly announced that it will resume construction of the road as soon as possible, and that it will complete the project before the Court has a chance to give its final decision.

21. The latter point is critical. In the *Great Belt* case⁸⁰, Denmark argued that there was no urgency to Finland’s request for provisional measures because “according to the planned schedule for construction . . . no physical hindrance for the passage through the Great Belt [would] occur before the end of 1994” and “by that time the case could have been finally decided by the Court”⁸¹. It was not *all* construction by Denmark that posed a risk of irreparable harm to Finland, only that portion of the works that would have obstructed passage. The Court accepted Denmark’s assurances that there would be no physical obstruction before the end of 1994. On that basis, it concluded that “the proceedings on the merits in the present case would, in the normal course, be completed before that time,” and therefore, that Finland had failed to show that “the right claimed will be infringed by construction work during the pendency of the proceedings”⁸². We are in the

⁷⁷*Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 135.

⁷⁸*Ibid.*, p. 140, para. 26.

⁷⁹*Ibid.*, pp. 140-141, paras. 27 and 30.

⁸⁰*Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12.

⁸¹*Ibid.*, p. 17, para. 24.

⁸²*Ibid.*, p. 18, para. 27.

opposite situation here. Any construction of the road by Costa Rica will cause still more harm to the river, and will therefore aggravate the ongoing infringement of Nicaragua's rights during the pendency of these proceedings.

22. The *Pulp Mills* case⁸³ also offers useful lessons. The Court will recall that it denied Argentina's request for provisional measures to stop Uruguay from commissioning two paper pulp mills on the Uruguay River. At the time, Uruguay had authorized construction, but not operation of the mills, which would not commence, even if authorized, for another two years⁸⁴. And Argentina acknowledged that there was no irreparable harm from construction alone, only from operation⁸⁵. Thus, irreparable harm, if any, was far from imminent.

23. Moreover, Uruguay had provided Argentina not only with its own environmental impact assessment, but also with two comprehensive studies done at the behest of the World Bank, which showed that the two mills could be safely operated without harming the river or its environs⁸⁶. Uruguay also pledged to conduct a further EIA, and subject the mills to additional environmental conditions recommended by the World Bank, prior to authorizing their operation⁸⁷. Finally, Uruguay agreed not to present Argentina or the Court with a *fait accompli*. It gave an undertaking to tear down the plants, or convert them to another use, if the Court determined in its final Judgment that the plants should not be operated⁸⁸. The Court thus found that "their construction at the current site cannot be deemed to create a *fait accompli*"⁸⁹, and that provisional measures were not necessary.

24. The Court distinguished that situation from the one in which construction itself causes the irreparable harm:

⁸³ *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 113.

⁸⁴ *Ibid.*, p. 125, para. 46.

⁸⁵ *Ibid.*, pp. 124-125, para. 45.

⁸⁶ *Ibid.*, p. 124, para. 45.

⁸⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures*, CR 2006/47, p. 47, para. 16.

⁸⁸ *Ibid.*, p. 50, para. 26.

⁸⁹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p.132, para. 78.

“if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled.”⁹⁰

25. Mr. President that is the situation we have here. In this case, unlike in *Pulp Mills*, the irreparable harm comes from the construction of the works — that is the building of the road — as much as, if not more than, by its use.

26. Nicaragua, unlike Argentina, cannot sit tight during the construction phase and hope that the operation of the facility is unharmful. By that time, still more irreparable harm will have been done to the river, and still more prejudice will have been caused to Nicaragua’s rights.

27. Also, unlike Argentina, Nicaragua has not been given an undertaking by Costa Rica that it will un-build the road at the end of the day if the Court determines it is harmful to the river. Nor would such an undertaking do any good here. The major irreparable damage, from construction of the road, will already have been done. Un-building it would make things even worse. Deconstruction of the road would be just as harmful to the river, in terms of massive deposit of sediments and other pollutants, as constructing it. Only the measures recommended by Dr. Kondolf and his team, and requested by Nicaragua, would stand any chance of protecting the river from the sediment and debris that are constantly entering the river from the road.

28. In this case, unlike *Pulp Mills*, there is a grave risk of irreparable environmental harm, not only to the river, but to the protected wetlands on both sides, the importance and vulnerability of which Costa Rica itself has highlighted. We take Costa Rica at its word in regard to its interest in protecting these wetlands, at the mouth of the San Juan River, from irreparable harm. Three weeks ago, Costa Rica’s expert, Dr. Thorne, warned that if enough silt were deposited at the mouth of the San Juan River, there would be “a significant risk that it would close entirely at times of low runoff during the next and subsequent dry seasons”⁹¹. According to Dr. Kondolf, that is the same risk that is exacerbated by Costa Rica’s road construction activities, and the sediments they drive into the river, which are carried down to the mouth where they accumulate.

⁹⁰*Ibid.*, p. 132, para. 78, referring to *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 19, para. 31.

⁹¹Professor Colin Thorne, Report on the Impact of the Construction of the two New Caños on Isla Portillos, Attach. PM-33, Request for Provisional Measures by Costa Rica, *Case Concerning Certain Activities Carried out by Nicaragua in the Border Area* (10 Oct. 2013), p. 6, para. 4.7.

29. Mr. President, Costa Rica, as well as Nicaragua, would appear to gain from measures that reduce the sediment load of the river, and enable it to continue to supply fresh and clean water to the wetlands, and the flora and fauna that inhabit it, on both banks of the Lower San Juan near its mouth. Keeping the river from silting up also serves Costa Rica's interests in being able to exercise its right to navigate on the river for commercial purposes. How then would Costa Rica be harmed by provisional measures requiring it to refrain from further road construction activities pending the issuance of the Court's Judgment?

30. To answer this question, we have to hear from Costa Rica on why it is building the road in the first place. Nicaragua offers no conjecture here. Again, we take Costa Rica at its own word. According to the President of Costa Rica, and various senior government officials, there is one purpose for the construction of this road: national defence⁹². President Chinchilla has repeatedly stated that the road is necessary to protect Costa Rica — specifically to protect the disputed area that is the subject of the *Certain Activities* case — against a “military invasion” by Nicaragua⁹³. The President, and other officials of her government, characterized Nicaragua's clearing and dredging activities in 2010, in regard to the first *caño* in the disputed area, expressly as a “military invasion” of Costa Rican territory⁹⁴. Route 1856 has been justified as a direct and immediate response to this so-called military invasion. Its construction was quickly authorized under an emergency decree as vital to the protection of Costa Rica's territorial integrity and national security⁹⁵. Costa Rica has not sought to justify it on the basis of economic development, commercial activity, or civilian transportation or communication needs. Its *raison d'être* is to facilitate the movement of Costa Rican security personnel to the region, to safeguard against potential Nicaraguan military encroachments upon the disputed area, and to evacuate civilians in

⁹²Presidency of the Republic of Costa Rica, *Position of the Government of the Republic in Relation to Route 1856*, 24 May 2013, available at <http://presidencia.go.cr/index.php/centro-de-prensa/prensa-presidencia/1549-posicion-del-gobierno-de-la-republica-en-relacion-con-la-ruta-1856> (NPM-3)

⁹³*Ibid.*; Decree No. 36440-MP, Costa Rica, Official Daily Gazette No. 46, 7 March 2011 (CMN, Vol. III, Ann. 35 (1)).

⁹⁴*Ibid.*

⁹⁵Presidency of the Republic of Costa Rica, *Position of the Government of the Republic in Relation to Route 1856*, 24 May 2013 (NPM-3). See also, By-laws and regulations, Presidency of the Republic, National Commission on Risk Prevention and Attention to Emergencies, Decision No. 0362-2011, Specific By-Laws regarding purchasing and contracts procedures under exception mechanisms regime by virtue of the Declaration of a State of Emergency by virtue of Decree No. 6440, 21 Sep. 2011 (MN, Ann. 12, in the *Dispute Concerning Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*).

case of a Nicaraguan armed attack⁹⁶. [Graphic] Here, in its own words, is how Costa Rica explained the purpose of the road as recently as May 2013. This is from a document, produced in its entirety at tab 11 of your judges' folder, both in the Spanish original and English translation. The document bears the heading: "Position of the Government of the Republic in Relation to Route 1856."

"Costa Rica assumed defense of its national sovereignty and territorial integrity as a consequence of acts carried out by Nicaragua in the northern borderline area. That country is the one that militarily invaded Costa Rican territory and keeps threatening us with a scale-up of the conflict.

At that time, our policemen did not have access to the area in conflict by land, they could not access it by water, and it was very difficult to do so by air. This obliged us to take urgent and immediate actions to allow them access to the area. In addition, the risk of an escalated conflict could result in the displacement of borderline communities, which required a road to facilitate civil evacuation actions, mobilization and defense."⁹⁷

31. There are, then, two competing rights at issue in these proceedings. One is Nicaragua's right to protection against harm to the San Juan River and its environment resulting from Costa Rica's road-building activities. The other is Costa Rica's right to construct a road in its own territory. These rights did not have to come into conflict, if Costa Rica had constructed a road after careful preparation of plans, following professional engineering standards, and observing its international obligations vis-à-vis Nicaragua. But Costa Rica did not do any of this, and a dispute has resulted. The Court will ultimately decide which of these rights prevails over the other, or whether they can be balanced in a manner that is equitable to both Parties. For present purposes, however, only one of these rights is threatened with irreparable harm. And that is Nicaragua's right to protection of its sovereignty and territorial integrity, and protection of the river from silting up, from pollution and from other environmental harm. Professor McCaffrey has shown how that harm is irreparable, and I have explained why it is imminent — such that protective measures are required as a matter of urgency.

32. The same cannot be said of Costa Rica's right. Postponing the resumption of construction activities for another year or so, until the Court issues its judgment, would do no

⁹⁶Presidency of the Republic of Costa Rica, *Position of the Government of the Republic in Relation to Route 1856* 24 May 2013 (NPM-3).

⁹⁷*Ibid.*, paras. 1-2.

irreparable harm to Costa Rica's right. Costa Rica has already delayed construction for more than a year due to its own internal difficulties. It has not been the victim of a Nicaraguan military invasion during this period. Nor is any such invasion likely, or even, to be blunt, remotely imaginable. Costa Rica's interest in having a road to protect its interests in the disputed area against a Nicaraguan attack is already protected by the Court's Order of 8 March 2011, which requires Nicaragua to refrain from sending military personnel into the disputed area.

33. Mr. President, even uttering the words "Nicaraguan military invasion" or "Nicaraguan attack" seems surreal. It is difficult to believe that Costa Rica takes this delusion seriously. Yet, this is what Costa Rica's most senior officials, including their President, repeatedly invoke as the reason for constructing Highway 1856, and the reason for rushing to complete it. This does not mean, however, that there is any basis for the Court to take it seriously. The evidence shows that it need not.

34. The day after the Court issued its Order — as the Court is aware — the Commander of the Nicaraguan army for the southern region issued his own order that explicitly forbade all military personnel from entering the area⁹⁸. This order was issued pursuant Presidential Decree No. 79 of the year 2009, which gave the army commander authority over all military and civilian governmental activities and personnel in the remote area of the Lower San Juan River. For at least two-and-a-half years, until August 2013, Nicaraguan military and civilian personnel faithfully complied with this order and, more importantly, with the Order of the Court. The Court has been informed of Mr. Pastora's activities in the area during late August and September, which President Ortega immediately put an end to, as soon as he learned of them. Costa Rica has complained of no other intrusions into the disputed area by Nicaraguan military or governmental personnel, and there have been none. Nicaragua remains subject to the Court's Order, and has reiterated to the Court its commitment to comply with it. In short, Costa Rica has a better means than Route 1856 of protecting itself from the purely hypothetical incursion of Nicaraguan military forces into the disputed area. It has an Order from the Court.

⁹⁸Order No. 005 from the Chief of the South Military Detachment for compliance of order from the Chief of Staff regarding the implementation of special measures based on provisional measures of protection ordered by the International Court of Justice and maintenance of the anti-drug trafficking plan, rural, security plan and presidential Decree 79/2009 at the San Juan de Nicaragua directorate, 9 March 2011 (CMN, Ann. 36, in the *Dispute Concerning Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*).

35. I should also point out another reason for the lack of urgency, if not lack of need itself, for the completion of this road. [Graphic] This is Costa Rica's map, from its Written Observations on the Admissibility of Nicaragua's Counter-Claims, in the *Certain Activities* case. It is at tab 12 of your judges' folder. The disputed area is indicated in the upper right quadrant, near the very top of the page. The road is shown as a green line, in the lower left quadrant. As depicted here, the road ends more than 25 km from the disputed area. It is a long 25 km. There is no way to get by land from the end of the road to the disputed area. Nor does Costa Rica have the right to send its security forces to the disputed area via the river. It would have to build a bridge across the Colorado branch of the San Juan, which is not included in their road construction project, and even then it would have to build a road across more than 20 km of impassable swampland that also happens to be a protected Ramsar site. This is truly, literally, a road to nowhere. It is difficult to imagine how it would be of use to Costa Rica in self-defence against a Nicaraguan military invasion of the disputed area, even if one were willing to suspend disbelief long enough to imagine such a possibility.

36. In the *Certain Activities* case, the Court will ultimately decide whether the disputed area belongs to Nicaragua or to Costa Rica. If it decides in favour of Nicaragua, then Costa Rica can have no interest in protecting that area against a so-called Nicaraguan "invasion". If it decides in favour of Costa Rica, then Nicaragua will no longer have a claim to the area, and will be bound by the Court's judgment, as well as the United Nations and OAS Charters and general international law, to respect Costa Rica's sovereignty and territorial integrity. Nicaragua has already told the Court it would abide by its Judgment, whatever it may be, and there is no reason to doubt this undertaking.

37. Thus, Costa Rica's right to protect itself by building a road on its territory is not threatened by the provisional measures requested by Nicaragua. If Nicaragua's request is granted, Costa Rica's right will not be irreparably harmed. In fact, it will not be harmed at all, given the stated purpose of the road. Costa Rica's security interests are already protected by an Order of the Court. Should a mythical Nicaraguan military incursion occur, or should Costa Rica have grounds for believing that it might, it can come back to the Court for further protection. It has shown no hesitancy about coming here in the past.

38. In conclusion, it is Nicaragua's right — and only Nicaragua's right — that is threatened with irreparable harm. The threat is grave, and it is imminent. The harm is such that it could not be prevented or reversed by the Court's final judgment. The Court's jurisprudence makes clear that, when considering the indication of provisional measures, the Court takes the interests of both parties into account and seeks to ensure that neither party's right in issue is subjected to irreparable prejudice pending the final judgment. Mr. President, Costa Rica's right in issue — to protect its claimed territory from military incursion by Nicaragua by construction of this road — has already been protected *pendente lite* by the Court. It is Nicaragua's right that requires protection now. The measures requested by Nicaragua would protect that right, without diminishing Costa Rica's. As Professor Pellet will now explain, those measures meet the well-known standards for the issuance of provisional measures, and should be indicated by the Court.

Mr. President, Members of the Court, I thank you for your kind and courteous attention and ask that you call my distinguished colleague Professor Pellet to the podium.

The PRESIDENT: Thank you, Mr. Reichler. Je passe la parole à M. le professeur Alain Pellet. Vous avez la parole, Monsieur.

M. PELLET :

LES MESURES DEMANDÉES PAR LE NICARAGUA

1. Merci, Monsieur le président. Monsieur le président, j'ai bien noté que je pouvais continuer jusqu'à 13 heures 10, cela m'évitera d'engager avec les interprètes une course qu'ils risqueraient de ne pas gagner.

Monsieur le président, Mesdames et Messieurs de la Cour, il m'appartient de détailler les mesures demandées par le Nicaragua et d'en établir le bien-fondé (II.). Auparavant, je souhaite dire quelques mots sur les relations qui peuvent exister entre nos propres demandes et celles dont le Costa Rica vous a saisis il y a trois semaines (I.).

I. Les relations entre les mesures demandées par le Nicaragua et par le Costa Rica

2. Monsieur le président, comme la Cour l'a expliqué dans ses ordonnances du 17 avril 2013, les deux affaires dont le Costa Rica d'abord, le Nicaragua ensuite, l'ont saisie, sont indissociables.

3. Il reste qu'elles demeurent des affaires distinctes en ceci au moins que celle dont le Nicaragua vous a saisis, l'affaire de la route 1856, concerne des problèmes de beaucoup plus grande ampleur — aussi bien géographiquement que matériellement — que ceux liés à la parcelle frontalière contestée⁹⁹. Dès lors, bien qu'il soit légitime, tant pour la Cour que pour les Parties, de tenir compte du contexte commun aux deux affaires et, à mon sens, que vous soyez parfaitement en droit, Mesdames et Messieurs de la Cour, de vous prononcer par une ordonnance commune sur les deux demandes en indication de mesures conservatoires, il convient certainement que vous appréciez leur bien-fondé individuellement et de manière distincte.

4. Il est fréquemment arrivé, dans le passé, que les deux Parties à un différend porté devant la Cour aient formulé des demandes croisées en indication de mesures conservatoires. Je pense par exemple à l'affaire *Burkina/Mali*¹⁰⁰, à celle du *Génocide*¹⁰¹ ou encore à *Cameroun c. Nigeria*¹⁰². Et c'est aussi ce que nous avons voulu faire dans le cadre du présent différend après que le Costa Rica vous a saisis d'un incident, qu'il eût pourtant été facile de résoudre par la voie diplomatique.

5. Il nous a semblé que cette «contre-demande», si l'on veut, était justifiée car, en vous saisissant de l'incident que je viens de mentionner — aussi regrettable qu'il pût paraître — le Costa Rica tentait de détourner l'attention des activités polluantes de grande ampleur qu'il mène ou prévoit de mener à nouveau, incessamment, sur le San Juan, activités qui constituent une menace, autrement plus grave, à la navigabilité et à l'environnement du fleuve. Pour reprendre une formule que vous aviez utilisée dans votre ordonnance de 1997 relative aux demandes reconventionnelles

⁹⁹ Voir *mutatis mutandis*, *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas)*, arrêt, C.I.J. Recueil 1969, p. 19, par. 11.

¹⁰⁰ *Différend frontalier (Burkina Faso/République du Mali), mesures conservatoires, ordonnance du 10 janvier 1986*, C.I.J. Recueil 1986, p. 4, par. 2, p. 5-6, par. 5-6, p. 7-8, par. 8 et p. 8, par. 9.

¹⁰¹ *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 8 avril 1993*, C.I.J. Recueil 1993, p. 7-8, par. 3 et p. 9-10, par. 9 et *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 13 septembre 1993*, C.I.J. Recueil 1993, p. 332-333, par. 6 et p. 335-336, par. 19.

¹⁰² *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), mesures conservatoires, ordonnance du 15 mars 1996*, C.I.J. Recueil 1996 (I), p. 18, par. 20, p. 19, par. 23 et p. 20, par. 26.

dans l'affaire du *Génocide*, les deux demandes costa-ricienne et nicaraguayenne relèvent d'«un même ensemble factuel complexe»¹⁰³. Il n'y a donc rien d'incongru à ce que la Cour soit appelée à examiner deux demandes en indication de mesures conservatoires introduites successivement par les deux Parties à des affaires que vous avez jointes.

6. Ceci étant, nous le reconnaissons bien volontiers, les délais étaient fort courts et il est compréhensible que, dans sa sagesse, la Cour ait décidé de dissocier la demande du Costa Rica, qui nous a réunis dans ce grand hall de justice il y a trois semaines, de celle que nous avons formulée à notre tour.

7. Outre les considérations pratiques qui suffisent à la justifier, cette dissociation a l'avantage de lever l'ambiguïté qui avait marqué le précédent de mai dernier. Je me permets de rappeler qu'à cette occasion le Costa Rica, fidèle à sa stratégie du harcèlement de la Cour par mesures conservatoires interposées, vous avait priés, Mesdames et Messieurs les juges, de modifier votre ordonnance en indication de mesures conservatoires du 8 mars 2011, ce à quoi le Nicaragua avait répondu par une demande modificatrice du même type. En même temps que vous rejetiez la demande costa-ricienne, vous avez, dans les motifs de votre ordonnance du 16 juillet dernier, considéré que :

«27. la demande du Nicaragua tendant à ce que l'ordonnance du 8 mars 2011 soit modifiée ou adaptée [était] sans rapport avec la situation considérée dans cette ordonnance»,

et que :

«même si la situation invoquée dans l'affaire *Nicaragua c. Costa Rica* justifiait l'indication de mesures conservatoires, la voie appropriée pour ce faire ne saurait être la modification de l'ordonnance rendue dans l'affaire *Costa Rica c. Nicaragua*»¹⁰⁴.

8. La dissociation que vous avez opérée¹⁰⁵ permet, je crois, de clarifier les choses : certes, notre demande en indication de mesures conservatoires est liée au même contexte factuel que l'était celle du Costa Rica ; mais il s'agit d'une demande autonome portant sur le volet *Nicaragua*

¹⁰³ *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), demandes reconventionnelles, ordonnance du 17 décembre 1997, C.I.J. Recueil 1997, p. 258, par. 34.*

¹⁰⁴ *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), mesures conservatoires, ordonnance du 16 juillet 2013, par. 26-29.*

¹⁰⁵ Lettre en date du 14 octobre 2013 adressée à l'agent du Nicaragua par le greffier (réf. 142617).

c. Costa Rica des affaires jointes par vos ordonnances du 17 avril 2013 et cette demande n'implique pas nécessairement une modification de votre décision du 8 mars 2011 : elle peut aussi bien se traduire par l'adoption d'une ordonnance distincte, entièrement nouvelle, s'ajoutant à celle-ci.

II. Les demandes du Nicaragua

9. Au bénéfice de ces remarques, j'en viens, Mesdames et Messieurs les juges, à l'examen du contenu des mesures conservatoires que le Nicaragua vous prie de bien vouloir décider.

10. Dans un débat public récemment organisé par l'American Society of International Law¹⁰⁶, l'une d'entre vous donnait ce sage conseil aux avocats se présentant devant vous : «ne dites jamais : «comme l'a dit mon confrère X ou Y...»». Je suis bien conscient que ce n'est pas de la bonne plaidoirie et que les rappels de ce genre ne sont, en principe, pas de mise : votre écoute est, bien sûr, attentive... Mais je me permets de penser que la formule est tolérable si elle est suivie par : «ceci me dispense d'y revenir». Je dirais donc : «comme l'ont montré de manière fort convaincante mes collègues et amis, Steve McCaffrey et Paul Reichler», les agissements du Costa Rica risquent de causer de manière imminente — et, à vrai dire, causent d'ores et déjà — un préjudice irréparable mettant en péril les droits du Nicaragua en cause dans l'affaire de la construction de la route n° 1856 ; «il n'est donc pas nécessaire que j'y revienne».

11. Cela signifie que, globalement, les deux conditions de fond qui doivent être réunies pour que vous indiquiez des mesures conservatoires sont remplies. Je vais m'employer maintenant à montrer spécifiquement que ces circonstances appellent plus précisément les mesures provisoires que le Nicaragua vous a priés de bien vouloir indiquer — et je me réfère à la lettre de l'agent du Nicaragua au greffier de la Cour du 11 octobre 2013¹⁰⁷ ; elle se trouve sous l'onglet n° 13 de votre dossier.

[Projection n° 1 : La première mesure conservatoire demandée par le Nicaragua.]

¹⁰⁶ J. Donoghue, Keynote Discussion, jeudi 31 octobre 2013, «A Conversation on the Art of Judging».

¹⁰⁷ Réf. HOL-EMB-196.

1. La première mesure conservatoire demandée par le Nicaragua

12. Aux termes de sa première demande, le Nicaragua prie la Cour de décider «that Costa Rica immediately and unconditionally provides Nicaragua with the Environmental Impact Assessment Study and all technical reports and assessments on the measures necessary to mitigate significant environmental harm to the River». Ceci, Monsieur le président, est la première des mesures indispensables pour préserver les droits du Nicaragua, celle qui conditionne l'efficacité de toutes les autres.

13. Le Nicaragua a justifié la nécessité d'une telle étude d'impact sur l'environnement, ~~une~~ («EIE»), dès sa requête introductive d'instance. Dès cette première étape, il avait demandé

«à la Cour de bien vouloir exercer le pouvoir que lui confère son Statut d'ordonner au Costa Rica de produire le document en question».

Et nous avons ajouté :

«En tout état de cause, et surtout si cette demande ne donne aucun résultat, le Nicaragua se réserve le droit de demander formellement l'indication de mesures conservatoires sur la base de l'article 41 du Statut et des procédures pertinentes prévues aux articles 73 et suivants du Règlement de la Cour.»¹⁰⁸

C'est ce à quoi vise la première demande du Nicaragua, puisque, jusqu'à présent, la Cour n'a pas donné suite à celle qu'il avait formulée dans sa requête et sur laquelle son agent avait à nouveau appelé son attention dans sa lettre au greffier du 19 décembre 2012 soumettant notre mémoire¹⁰⁹.

14. De même, dans le mémoire en question, le Nicaragua a établi que le Costa Rica ne pouvait écartier d'un revers de la main l'obligation d'établir une étude d'impact sur l'environnement et de lui en communiquer le résultat¹¹⁰, et il en a conclu que le Costa Rica était dans l'obligation

«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.»¹¹¹

15. Il est clair que le Nicaragua a donc toujours présenté l'établissement et la communication d'une EIE comme le préalable indispensable à toute décision concernant la route n° 1856. Il s'agit

¹⁰⁸ Requête introductive d'instance, p. 33, par. 55.

¹⁰⁹ Lettre en date du 19 décembre 2012 adressée à la Cour par le Nicaragua, accompagnant le mémoire du Nicaragua (réf. 02-19-12-2012).

¹¹⁰ Voir notamment p. 152-171, par. 5.6-5.41.

¹¹¹ *Submissions*, par. 2 iv).

là non pas de l'objet de la requête du Nicaragua, mais d'un acte préalable, préparatoire, nécessaire pour évaluer le bien-fondé de celle-ci.

16. Telle est d'ailleurs aussi la manière dont le Costa Rica lui-même voit les choses :

«States are under an obligation to ensure that such activities within their jurisdiction and control do not cause damage to the environment of other States or areas beyond their national jurisdiction¹¹². Stemming from this obligation, a proper environmental impact assessment *is a prerequisite*. A State is obliged, as a matter of general international law, to assess the extent to which activities within its jurisdiction will cause harm to other States, particularly in areas or regions of shared environmental conditions, and to consult with neighbouring States about the environmental implications of the planned activities¹¹³.»¹¹⁴

Je ne saurais mieux dire, Monsieur le président : l'EIE est une condition préalable, *a prerequisite*, à l'appréciation du bien-fondé de toute action envisagée dans des circonstances de ce genre.

17. Telle est aussi la très ferme position prise par la Cour, qui a rappelé, dans l'affaire des *Usines de pâte à papier*, l'existence d'

«une pratique acceptée si largement par les Etats ces dernières années que l'on peut désormais considérer qu'il existe, en droit international général, une obligation de procéder à une évaluation de l'impact sur l'environnement lorsque l'activité industrielle projetée risque d'avoir un impact préjudiciable important dans un cadre transfrontière, et en particulier sur une ressource partagée. De plus, on ne pourrait considérer qu'une partie s'est acquittée de son obligation de diligence, et du devoir de vigilance et de prévention que cette obligation implique, dès lors que, prévoyant de réaliser un ouvrage suffisamment important pour affecter le régime du fleuve ou la qualité de ses eaux, elle n'aurait pas procédé à une évaluation de l'impact sur l'environnement permettant d'apprécier les effets éventuels de son projet.»¹¹⁵

Tout récemment, le Tribunal arbitral constitué dans l'affaire du *Barrage de Kishenganga* a également rappelé avec fermeté l'obligation d'évaluer le risque écologique avant de procéder à la réalisation de tout projet de ce type¹¹⁶.

18. Il s'agit bien d'une condition préalable, préparatoire, conservatoire par excellence, en l'absence de laquelle aucune action ne peut être décidée ou entreprise — et aucune appréciation du bien-fondé d'une telle action ne peut être faite en connaissance de cause. Comme la Commission

¹¹² Note 443, Report of the United Nations Conference on the Human Environment, Rio Declaration on Environment and Development, 1992, A/CONF.151/26 (Vol. I), Principle 2 ; see also Principle 21.

¹¹³ Note 444, Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, Principle 14.

¹¹⁴ MCR, p. 208, par. 5.22 - souligné par moi.

¹¹⁵ *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, C.I.J. Recueil 2010 (I), p. 82-83, par. 204.

¹¹⁶ *Indus Waters Kishenganga Arbitration*, sentence partielle du 18 février 2013, p. 169, par. 450, http://www.pca-cpa.org/showpage.asp?pag_id=1392.

du droit international l'a noté dans son pourtant très prudent projet d'articles sur la prévention des dommages transfrontières :

«Toute décision relative à l'autorisation d'une activité entrant dans le champ d'application des présents articles, repose, en particulier, sur une évaluation du dommage transfrontière possible du fait de cette activité, *dont une évaluation de l'impact sur l'environnement.*»¹¹⁷

19. Dans la lettre qu'il a adressée à l'agent du Nicaragua le 11 mars 2013, le greffier indiquait que la Cour était d'avis «that the circumstances of the case, as they now present themselves to it, are not such as to require the exercise of its power under Article 75 of the Rules of Court to indicate provisional measures proprio motu»¹¹⁸. Outre qu'il n'est plus demandé à votre haute juridiction de se prononcer *proprio motu*, sans avoir été éclairée par les éléments de preuves discutées par les Parties, les circonstances elles-mêmes ont changé et l'exigence préalable d'une EIE s'est faite particulièrement pressante du fait de l'annonce par le Costa Rica de son intention de reprendre les travaux de construction de la route n° 1856.

[Fin de la projection n° 1 — Projection n° 2 : La deuxième mesure conservatoire demandée par le Nicaragua.]

2. La deuxième mesure conservatoire demandée par le Nicaragua

20. Monsieur le président, la deuxième mesure conservatoire — ou plutôt la deuxième série de mesures conservatoires — que le Nicaragua prie la Cour de bien vouloir indiquer est plus complexe. Ces demandes sont projetées à l'écran en ce moment et figurent à l'onglet n° 14 du dossier des juges.

21. L'érosion des rives du fleuve est continue ; et l'éboulement des pentes de la route menace constamment. Tout ceci est d'autant plus préoccupant que tout accident météorologique se traduira inévitablement, si l'on n'y veille, par une aggravation dramatique de la situation.

¹¹⁷ Article 7 (Evaluation du risque) du Projet d'articles sur la prévention des dommages transfrontières résultant d'activités dangereuses, *Annuaire de la Commission du droit international* (2001), vol. II, 2^e partie, p. 169 ; les italiques sont de moi. Voir aussi, par exemple, la convention sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière, 25 février 1991, Espoo, Finlande, Nations Unies, *Recueil des traités*, vol. 1989, p. 333-334, art. 2, al. 3) et 7).

¹¹⁸ Lettre en date du 14 mars 2013 adressée à l'agent du Nicaragua par le greffier (réf. 141600).

22. Or, depuis que le Nicaragua a déposé sa requête, pratiquement rien n'a été fait et la situation s'est au contraire considérablement dégradée, ce que confirme le rapport du professeur Kondolf de la semaine dernière :

«Our field observations in October 2013 clearly showed that erosion is actively occurring along multiple parts of the road, and that erosion control and drainage works have been ineffective in addressing the serious erosion and slope stability problems.»¹¹⁹

23. Des mesures conservatoires d'urgence semblent, dans ces conditions, plus qu'amplement justifiées. Les quatre mesures concrètes que le Nicaragua prie la Cour de bien vouloir indiquer sont de nature à éviter l'accumulation des dommages causés au fleuve — dont il me paraît important de rappeler à nouveau qu'il est sous souveraineté nicaraguayenne¹²⁰ — et ces mesures semblent relativement aisées à mettre en œuvre.

24. [Surligner 2 a)] La première de ces mesures s'avère tout particulièrement nécessaire car comme l'écrivait le professeur Kondolf dès décembre 2012,

«[s]ediment eroded from Route 1856 has already reached the Río San Juan through a number of pathways»¹²¹.

25. Le professeur de Berkeley n'est pas seul à s'alarmer des risques d'affaissement de la route. Ainsi, dans un rapport de mai 2012 (mais la situation ne s'est pas améliorée depuis lors bien au contraire), le laboratoire national des matériaux et des modèles structurels de l'Université du Costa Rica dénonçait **the** «high risk of collapsing during the rainy season as a result of nonexistent drainage structures and instability of a large number of cuts and fills» **and stressed that,**

«Leaving the Border Trail in full operating condition immediately requires a major additional investment of resources to build missing drainage structures, complete and stabilize many cut and fill sectors, and particularly build bridges over Sarapiquí, San Carlos, and Pocosal rivers.»¹²²

¹¹⁹ G. M. Kondolf, «Continued Impacts of Erosion from Rte 1856, Costa Rica to the Río San Juan, Nicaragua», 30 octobre 2013, annexe 2 de la lettre du 1^{er} novembre 2013, p. 2 (réf. HOL-EMB-223).

¹²⁰ Voir l'article VI du traité de limites du 15 avril 1858 ; voir aussi : CMN, p. 32, par. 2.29, p. 33, par. 2.35 et p. 52-56, par. 3.3-3.13.

¹²¹ G. Mathias Kondolf, Danny Hagans, Bill Weaver & Eileen Weppner : «Environmental Impacts of Juan Rafael Mora Porras Route 1856, Costa Rica, on the Río San Juan, Nicaragua», décembre 2012, par. 1.3.5 (MN, vol. II, p. 6).

¹²² National Laboratory of Materials and Structural Models of the University of Costa Rica, «Report INF-PITRA-014-12 : Report from Inspection of Route 1856 - Juan Rafael Mora Porras Border Road», mai 2012 (MN, annexe 3, vol. II, p. 255) ; voir aussi : Federated Association of Engineers and Architects of Costa Rica, «Report on Inspection on the Border Road, of the Northern Area Parallel to the San Juan River CFIA Report», 8 juin 2012, par. 5.8 (MN, annexe 4, vol. II, p. 284).

26. Ces propositions du laboratoire costa-ricien rejoignent largement les mesures conservatoires que le Nicaragua prie aujourd'hui la Cour d'indiquer conformément aux préconisations du professeur Kondolf — que je n'ai pas le temps de lire ; mais elles se trouvent sous l'onglet n° 15 du dossier des juges. En les lisant, vous pourrez constater, Mesdames et Messieurs de la Cour, à la fois combien elles sont indispensables, précises, raisonnables, et, autant que je puisse en juger, relativement faciles à mettre en œuvre (même si elles doivent l'être sérieusement).

27. [Surligner 2 b)] En deuxième lieu, Monsieur le président, le Nicaragua a prié la Cour d'indiquer au Costa Rica qu'il doit d'urgence «(b) Eliminate or significantly reduce the risk of future erosion and sediment delivery at all stream crossings along Route 1856.»

28. Les vices qui entachent la conception et la construction des nombreux franchissements de cours d'eau (*stream crossings*) par la route 1856 (il en existe déjà une soixantaine) en font des endroits particulièrement exposés en cas de pluies. En conséquence, comme le souligne le professeur Kondolf, ils peuvent être à l'origine de déversements massifs dans le fleuve et de pollutions très importantes¹²³.

29. Ici encore ces observations rejoignent celles du laboratoire de physique des matériaux de l'Université du Costa Rica qui dénonce «the poor management of this issue [concerning the stream-crossing] in the project»¹²⁴.

30. Dès mai 2012, ce laboratoire costa-ricien faisait les propositions suivantes pour tenter de remédier à la situation :

«Completing the construction of adequate drainage structures in trail sectors having a stable gravel platform as a high priority, in order to protect road investment and functionality.

Building drainages in the other road sectors consisting of a dirt trail. All these drainage works should be designed according to hydrological requirements in the area and existing waterbody hydraulic characteristics.»¹²⁵

¹²³ G. Mathias Kondolf, Danny Hagans, Bill Weaver & Eileen Weppner : «Environmental Impacts of Juan Rafael Mora Porras Route 1856, Costa Rica, on the Río San Juan, Nicaragua», décembre 2012, par. 1.3.4 (MN, vol. II, p. 7-8) ; voir aussi G. M. Kondolf, «Continued Impacts of Erosion from Rte 1856, Costa Rica to the Río San Juan, Nicaragua», 30 octobre 2013, annexe 2 de la lettre du 1^{er} novembre 2013 (réf. HOL-EMB-223), p. 5-7, 10, 26 et 29.

¹²⁴ National Laboratory of Materials and Structural Models of the University of Costa Rica, «Report INF-PITRA-014-12: Report from Inspection of Route 1856 - Juan Rafael Mora Porras Border Road», mai 2012 (MN, annexe 3, vol. II, p. 239-240).

31. Rien n'ayant bien sûr été fait en ce sens depuis lors, les propositions du professeur Kondolf qui vont dans le même sens et que relaient les demandes du Nicaragua paraissent faire l'unanimité des spécialistes *au moins lorsqu'ils se prononcent* à titre indépendant. Les recommandations motivées du professeur Kondolf figurent sous l'onglet n° 16 du dossier des juges. Comme les précédentes, il me semble qu'elles méritent une lecture attentive.

32. [Surligner 2 c)] Les deux autres mesures d'urgence que, selon nous, la Cour devrait indiquer dans son ordonnance sont étroitement liées l'une à l'autre.

33. Dès son premier rapport, le professeur Kondolf avait attiré l'attention sur l'importance de l'érosion de surface :

«We estimate that an annual and ongoing sediment input of 87,000 to 109,000 cubic meters [reaches the San Juan]. Future erosion and sediment delivery during a tropical storm or hurricane will likely be greater than the current sediment transfer by a factor of at least ten.»¹²⁶

34. Dans son rapport du 30 octobre de cette année, M. Kondolf montre que l'effet de cette érosion massive se fait sentir immédiatement sur le fleuve¹²⁷ et il rappelle combien les pluies abondantes favorisent cette érosion¹²⁸. Il y constate en outre que les choses ne se sont pas améliorées malgré quelques aménagements de fortune :

«Our field observations in October 2013 clearly showed that erosion is actively occurring along multiple parts of the road, and that erosion control and drainage works have been ineffective in addressing the serious erosion and slope stability problems.»¹²⁹

35. Et, conformément à la méthode constamment suivie par l'expert, celui-ci conclut cette partie de son rapport en faisant un certain nombre de propositions précises et très concrètes, qui sont reproduites sous l'onglet n° 17 du dossier des juges. On peut considérer la demande 2 c) que nous formulons comme une version abrégée de (et une référence à) ces préconisations.

¹²⁵ National Laboratory of Materials and Structural Models of the University of Costa Rica, «Report INF-PITRA-014-12: Report from Inspection of Route 1856 - Juan Rafael Mora Porras Border Road», mai 2012 (MN, annexe 3, vol. II, p. 255-256).

¹²⁶ G. Mathias Kondolf, Danny Hagans, Bill Weaver & Eileen Weppner : «*Environmental Impacts of Juan Rafael Mora Porras Route 1856, Costa Rica, on the Río San Juan, Nicaragua*», décembre 2012, par. 1.3.6 (MN, vol. II, p. 9).

¹²⁷ G. M. Kondolf, «Continued Impacts of Erosion from Rte 1856, Costa Rica to the Río San Juan, Nicaragua», 30 octobre 2013 (annexe 2 à la lettre du 1^{er} novembre 2013 (réf. HOL-EMB-223)).

¹²⁸ *Ibid.*, p. 1-2, 8-10, 14 et 29.

¹²⁹ *Ibid.*, p. 2 ; voir aussi, par exemple, le rapport de la délégation territoriale du fleuve San Juan du ministère de l'environnement et des ressources naturelles, 27 septembre 2013 (annexe 1 à la lettre en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)).

36. [Surligner 2 d)] Par ailleurs, dans son rapport de 2012 — et ceci se rapporte davantage à la mesure 2 d) — le professeur Kondolf dénonce

«The evident lack of measures to prepare for the wet season and lack of erosion control measures along the route has resulted in persistent and serious erosion of bare soils all along the recently bulldozed alignment and at disturbed rock quarry sites. Much of this eroded sediment has been delivered to the Río San Juan.»¹³⁰

37. Ici encore, ces constatations débouchent sur des propositions de sauvegarde que l'expert consulté par le Nicaragua énonce dans son rapport du 12 octobre 2013¹³¹. Elles sont reproduites sous l'onglet n° 18 de vos dossiers.

38. Les recommandations du Professeur Kondolf rejoignent celles — malheureusement jamais suivies d'effet — faites dès mai 2012 par le laboratoire de physiques des matériaux de l'Université du Costa Rica :

«Expanding the use of erosion stabilization and control practices to the different project sectors requiring them. Assessing the use of vegetative methods that could be easily applied in several sectors.»¹³²

Je note en passant qu'aux fins de la présente instance, la Partie costa-ricienne s'est bien gardée de faire appel à l'expertise considérable réunie dans ce laboratoire...¹³³

39. Monsieur le président, les photos qu'ont projetées mes collègues ne me paraissent pas laisser de grands doutes sur les graves malfaçons qui marquent la construction de la route ; et les risques en résultant pour le San Juan paraissent également assez évidents même à un Béotien. Mais, pas davantage, sans doute, que la très grande majorité des juristes, je n'ai la moindre idée sur la manière dont, techniquement, on peut supprimer ces risques ou, au moins, en diminuer

¹³⁰ G. Mathias Kondolf, Danny Hagans, Bill Weaver & Eileen Weppner : *«Environmental Impacts of Juan Rafael Mora Porras Route 1856, Costa Rica, on the Río San Juan, Nicaragua»*, décembre 2012, par. 3.8 (MN, vol. II, p. 37-38).

¹³¹ G. M. Kondolf, «Confirmation of Urgent Measures to Mitigate Erosion & Sediment Delivery from Rte 1856, Costa Rica, into the Río San Juan, Nicaragua», 12 octobre 2013, annexe 1 de la lettre du 1^{er} novembre 2013 (réf. HOL-EMB-223), p. 5. Voir aussi : G. M. Kondolf, «Continued Impacts of Erosion from Rte 1856, Costa Rica to the Río San Juan, Nicaragua», 30 octobre 2013.

¹³² National Laboratory of Materials and Structural Models of the University of Costa Rica, «Report INF-PITRA-014-12: Report from Inspection of Route 1856 - Juan Rafael Mora Porras Border Road», mai 2012 (MN, annexe 3, vol. II, p. 255-256).

¹³³ Voir Costa Rican Institute of Electricity (ICE), SBU Projects and Associated Services, Centre for Basic Engineering Studies, Department of Hydrology, «Report on Hydrology and Sediments for the Costa Rican River Basins draining to the San Juan River», août 2013 (annexe 1 à la lettre en date du 1^{er} novembre 2013 adressée à la Cour par le Costa Rica) ; et University of Costa Rica Centre for Research in Sustainable Development, Department of Civil Engineering, «Report on Systematic Field monitoring of Erosion and Sediment Yield along Route 1856», septembre 2013 (annexe 2 à la lettre en date du 1^{er} novembre 2013 adressée à la Cour par le Costa Rica).

l'intensité. Et c'est la raison pour laquelle nous avons reproduit les conclusions du professeur Kondolf dans le dossier des juges, afin de bien montrer que nous n'avons rien inventé.

40. Monsieur le président, je ne pense pas qu'il faille avoir du principe de précaution une conception rigide et dogmatique car on risque alors l'immobilisme. Il n'en reste pas moins que les prévisions à la fois très posées et alarmistes du Professeur Kondolf ne doivent pas être prises à la légère : il existe, indiscutablement, un risque grave et imminent de préjudice irréparable, et des mesures doivent et peuvent être prises pour le minimiser. L'indication des mesures suggérées par le Nicaragua dans le point 2) des demandes formulées dans la lettre de l'ambassadeur Argüello Gómez du 11 octobre dernier irait dans le sens de cette minimisation.

[Fin de la projection n° 2. Projection n° 3 : La troisième mesure conservatoire demandée par le Nicaragua/*The Third Provisional Measures Requested by Nicaragua.*]

3. La troisième mesure conservatoire demandée par le Nicaragua

41. Monsieur le président, dans le point 3 de ces mêmes conclusions, le Nicaragua prie la Cour to «Order Costa Rica not to renew any construction activities of the road while the Court is seized of the present case.»

42. Cette demande paraît, à vrai dire relever du simple bon sens. Dans votre ordonnance du 8 mars 2011, vous avez, Mesdames et Messieurs de la Cour, enjoint à l'unanimité aux Parties de «s'abst[enir] de tout acte qui risquerait d'aggraver ou d'étendre le différend dont [elle] est saisie ou d'en rendre la solution plus difficile»¹³⁴ et, toujours à l'unanimité, vous avez réaffirmé «en particulier» cette mesure dans votre ordonnance du 16 juillet 2013¹³⁵. Certes, cette injonction est contenue dans les ordonnances relatives à l'affaire *Costa Rica c. Nicaragua* alors que la reprise de la construction de la route n° 1856 relève plus directement de *Nicaragua c. Costa Rica* ; mais, comme le confirme leur jonction, les deux affaires sont étroitement liées et il n'est pas douteux que la relance des travaux envisagée par la Partie costaricienne aggraverait considérablement la

¹³⁴ *Certaines activités menées par le Nicaragua dans la région frontalier (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011 (I), p. 27, par. 86, point 3).*

¹³⁵ *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), mesures conservatoires, ordonnance du 16 juillet 2013, par. 40, point 2.*

sédimentation du fleuve San Juan, rendant ainsi impossible le rétablissement de la situation existante en 1858 à laquelle le Nicaragua a droit¹³⁶.

43. Du reste, la mesure que vous avez ordonnée en 2011 et réaffirmée en juillet dernier, n'est que l'expression d'une obligation plus générale. On peut en effet considérer que les parties à toute affaire portée devant la Cour sont tenues de ne pas aggraver la situation et de ne pas rendre plus difficile le règlement du différend. Cette obligation est, en quelque sorte, le substrat, l'arrière-plan, de toutes les autres mesures conservatoires que vous indiquez.

44. Comme vous l'avez rappelé dans vos ordonnances du 23 janvier 2007 et du 8 mars 2011 :

«la Cour a déjà indiqué à plusieurs reprises des mesures conservatoires ordonnant à l'une ou l'autre des parties, voire aux deux, de s'abstenir de tous actes de nature à aggraver ou étendre le différend ou à en rendre la solution plus difficile»¹³⁷.

et, vous avez ajouté que :

«dans ces affaires, des mesures conservatoires autres que celles ordonnant aux parties de s'abstenir de tous actes de nature à aggraver ou étendre le différend ou à en rendre la solution plus difficile ont été également indiquées...»¹³⁸

45. Dans notre espèce, l'adoption d'une mesure rappelant au Costa Rica qu'il ne doit pas entreprendre de nouveaux travaux de construction de la route n° 1856 aussi longtemps que votre arrêt sur le fond n'aura pas été rendu n'est que la conséquence évidente de l'obligation dans laquelle il se trouve — comme le Nicaragua d'ailleurs — de ne pas aggraver le différend. C'est aussi, typiquement, une mesure entrant dans le cadre du

«droit pour la Cour d'indiquer des mesures conservatoires, prévu à l'article 41 du Statut, [qui] a pour objet de sauvegarder les droits des parties en attendant que la Cour rende sa décision, [et qui] présuppose qu'un préjudice irréparable ne doit pas être

¹³⁶ CMN, p. 60, par. 3.20, p. 95-96, par. 4.33 et p. 456, *Submissions*, par. 2 iv).

¹³⁷ Voir, par exemple, *Personnel diplomatique et consulaire des Etats-Unis à Téhéran, mesures conservatoires, ordonnance du 15 décembre 1979, C.I.J. Recueil 1979*, p. 21, par. 47, point B) ; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993*, p. 24, par. 52, point B) ; *Frontière terrestre et maritime entre le Cameroun et le Nigeria (Cameroun c. Nigeria), mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I)*, p. 24, par. 49, point 1) ; *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), mesures conservatoires, ordonnance du 1^{er} juillet 2000, C.I.J. Recueil 2000*, p. 129, par. 47, point 1).

¹³⁸ *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 23 janvier 2007, C.I.J. Recueil 2007 (I)*, p. 16, par. 49 ; et *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011 (I)*, p. 21, par. 62.

causé aux droits en litige devant le juge et qu'aucune initiative concernant les mesures litigieuses ne doit anticiper sur l'arrêt de la Cour»¹³⁹.

46. En effet, ici, comme, *mutatis mutandis*, dans l'affaire de la *Compétence en matière de pêcheries*, la reprise de travaux de construction de la route par le Costa Rica, en anticipant sur l'arrêt de la Cour, «porterait préjudice aux droits invoqués par le [Nicaragua] et nuirait à la possibilité de leur rétablissement intégral au cas où la Cour se prononcerait en sa faveur»¹⁴⁰.

47. J'ajoute que votre haute juridiction a eu, à maintes reprises, l'occasion d'ordonner la suspension ou la non-reprise de certaines activités dans ses ordonnances en indication de mesures conservatoires¹⁴¹. Certes, dans deux affaires qui présentaient certains points communs avec celle qui nous occupe — celle du *Grand Belt* et celle des *Usines de pâte à papier*, la Cour a refusé d'indiquer les mesures conservatoires demandées par l'Etat requérant. Mais, comme l'a excellemment montré Paul Reichler, la question qui nous retient s'y posait, en réalité, tout à fait différemment, en particulier parce que le caractère imminent de la menace, qui faisait défaut dans ces deux affaires, n'est pas douteux dans la nôtre et, faute d'une ordonnance de la Cour, elle se concrétisera bien *pendente litis*.

48. A cet égard, je relève que, assurément, il est difficile de préciser la date exacte à laquelle celle-ci se concrétisera car la reprise annoncée des travaux semble se heurter à des difficultés financières et à des soupçons de corruption¹⁴². Mais la ferme volonté des autorités costa-riciennes d'y procéder dès que possible ne fait pas le moindre doute : la date de passation des contrats nécessaires au début des travaux et celle de leur commencement effectif ont été plusieurs fois

¹³⁹ *Compétence en matière de pêcheries (Royaume-Uni de Grande-Bretagne et d'Irlande du Nord c. Islande), mesures conservatoires, ordonnance du 17 août 1972, C.I.J. Recueil 1972, p. 16, par. 21.*

¹⁴⁰ Voir *ibid.*, par. 22.

¹⁴¹ Voir, par exemple, *Essais nucléaires (Australie c. France), mesures conservatoires, ordonnance du 22 juin 1973, C.I.J. Recueil 1973, p. 106 ; Essais nucléaires (Nouvelle-Zélande c. France), mesures conservatoires, ordonnance du 22 juin 1973, C.I.J. Recueil 1973, p. 142 ; Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 10 mai 1984, C.I.J. Recueil 1984, p. 187, par. 41 ; Différend frontalier (Burkina Faso/République du Mali), mesures conservatoires, ordonnance du 10 janvier 1986, C.I.J. Recueil 1986, p. 11-12, par. 32 ; Frontière terrestre et maritime entre le Cameroun et le Nigéria, mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I), p. 24, par. 49 ; et Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), mesures conservatoires, ordonnance du 1^{er} juillet 2000, C.I.J. Recueil 2000, p. 129, par. 47.*

¹⁴² Voir, par exemple, le communiqué de presse de la présidence du Costa Rica du 14 mars 2013 (annexe 2 à la lettre en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)).

annoncées¹⁴³ et repoussées, mais ceci n'a visiblement pas entamé la résolution des plus hautes autorités de l'Etat de procéder aux travaux aussitôt que possible, sans égard pour l'affaire actuellement pendante devant la Cour. Pas plus tard que la semaine dernière, et je crois important de le citer à nouveau, le ministre costa-ricien de la Communication déclarait encore :

«that construction of the Borderline Trail will continue to a priority piece of work until termination by the current government and anticipates that it will also be (a priority) for the next (government).

In addition, he emphasized that the works will continue forward even though this does not please Nicaragua.»¹⁴⁴

49. Au demeurant, l'absence de date précise n'empêche nullement qu'une menace de risque irréparable soit considérée comme imminente et, par conséquent, comme étant de nature à justifier l'indication de mesures conservatoires propres à écarter une telle menace¹⁴⁵. Monsieur le président je ne me hasarderai pas à avancer la date à laquelle les travaux de construction de la route débiteront à nouveau ; mais la décision est prise et, même s'il est impossible de déterminer précisément la date à laquelle elle se concrétisera, la menace est suffisamment réelle pour que cette incertitude ne soit pas «de nature à interdire à la Cour d'indiquer des mesures conservatoires» et,

¹⁴³ Voir *CRHoy*, «Completion of Route 1856 Works Will be Undertaken with Five Bids», 22 octobre 2012 (annexe 5 à la lettre en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)) ; communiqué de presse de la présidence du Costa Rica du 14 mars 2013 (annexe 2 à la lettre en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)) ; *El País*, «Contracts Entered into with Companies Involving Route 1856 Suspended Due to Irregularities», 9 mai 2013 (annexe 7 à la lettre en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)) ; *La Nación*, «Stretch from Pocosol up to Delta Costa Rica. MOPT will Tender New Designs for the Trail Works include grave) road design; also walls and drainage systems. The head of MOPT expects to commence Works within a month, at the latest», 22 juillet 2013 (annexe 9 en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)) et *El Guardian*, Costa Rica, «Once Again, CONAVI's Carelessness Leaves Trail 1856 Without a Redesign», 28 octobre 2013 (annexe 15 à la lettre en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)).

¹⁴⁴ Déclaration du ministre de la communication du Costa Rica, Carlos Roverssi, 28 octobre 2013 (annexe 14 à la lettre en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)). Voir aussi, notamment, L. M. Herrera, *La Nación*, «Stretch from Pocosol up to Delta Costa Rica. MOPT will Tender New Designs for the Trail», 22 juillet 2013 (annexe 9 à la lettre en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)) ; *CRHoy*, Costa Rica, «Works of the Road Set to Continue Without an Environmental Mitigation Plan», 25 January 2013, available at <http://www.crhoy.com/trabajos-en-la-trocha-estan-por-reiniciar-sin-plan-de-mitigacion-ambiental/> ; *La Nación*, Costa Rica, «Route 1856 does have a destiny», 3 February 2013, available at <http://www.nacion.com/2013-02-03/Opinion/la-ruta-1856-si-tiene-un-destino.aspx> ; *CRHoy*, Costa Rica, «Government will present road works plan», 31 January 2013, available at <http://www.crhoy.com/gobierno-presentara-plan-de-trabajos-para-la-trocha/> ; communiqué de presse de la présidence du Costa Rica du 14 mars 2013 (annexe 2 à la lettre en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)) ; Service de presse de la *Fracción Parlamentaria P.L.N.* citant *La Voz Liberacionista*, San José, 19 mars 2013 (http://www.asamblea.go.cr/Diputadas_Diputados/Sitio_Fraccion_Liberacion_Nacional/Boletn_La_Voz_Liberacionista/2013_MARZO/Licitación_abreviada_y_recorrido_ruta0001.pdf) ; J. Bravo, *La Prensa*, Managua, «Chinchilla no verá culminada carretera fronteriza durante su mandato», 18 juin 2013 (<http://www.laprensa.com.ni/2013/06/18/ambito/151335-chinchilla-no-vera-culminada>).

¹⁴⁵ *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 5 février 2003, C.I.J. Recueil 2003, p. 90-91, par. 53-54.*

tout spécialement, la non-reprise des travaux en question. De toute évidence, à moins que le Costa Rica se borne à jouer des nerfs des dirigeants nicaraguayens par des provocations pures et simples, ces nouveaux et désastreux travaux interviendront «avant que la Cour n'ait eu l'occasion de rendre sa décision définitive»¹⁴⁶. Il est donc plus que probable que, si la Cour n'intervient pas, «une action préjudiciable aux droits de l'une ou de l'autre Partie sera commise avant que la Cour n'ait rendu sa décision définitive»¹⁴⁷ ¹⁴⁸.

50. Et il y a une autre raison — tout aussi décisive que celles que je viens d'exposer.

51. Par une décision préliminaire du 17 janvier 2012, la Cour de justice centraméricaine a ordonné :

«To immediately suspend the construction of the road that the Government of Costa Rica is building parallel to the south bank of San Juan River, so that the situation does not escalate, thus protecting the rights of each of the parties and preventing the occurrence of irreversible and irreparable damage.»¹⁴⁹

Or, comme l'a relevé la même Cour dans sa décision du 21 juin 2012, dont certains extraits figurent au dernier onglet de votre dossier,

«These protective measures were not respected by the State of Costa Rica, violating Article 39 of the Convention on the Statute of the Central American Court of Justice...»¹⁵⁰,

¹⁴⁶ *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 23 janvier 2007, C.I.J. Recueil 2007 (I), p. 11, par. 32. Voir aussi Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 17, par. 23 ; Convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 9 avril 1998, C.I.J. Recueil 1998, p. 257, par. 37 ; Certaines procédures pénales engagées en France (République du Congo c. France), mesures conservatoires, ordonnance du 17 juin 2003, C.I.J. Recueil 2003, p. 107, par. 22 ; Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006, p. 131, par. 70 ; Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique) (Mexique c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 16 juillet 2008, C.I.J. Recueil 2008, p. 330, par. 72.*

¹⁴⁷ Suite de la citation : «(voir, par exemple, *Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 17, par. 23 ; Certaines procédures pénales engagées en France (République du Congo c. France), mesures conservatoires, ordonnance du 17 juin 2003, C.I.J. Recueil 2003, p. 107, par. 22 ; Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 23 janvier 2007, C.I.J. Recueil 2007 (I), p. 11, par. 32*)».

¹⁴⁸ *Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique) (Mexique c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 16 juillet 2008, C.I.J. Recueil 2008, p. 328-329, par. 66.*

¹⁴⁹ Cour de justice centraméricaine, affaire n° 12-06-12-2011, ordonnance du 17 janvier 2012, citée dans Cour de justice centraméricaine, affaire n° 12-06-12-2011, décision du 21 juin 2012, p. 10-11, considérant IX (MN, annexe 13, vol. II, p. 380).

¹⁵⁰ Cour de justice centraméricaine, affaire n° 12-06-12-2011, décision du 21 juin 2012, p. 10-11, considérant IX (NM, annexe 13, vol. II, p. 380-381).

ce qui a conduit la Cour de Managua à condamner le Costa Rica «for incurring in contempt of court by not complying with the precautionary measures ordered by the Central American Court of Justice on January seventeen, two thousand twelve» and the Court added: «the order to definitively suspend the construction of this road is reaffirmed»¹⁵¹. Le Costa Rica s'est empressé de proclamer qu'il ne respecterait pas cette décision¹⁵².

52. Certes, Monsieur le président, la Cour de céans n'est pas un «agent d'exécution» de la Cour de justice centraméricaine ; mais les décisions de celles-ci sont obligatoires pour les Parties en vertu de l'article 39 du traité l'instituant ; peu importe qu'il s'agisse d'obligations «secondaires» plutôt que «primaires» — elles s'imposent aux Parties. En indiquant la troisième mesure demandée par le Nicaragua, vous ne ferez, Mesdames et Messieurs les juges, que confirmer, avec l'autorité particulière qui est la vôtre, la décision prise à deux reprises — et à l'unanimité mais en vain — par la Cour de Managua et vous ferez ainsi respecter le principe sacré de la *res judicata*.

53. Monsieur le président, le Costa Rica aime à donner des leçons de bonne conduite et de moralité internationales. La présente affaire montre à quel point il peut faire fi de ses principes s'il estime n'y pas trouver son compte :

- 1) la poursuite de la construction de la route n° 1856 confirmerait l'outrage au tribunal — *the contempt of Court* — dont il est responsable en faisant fi des décisions dépourvues de toute ambiguïté de la Cour d'Amérique centrale lui enjoignant de cesser ces travaux ;
- 2) la reprise des travaux, annoncée comme imminente, porterait une atteinte irréversible à l'environnement du San Juan et aux droits que le Nicaragua a entendu faire respecter en portant le présent différend devant la Cour ;
- 3) en tout état de cause, il est impossible à quiconque — même à votre haute juridiction, Mesdames et Messieurs les juges, de prendre quelque décision éclairée que ce soit concernant tant le tronçon déjà construit de la route que ceux que le Costa Rica continue à vouloir construire, en l'absence d'une étude d'impact environnemental sérieuse, préalable et nécessaire à toute action future et à toute appréciation du fait accompli jusqu'à présent ; et

¹⁵¹ *Ibid.*, p. 27, point VIII du dispositif.

¹⁵² *Inside Costa Rica*, «Costa Rica: Central American Court Ruling Illegitimate», 3 juillet 2012 (<http://www.insidecostarica.com/dailynews/2012/july/03/costarica120070301.htm>), voir MN, vol. I, p. 235, par. 6.20, note 587.

4) il n'est guère envisageable de laisser le *statu quo* produire ses effets catastrophiques en attendant votre arrêt ; des mesures d'urgence s'imposent dans la ligne des recommandations très motivées du professeur Kondolf (qui elles-mêmes vont dans le même sens que les préconisations du laboratoire costa-ricien de physique des matériaux et de la modélisation, que le Costa Rica tient dorénavant soigneusement à l'écart).

54. Monsieur le président, Mesdames et Messieurs les juges, ceci conclut les plaidoiries du premier tour du Nicaragua. Nous vous remercions bien sincèrement de votre écoute — d'autant plus «méritoire» si je peux dire, que vous aviez déjà dû siéger, il y a peu, pour entendre les plaidoiries des mêmes Parties sur un autre volet de ces affaires jointes. Je me permets respectueusement de dire que je continue de penser — nous continuons de penser — que s'y arrêter ne vous aurait permis de n'avoir qu'une vue très partielle et fort déséquilibrée des choses. Merci de nous avoir donné l'occasion de les remettre en perspective. Je vous souhaite un excellent appétit.

Le PRESIDENT : Merci Monsieur le professeur. Ceci met fin à l'audience d'aujourd'hui. La Cour se réunira demain à 10 heures pour entendre le Costa Rica dans son premier tour des arguments oraux. Je vous remercie. La séance est levée.

La séance est levée à 13 h 5.
