

CR 2013/29

International Court  
of Justice

Cour internationale  
de Justice

THE HAGUE

LA HAYE

YEAR 2013

*Public sitting*

*held on Wednesday 6 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)*

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VERBATIM RECORD

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ANNÉE 2013

*Audience publique*

*tenue le mercredi 6 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)*

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COMPTE RENDU

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*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

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*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

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***The Government of Nicaragua is represented by:***

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

*as Agent and Counsel;*

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

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

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

*as Counsel and Advocates;*

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

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

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

Mr. Lawrence H. Martin, Foley Hoag LLP, Washington D.C., member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,

*as Counsel;*

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

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

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

Ms Clara E. Brillembourg, Foley Hoag LLP, member of the Bars of the United States Supreme Court, the District of Columbia and New York,

*as Assistant Counsel;*

Ms Sherly Noguera, Consul General, Ministry of Foreign Affairs of Nicaragua,

*as Assistant.*

***Le Gouvernement du Nicaragua est représenté par :***

S. Exc. M. Carlos José Argüello Gómez, ambassadeur de la République du Nicaragua auprès du Royaume des Pays-Bas,

*comme agent et conseil ;*

M. Stephen C. McCaffrey, professeur de droit international à la McGeorge School of Law de l'Université du Pacifique à Sacramento (Etats-Unis d'Amérique), ancien membre ***et ancien président*** de la Commission du droit international,

M. Alain Pellet, professeur à l'Université de Paris Ouest (Nanterre-La Défense), ancien membre et ancien président de la Commission du droit international, membre de l'Institut de droit international,

M. Paul S. Reichler, avocat au cabinet Foley Hoag LLP (Washington D.C.), membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Columbia,

*comme conseils et avocats ;*

M. César Vega Masís, directeur des affaires juridiques, de la souveraineté et du territoire au ministère des affaires étrangères du Nicaragua,

M. Walner Molina Pérez, conseiller juridique au ministère des affaires étrangères du Nicaragua,

M. Julio César Saborio, conseiller juridique au ministère des affaires étrangères du Nicaragua,

M. Lawrence H. Martin, avocat au cabinet Foley Hoag LLP (Washington D.C.), membre des barreaux de la Cour suprême des Etats-Unis d'Amérique, du district de Columbia et du Commonwealth du Massachusetts,

*comme conseils ;*

M. Edgardo Sobenes Obregon, conseiller à l'ambassade du Nicaragua au Royaume des Pays-Bas,

Mme Claudia Loza Obregon, premier secrétaire à l'ambassade du Nicaragua au Royaume des Pays-Bas,

M. Benjamin Samson, chercheur, Centre de droit international de Nanterre (CEDIN), Université Paris Ouest (Nanterre-La Défense),

Mme Clara E. Brillembourg, avocat au cabinet Foley Hoag LLP (Washington D.C.), membre des barreaux de la Cour suprême des Etats-Unis d'Amérique, du district de Columbia et de New York,

*comme conseils adjoints;*

Mme Sheryl Noguera, consul général, ministère des affaires étrangères du Nicaragua,

*comme assistante.*

***The Government of Costa Rica is represented by:***

H.E. Mr. Edgar Ugalde Álvarez, Ambassador of Costa Rica to the Organization of American States, Washington D.C.,

*as Agent;*

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,

*as Co-Agent, Counsel and Advocate;*

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

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

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

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

*as Counsel and Advocates;*

Mr. Ricardo Otarola, Minister Counsellor and Consul General of Costa Rica to the Republic of Colombia,

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,

*as Advisers.*

***Le Gouvernement du Costa Rica est représenté par :***

S. Exc. M. Edgar Ugalde Álvarez, ambassadeur de la République du Costa Rica auprès de l'Organisation des Etats américains,

*comme agent ;*

S. Exc. M. Jorge Urbina, ambassadeur de la République du Costa Rica auprès du Royaume des Pays-Bas,

*comme coagent ;*

M. Sergio Ugalde, conseiller principal auprès du ministère des affaires étrangères et du culte du Costa Rica, membre de la Cour permanente d'arbitrage,

*comme coagent, conseil et avocat ;*

M. Marcelo Kohen, professeur de droit international à l'Institut de hautes études internationales et du développement de Genève, membre de l'Institut de droit international,

M. Samuel Wordsworth, QC, membre des barreaux d'Angleterre et de Paris, Essex Court Chambers,

M. Arnoldo Brenes, conseiller principal auprès du ministère des affaires étrangères et du culte du Costa Rica, membre du barreau du Costa Rica,

Mme Kate Parlett, solicitor (Queensland (Australie) et Angleterre et pays de Galles),

*comme conseils et avocats ;*

M. Ricardo Otarola, ministre-conseiller, consul général du Costa Rica en République de Colombie,

M. Gustavo Campos, ministre-conseiller, consul général du Costa Rica au Royaume des Pays-Bas,

Mme Ana Marcela Calderón, ministre-conseiller de l'ambassade du Costa Rica au Royaume des Pays-Bas,

Mme Katherine Del Mar, titulaire d'un doctorat de l'Institut de hautes études internationales et du développement de Genève,

M. Rowan Nicholson, assistant de recherche au Lauterpacht Centre for International Law de l'Université de Cambridge,

*comme conseillers.*

The PRESIDENT: Good morning, please be seated. The sitting is now open and the Court meets this morning to hear the first round of oral observations of Costa Rica on the Request for the indication of provisional measures submitted by Nicaragua. I now call upon his Excellency Ambassador Edgar Ugalde Álvarez, Agent of Costa Rica. Excellency, you have the floor.

Mr. UGALDE ÁLVAREZ:

1. Mr. President, distinguished Members of the Court, it is an honour for me to appear before you again on behalf of the Republic of Costa Rica.

2. Mr. President, Nicaragua asserts that Costa Rica is causing irreparable harm to the San Juan River by constructing a road which is entirely within Costa Rican sovereign territory. Nicaragua even objects to the name of the road. Yesterday Professor McCaffrey suggested that the name *Road 1856 Juan Rafael Mora Porras* was calculated to insult Nicaragua because President Mora Porras invaded Nicaragua in the nineteenth century. Mr. President, nothing could be further from the truth. Nicaragua has paid homage to the actions of President Mora Porras on many occasions. In 2005, the then President of Nicaragua, President Bolaños, noted that the incursion of President Mora Porras onto Nicaraguan territory in 1856 not only was authorized by Nicaragua, but it was decisive for achieving the defeat of the filibusters, and was a display of the solidarity shown to Nicaragua by its “Costa Rican brothers”<sup>1</sup>. The way Nicaragua has understood the road’s name is misconceived and unfortunate.

3. Mr. President, there is a curious pattern:

(a) First, Costa Rica initiates proceedings against Nicaragua. Subsequently Nicaragua also initiates proceedings against Costa Rica.

(b) Second, Costa Rica requests the Court to modify the provisional measures it indicated. Subsequently, Nicaragua also requests the Court to modify the provisional measures it indicated.

(c) Third, Costa Rica requests the Court to indicate new provisional measures. Subsequently, Nicaragua also requests the Court to indicate new provisional measures.

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<sup>1</sup>*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Reply of Costa Rica, 15 Jan. 2008, App. A, para. A.22.

4. This sequence is not coincidental. It is an inappropriate use of the Court's time, and highly regrettable.

5. Costa Rica carried out the road works on its sovereign territory for the development of the northern areas of the country as a response, first, to the aggressive actions and threats that led it to commence the proceedings in the *Certain Activities* case, and second, as a result of the continuous threats made to its territorial integrity. Mr. Brenes will detail the context in which the road works were carried out. Suffice to say, the Border Road was a wholly reasonable reaction to Nicaragua's unlawful incursion, occupation and use of Costa Rican territory, and other aggressive acts and threats that followed.

6. Mr. President, yesterday Nicaragua complained that it has been left in the dark about Costa Rica's road works<sup>2</sup>. Nicaragua conveniently fails to mention that it was Costa Rica who wrote to Nicaragua on 29 November 2011 *before* Nicaragua initiated proceedings in the present case, and invited Nicaragua to enter into a co-operative dialogue with Costa Rica<sup>3</sup>. Nicaragua was publicly making allegations about Costa Rica's road infrastructure works, but it had not provided any basis for these allegations, nor had it raised these directly with Costa Rica.

7. Costa Rica then reacted by immediately writing to Nicaragua and asking it to substantiate its concerns so as to be in a position to deal with them. Nicaragua's response was litigious, not co-operative. It initiated the present proceedings on 22 December 2011.

8. After the initiation of these proceedings, Costa Rica has tried to co-operate with Nicaragua in order to establish whether there is any basis for its allegations of environmental damage. As you know, Mr. President, it was Costa Rica who proposed a joint monitoring programme for the waters of the San Juan to determine the sources of sediment input into the river, from both banks<sup>4</sup>. Nicaragua has shown its unwillingness to participate by imposing unreasonable conditions at every opportunity, effectively derailing the programme.

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<sup>2</sup>CR 2013/28, p. 38, para. 3 (Reichler).

<sup>3</sup>*Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Application Instituting Proceedings, 21 Dec. 2011, Ann. 17, 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, 29 Nov. 2011.

<sup>4</sup>Letter from H.E. Enrique Castillo Barrantes, Minister for Foreign Affairs and Worship, Costa Rica to H.E. Samuel Santos Lopez, Foreign Affairs Minister, Nicaragua, 6 Feb. 2013, Ref. DM-AM-063-13.

9. Nicaragua has vehemently criticized Costa Rica's decision to undertake the road works<sup>5</sup>. But it is not for Nicaragua to challenge the decision of Costa Rica to undertake urgent infrastructure works entirely within its own territory. For the purposes of Nicaragua's Request now being considered by the Court, Nicaragua must show that the road is putting its rights at imminent risk of irreparable prejudice. This it cannot do.

10. Nicaragua alleges that large amounts of sediment have been deposited in the San Juan River as a result of the construction of the road. Nicaragua has not carried out any credible study of the impact of the road on the river, but Costa Rica has, and the measurements which result from Costa Rica's technical studies show that on the worst-case analysis the volume of added sediment is trivial, and in fact imperceptible, when the sediment load of this sediment-heavy river is taken into account. In respect of the Lower San Juan, where Nicaragua claims it is forced to carry out dredging works because of the impact of the road, the evidence shows that the maximum contribution of road-related sediment to the bed of the river could be, at its worst, twice the width of a grain of sand<sup>6</sup>. There is no risk of the road causing any irreparable harm to the San Juan River. That is a fact which Mr. Wordsworth will explain in greater detail.

11. Unlike Costa Rica's Request in the *Certain Activities* case, Nicaragua's Request in the *Road* case is not based on any new facts or any new events. Nicaragua has been making the same complaint to the Court since December 2011, and the Court has not accepted that complaint at any time.

12. Mr. President, I shall now set out the programme for Costa Rica's first round argument this morning. To begin, Mr. Arnaldo Brenes will set out the facts relating to the construction of the road, including the works which are currently being pursued on the road. Mr. Sam Wordsworth will demonstrate that there is no risk of irreparable prejudice to Nicaragua's rights. Mr. Sergio Ugalde will then explain that Nicaragua has not met the requirement of urgency, such as would justify the indication of provisional measures. Finally, Professor Marcelo Kohén will

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<sup>5</sup>See e.g. *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, MN, paras. 1.9 and 5.20.

<sup>6</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, p. 27, para. 73.

conclude Costa Rica's first round presentation, by explaining that Nicaragua's Request is not justified and that Nicaragua is not entitled to the specific measures sought by it.

Mr. President, distinguished Members of the Court, thank you very much for your kind attention. Mr. President, I ask that you give the floor to Mr. Brenes.

The PRESIDENT: Thank you very much, Ambassador Ugalde, and I call on Mr. Arnaldo Benes. You have the floor, Sir.

Mr. BRENES:

### **RELEVANT FACTS ABOUT THE BORDER ROAD**

1. Mr. President, distinguished Members of the Court, it is a great honour to appear before you on behalf of Costa Rica.

#### **A. Introduction**

2. My task today is to present some basic facts about the Border Road and the context in which it was planned and constructed. Firstly, I will explain that the construction of the Border Road was a reasonable and entirely lawful measure taken in direct response to the national emergency in Costa Rica; an emergency caused by Nicaragua. Secondly, I will set the record straight by setting out the true characteristics of the Border Road. Finally, I will refer to some of the mitigation measures Costa Rica has already taken and which are ongoing. Indeed, several months before Nicaragua requested the Court to indicate provisional measures *proprio motu*, Costa Rica had already carried out mitigation and correctional works. Yesterday Nicaragua attempted to portray them as failed mitigation works by showing a selective series of photographs. This is far from the situation on the ground, as we will see. Nicaragua is not entitled to the provisional measures it now requests. This is not only because there is no urgency, nor any risk of irreparable harm, as my colleagues will show you shortly. It is also because Costa Rica has been carrying out, on its own initiative and in an effective manner, the measures Nicaragua now asks the Court to order Costa Rica to perform.

## **B. Context in which the road works were undertaken**

3. Mr. President, Members of the Court, Costa Rica's decision to undertake road works in the border area is a direct response to a series of aggressive acts and threats by Nicaragua since October 2010 against Costa Rica, a neighbouring State with no standing army. The Court is well aware of Nicaragua's incursion into and occupation of previously undisputed Costa Rican territory in the northern sector of Isla Portillos. The damage Nicaragua caused there is also well known. By these actions, Nicaragua intended to modify an international border established since 1858 and determined in 1897, and to annex a portion of Costa Rican territory.

4. But Nicaragua is mistaken in suggesting that the construction of the Border Road was intended to provide land access to the "disputed territory"<sup>7</sup>. This was never the purpose of the road, and the map that Nicaragua showed us yesterday, taken from Costa Rica's Written Observations on the Counter-Claims submitted by Nicaragua in its Counter-Memorial for the *Certain Activities* case<sup>8</sup>, makes this clear. The main purpose of the Border Road was to facilitate Costa Rica's protection of its border and the communities living in the border area in light of the situation created by Nicaragua's military incursion in October 2010. Indeed, less than a month after the unlawful incursion, in November 2010, President Ortega claimed non-existent rights of navigation on the Colorado River, a Costa Rican river running entirely within Costa Rican territory<sup>9</sup>. President Ortega's threat to claim navigational rights on the Colorado River was accompanied by an increased military presence along the San Juan River<sup>10</sup>, particularly the Lower San Juan, that is, the stretch between the delta of the Colorado River and the outlet of the San Juan in the Caribbean. In the circumstances, Costa Rica had a very real and plausible concern that the situation would further escalate into an armed conflict. This concern was exacerbated by Costa Rica's lack of military capacity to repel an armed invasion.

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<sup>7</sup>CR 2013/28, p. 49, para. 35 (Reichler).

<sup>8</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Written Observations of Costa Rica on the Admissibility of Nicaragua's Counter-Claims, 30 Nov. 2012.

<sup>9</sup>*El 19* (Nicaragua), "Nicaragua will request before the ICJ navigation through Río Colorado", 13 Nov. 2010, available at [http://www.el19digital.com/index.php?option=com\\_content&view=article&id=18149:nicaragua-pedira-ante-cij-navegacion-por-rio-colorado&catid=23:nacionales&Itemid=12](http://www.el19digital.com/index.php?option=com_content&view=article&id=18149:nicaragua-pedira-ante-cij-navegacion-por-rio-colorado&catid=23:nacionales&Itemid=12); tab 3 of Costa Rica's judges' folders.

<sup>10</sup>*La Nación* (Costa Rica) "Nicaragua Reinforces Troops at the Border", 24 Oct. 2010 available at [http://www.nacion.com/sucesos/Nicaragua-refuerza-tropas-frontera\\_0\\_1154884554.html](http://www.nacion.com/sucesos/Nicaragua-refuerza-tropas-frontera_0_1154884554.html); tab 4 of Costa Rica's judges' folders.

5. In light of Nicaragua's aggressive actions, Costa Rica's National Security Council met on the 24 November 2010 to analyse the situation. It requested Ministers to carry out the necessary actions to ensure access to the border area<sup>11</sup>. This was because the only way to access the police posts at Delta Costa Rica and Boca Sarapiquí was via Costa Rican rivers, such as the Colorado and the Sarapiquí. The map now projected on the screen and found at tab 6 of your folders shows the location of these police posts. The only police post that could be accessed by land was the post at Boca San Carlos, and then only with great difficulty during the rainy season. Furthermore, there was no connection by land between all of these police posts.

6. Following the request of the National Security Council, on 1 December 2010 Costa Rica's Minister of Public Security wrote to the Costa Rican Minister of Public Works, pointing out the need to provide access by land to the police posts at Delta Costa Rica, Boca Río Sarapiquí, Puerto Lindo and Los Chiles. He also requested that the access routes be repaired<sup>12</sup>. Following that request, in December 2010, work began on providing land access to the police posts at Delta Colorado and Boca Sarapiquí. Eventually, it was decided to extend the works along the border between Delta and the town of Los Chiles. This was in order to provide a continuous route of communication along the border between these police posts.

7. This was one of the principal motivations for the Border Road: as defensive infrastructure to allow Costa Rican police to have direct and expeditious access by land to the border with Nicaragua, and to provide the local population with essential services. This sense of urgency increased after Nicaraguan President Ortega claimed on 6 April 2011 that the Costa Rican province of Guanacaste, bordering the Pacific Ocean, was actually Nicaraguan<sup>13</sup>. This same threat in respect of Guanacaste was reaffirmed by President Ortega during a speech delivered at the celebration of the 33rd Anniversary of Nicaragua's Naval Force less than three months ago<sup>14</sup>.

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<sup>11</sup>Government of Costa Rica, Certification of Minutes of National Security Council Ordinary Session No. 3 of 24 Nov. 2010; tab 5 of Costa Rica's judges' folders.

<sup>12</sup>Note from the Minister of Public Security of Costa Rica to the Minister of Public Works and Transportation of Costa Rica, 1 Dec. 2010, Ref. 2278-2010; tab 7 of Costa Rica's judges' folders.

<sup>13</sup>See "Inaugural Lesson of the Academic Year 2011, 6 April 2011", available at [http://www.presidencia.gob.ni/index.php?option=com\\_content&view=article&id=358:leccion-inaugural-del-ano-academico-2011&catid=84:abril-2011&Itemid=54&showall=1](http://www.presidencia.gob.ni/index.php?option=com_content&view=article&id=358:leccion-inaugural-del-ano-academico-2011&catid=84:abril-2011&Itemid=54&showall=1); tab 9 of Costa Rica's judges' folders.

<sup>14</sup>*El 19* (Nicaragua) "33rd Anniversary of the Naval Force", 14 Aug. 2013, available at <http://www.el19digital.com/index.php/discursos/ver/12213/33-aniversario-de-la-fuerza-naval->; tab 10 of Costa Rica's judges' folders.

8. Yesterday, Nicaragua suggested that the only reason for constructing the Border Road was national defence<sup>15</sup>. There was also another very important reason, and that is the need to reduce the dependence of the Costa Rican inhabitants and public authorities on the San Juan River for purposes of communication. Costa Rica possesses perpetual navigation rights in the border region. Historically, the inhabitants of the region, apparently some 1,900 people, as well as public authorities, had relied on the San Juan River as the only means of communication in the border area. This was because there were not adequate roads<sup>16</sup>, a fact that Nicaragua itself has acknowledged<sup>17</sup>. The need to provide land access routes was exacerbated by Nicaragua's increased obstructions to Costa Rica's navigational rights. As explained by Costa Rica in the *Certain Activities* case, Nicaragua prevented Costa Ricans from navigating the San Juan River<sup>18</sup>. Nicaragua aggravated its policy of restricting Costa Rican navigation on the San Juan, the most recent incident being the obstruction of navigation by Costa Rica's personnel charged with the protection of the environment. On 18 September 2013, they attempted to navigate the San Juan River to verify the existence of the new artificial *caños* that Nicaragua was constructing on the disputed territory in Isla Portillos<sup>19</sup>.

9. It was in this context that in December 2010 Costa Rica commenced infrastructure works to provide land access to its police posts along the border. This entailed undertaking improvement works on some pre-existing rudimentary roads that connected those police posts to other Costa Rican communities. In some cases, new sections of road were constructed so as to connect all of the communities in these remote areas. This road would permit the mobilization of public

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<sup>15</sup>CR 2013/28, p. 46, para. 30 (Reichler).

<sup>16</sup>*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, MCR, paras. 2.05, 2.06 and 4.53.

<sup>17</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, Ann. 12, Technical Opinion, Environmental Impact Study Project, Improvement of Navigation on the San Juan de Nicaragua River, Nov. 2008, p. 263.

<sup>18</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, MCR, pp. 290-294, paras. 6.54-6.60; Anns. 121, 122 and 131, *La Nación* (Costa Rica), "Nica Army impedes teacher access to Isla Calero", 16 Feb. 2011; *La Nación* (Costa Rica), "MEP will relocate the school located in Isla Calero", 17 Feb. 2011; *La Nación* (Costa Rica), "Border School started lessons with a 100 days delay", 19 May 2011. See also *La Nación* (Costa Rica) "Nicaraguan immigration denies entry to journalists through San Juan River", 22 Oct. 2010, available at <http://www.nacion.com/archivo/Migracion-prohibe-periodistas-San-Juan-0-1154484546.html>; tab 11 of Costa Rica's judges' folders.

<sup>19</sup>See *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request by Costa Rica for New Provisional Measures, Report of Costa Rican Ministry of Environment and Energy (MINAE) and the National System of Conservation Areas (SINAC), 18 Sept. 2013, Attachment PM-6.

authorities and the local population in general and in case of an emergency. It would also permit Costa Rica to provide other essential services to these areas when necessary, without having to rely on the San Juan River. This was particularly necessary in view of Nicaragua's restrictions on Costa Rican navigation. With these needs in mind, and in order to provide the proper legal framework to carry out the necessary works, on 21 February 2011 the Costa Rican Government issued an Executive Decree entitled "To Declare that the Situation brought about by the Violation of Costa Rican Sovereignty by Nicaragua constitutes a State of Emergency"<sup>20</sup>.

10. This Emergency Decree has been the subject of three different cases before Costa Rica's Constitutional Court. In every one of these cases, the Constitutional Court upheld the Decree as being in full accordance with Costa Rica's Constitution. The road works have thus been adjudged to be consistent with Costa Rica's legal system. In accordance with the established jurisprudence of its Constitutional Court, due to the national emergency Costa Rica was facing as a result of Nicaragua's actions, there was no obligation under Costa Rican law to conduct environmental studies or present detailed designs of the Border Road. Nicaragua's assertions to the contrary are groundless<sup>21</sup>. I note also that, under Nicaraguan domestic law, the usual requirement to undertake an environmental impact assessment may be displaced in situations of national emergency, including for security reasons<sup>22</sup>.

11. In light of the extraordinary circumstances created by Nicaragua, which presented a real and imminent threat to Costa Rica's territorial integrity, and to the welfare of its inhabitants, Costa Rica decided to take lawful and peaceful measures as quickly as it was able to. All of the actions taken by Costa Rica as a result of the emergency described in the Emergency Decree, and in particular works undertaken on Costa Rica's road infrastructure in the border area, are lawful under Costa Rica's domestic law. They would equally be lawful under the domestic law of most other countries. Costa Rica will also demonstrate in due time that it acted lawfully under international law.

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<sup>20</sup>See dispute concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, MN, Ann. 35, Executive Decree 36440-MP of 21 Feb. 2011, published in *La Gaceta*, No. 46 of 7 March 2011.

<sup>21</sup>MN, Vol. I, para. 2.20.

<sup>22</sup>Nicaragua, Decree No. 76-2006, approved on 19 Dec. 2006, published in *La Gaceta* No. 248 of 22 Dec. 2006, Art. 12, available at [http://www.ine.gob.ni/DCA/leyes/decreto/Decreto\\_76-2006\\_SistemaEvaluacionAmbiental.pdf](http://www.ine.gob.ni/DCA/leyes/decreto/Decreto_76-2006_SistemaEvaluacionAmbiental.pdf).

### **C. Setting the record straight about the Border Road**

12. Mr. President, I will now set the record straight about the Border Road. In all, the Border Road project entails carrying out works on some 380 km of access roads and approximately 160 km along the border between Los Chiles and Delta Costa Rica. The map being shown on the screen now is at tab 12. Of the 160 km comprising the entire Road in the border area, approximately 108 km of the road runs between Marker II and Delta Colorado<sup>23</sup>, that is, the area where the right margin of the San Juan River marks the boundary between Costa Rica and Nicaragua. This is the portion of the road that is the subject of Nicaragua's claims in this case. Significantly, almost 64 per cent of the total length of the 160-km-long road between Los Chiles and Delta Costa Rica, is comprised of pre-existing rustic roads<sup>24</sup>. Similarly, in the area between Marker II and Delta Costa Rica, some 46 per cent of Route 1856 was built on pre-existing rustic roads<sup>25</sup>.

13. The fact that Route 1856 used these pre-existing paths also means that, in reality, the impact of the Border Road was much lower than Nicaragua would have you believe. As the Land Use Change Report submitted by Costa Rica evidences, around 72 per cent of the area which was used for the Border Road was pasture which had already been cleared of trees and vegetation, long before the road was constructed<sup>26</sup>. Therefore, the impact of the road on the Costa Rican environment, ecology, soil erosion and sediment production along nearly three quarters of its length, ranges between low and imperceptible<sup>27</sup>.

14. Given the emergency situation in which the work was to be carried out, the Department, known by the Spanish acronym "CONAVI", of Costa Rica's Ministry of Public Works and Transportation engaged the services of several local contractors to carry out the necessary works on the Border Road. In order to advance the work in the pressing circumstances of the national emergency, the Border Road was divided into five sections. Each of these were assigned to different contractors, with the intention that work could be carried out simultaneously in all of

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<sup>23</sup>Allan Astorga G. and Andreas Mende, Route 1856: Analysis of the Change in Land use Based on Satellite Images Before and After the Construction of the Border Road, Aug. 2013, Attachment CR-4, p. 4.

<sup>24</sup>*Ibid.*, p. 6.

<sup>25</sup>*Ibid.*, p. 6.

<sup>26</sup>*Ibid.*, p. 27.

<sup>27</sup>*Ibid.*

them. The map now projected on the screen and at tab 13 of your folders is the official CONAVI map showing the different sections of the Border Road that were assigned to different contractors. It also shows the roads that would permit access to the Border Road from different parts of the country.

15. The contractors hired by CONAVI had to implement solutions of a temporary nature, such as small bridges and culverts using logs and metal containers. These temporary solutions were used to put in place basic infrastructure to provide provisional access to towns and locations along the border that had no other viable means of access. This was done in case such access became necessary in light of the national emergency, as well as to allow the mobilization of the machinery and construction personnel from one location to another to advance the works on the Border Road.

16. Yesterday, Nicaragua made reference to some reports made by the National Laboratory of Materials of the University of Costa Rica and of the Costa Rican Association of Engineers. Nicaragua essentially repeated the misrepresentation of these reports which is contained in its Memorial. It contended yesterday that these reports suggested that construction of the Border Road has led to sediment run-off creating obstacles in the San Juan River, which in turn has obstructed navigation on the river<sup>28</sup>. It is simply not true that the reports suggest this. This much is clear from the reports themselves. If there were any doubt about it, a letter from the President of the Association of Engineers explaining how Nicaragua has misused its report is at tab 14 of your folders<sup>29</sup>.

17. Initially, the work progressed in an efficient and accelerated manner. However, funds were depleted by December 2011, and in early 2012, work progressed more slowly. Before the project could be finalized, in May 2012 the Government of Costa Rica exposed and denounced alleged irregularities concerning payments made in connection with the works. This prompted immediate action on the part of the Costa Rican administrative and judicial authorities, and a large-scale investigation was launched. As Nicaragua acknowledged yesterday<sup>30</sup>, the rule of law in

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<sup>28</sup>CR 2013/28, p. 16, para. 23 (Arguëllo).

<sup>29</sup>Letter to Minister Enrique Castillo Barrantes from the President of the CFIA, 28 Aug. 2013, Ref. 034-2012-2013-PRES, tab 14 of Costa Rica's judges' folders.

<sup>30</sup>CR 2013/28, p. 40, para. 12 (Reichler).

Costa Rica is sufficiently robust as to detect apparent acts of corruption and to take measures to address them. Investigations carried out by Costa Rica's Judiciary and Congress, as well as the National Comptroller's Office are still ongoing. The Government has striven to apply the most stringent contracting procedures, which include public tenders and a system of appeals. It has done so in the interests of complete transparency. It has also taken all steps to ensure that the road will be built with first-class engineering and environmental standards. Efforts are being made to finalize contracts for the final design plans of the whole road, before tendering for and concluding contracts for its construction.

18. Nicaragua seems to base its entire claim of urgency upon a presentation made by the Minister of Public Works during a press conference that took place on 14 March 2013, which contained a graphic that outlined the expected dates for the construction of the road in five phases. It is at tab 23 of your folders, and it is now projected on the screen. It is curious that Nicaragua just recently "discovered" this timetable, since it has been publicly available since March of this year. My colleague Mr. Ugalde will explain this further shortly. In any event, Nicaragua's selective interpretation of this timetable is curious, because it only focuses on the column on the right, which refers to the expected dates for construction, but it ignores the column on the left, which refers to the design phase. Clearly this timetable is outdated. The deadlines corresponding to the design phase have not been met, so the entire schedule has been pushed back. Although several public tenders have been carried out in recent months to contract the final designs of the road, at the present time, it has not been possible to conclude any contracts. And without designs, there will be no further construction work on the road in the short term, except for some works on bridges which are currently being carried out.

#### **D. Mitigation works**

19. Mr. President, Members of the Court, despite the exaggerated claims made by Nicaragua, this is a project which is certainly being proceeded with as a matter of priority. It is also being pursued with all due regard for environmental impact, and in full compliance with the law, particularly public contracting requirements. This is precisely the reason why works have not advanced as rapidly as we would all have liked. But the setbacks that the Costa Rican Government

has encountered have not led to the disaster Nicaragua is trying to make out. Plainly, they do not risk irreparable prejudice to any of Nicaragua's rights claimed in the present case. This is the issue which is the subject of these hearings on Nicaragua's Request for provisional measures.

20. Since April 2012 the Costa Rican Government has been carrying out works to consolidate what has already been commenced, and to remediate aspects of it. In fact, a series of remedial actions have been undertaken by Costa Rica, and technical reports explaining them have been provided to the Court and to Nicaragua in the context of these hearings. Nicaragua itself included in its Memorial an environmental management plan prepared by Costa Rica's Ministry of the Environment, which has formed the basis for many of the mitigation works<sup>31</sup>. Among the documents Costa Rica has submitted is an updated report by the Vice-Minister of the Environment explaining some of the actions taken so far in accordance with this plan<sup>32</sup>. A more complete environmental diagnostic study will be annexed to Costa Rica's Counter-Memorial next month.

21. The reports that Costa Rica has now submitted at this incidental phase suffice to deny the picture Nicaragua is trying to portray. A report published by CONAVI on 25 October 2013 details the works on the road that Costa Rica completed between February and April of this year<sup>33</sup>. A series of "before" and "after" photographs are included in this report, some of which are now shown on the screen.

22. The expert report by Professor Colin Thorne refers to the works he personally witnessed during the visits he made to Costa Rica this year, including the reforested areas<sup>34</sup>. He concludes that "the measures taken by Costa Rica have reduced and will continue to reduce the risk that significant erosion might occur during heavy rainstorms, compared to conditions immediately following construction of the Road", and "they will significantly reduce local erosion rates for the next year or two, allowing time for the work necessary to design, contract and build permanent works".

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<sup>31</sup>*Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* MN, Ann. 2.

<sup>32</sup>Report from Ana Lorena Guevara Fernández, Vice-Minister of the Environment, Costa Rica, to Enrique Castillo Barrantes, Minister of Foreign Affairs, Costa Rica, Ref. DVM-293-2013, 8 Oct. 2013, Attachment CR-5.

<sup>33</sup>Consejo Nacional de Vialidad (CONAVI), Program for the Consolidation and Continued Improvement of Route No. 1856, Ref. DIE-02-13-3107, 25 Oct. 2013, Attachment CR-3.

<sup>34</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, p. 41, para. 89

23. The picture of the road that Nicaragua is trying to portray does not correspond to reality. The road is not the huge disaster that Nicaragua claims it to be. The photos on the screen give a fair overview of the situation on the ground. They show what has been done, and they demonstrate that the situation is not as Nicaragua would have you believe.

24. Additional works are currently being carried out, and concrete plans are in place for future work. Seven locations where remediation work will be undertaken have been identified between Marker II and Delta Costa Rica, and these are shown in the map at tab 15 of your folders and now projected on the screen. Work at the first three points, which are located between the town of Tiricias and east of the Infiernito River, will be carried out directly by Costa Rica's Ministry of Public Works, with its own machinery and personnel. In the case of points four, five and six — in order to avoid using heavy machinery that might create additional disturbances — manual labour will be used, for which the Ministry of the Environment is in the process of contracting an NGO specializing in this kind of work. These works will include the stabilization of slopes, building ditches, culverts and sediment traps, as well as planting of vegetation. Grass particularly adapted to prevent erosion has already been planted on a number of slopes. Attachment CR-6 includes several photos showing the slopes both before and after the works were carried out<sup>35</sup>.

25. Costa Rica has also carried out tree planting on a large scale in the border area since April 2012, mainly on the bank of the San Juan River, and proximate to the road. To date, Costa Rica has planted approximately 27,000 trees of native species in different sites along the road, which currently range in height between 1 and 3 metres<sup>36</sup>. In late September 2013, a second phase of the reforestation project began, and it is expected to include the planting of 25,000 more trees, to reach a total of 52,000 trees<sup>37</sup>.

26. In its Request, Nicaragua has listed a series of measures that it asks the Court to order Costa Rica to undertake as part of the second provisional measure it is seeking. Mr. President,

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<sup>35</sup>Comisión de Desarrollo Forestal de San Carlos (CODEFORSA), Consulting Services for the Development and Implementation of an Environmental Plan for the Juan Rafael Mora Porras Border Road, Report of Activities to the Ministry of Foreign Affairs of the Republic of Costa Rica, January 2013, Attachment CR-6.

<sup>36</sup>Report from Ana Lorena Guevara Fernández, Vice-Minister of the Environment, Costa Rica, to Enrique Castillo Barrantes, Minister of Foreign Affairs, Costa Rica, Ref. DVM-293-2013, 8 Oct. 2013, p. 2, Attachment CR-5.

<sup>37</sup>*Ibid.*

Costa Rica is already undertaking necessary measures to improve the roadworks in the border area and it has been doing so for a long time. Professor Kohen will discuss in more detail why the second provisional measure requested by Nicaragua is not only groundless but unnecessary.

27. Mr. President, Members of the Court, I thank you for your patience, and I respectfully ask you to call on Mr. Wordsworth.

The PRESIDENT: Thank you very much, Mr. Brenes. Now I call on Mr. Samuel Wordsworth to continue. You have the floor, Sir.

Mr. WORDSWORTH:

## **NO IRREPARABLE PREJUDICE**

### **A. Introduction**

1. Mr. President, Members of the Court, it is a privilege to appear before you, and to have been asked by the Republic of Costa Rica to address the risk of irreparable prejudice as put forward by Nicaragua; and there are four introductory points that I wish to make, before turning to the details on this aspect of Nicaragua's Request.

2. First, Nicaragua's Request has, of course, been made at an unusual stage in the proceedings, and the Court may feel that it has an unusually large body of evidence before it for a provisional measures hearing, including two new reports from Nicaragua's expert, Dr. Kondolf, as well as his report submitted with Nicaragua's Memorial — and I hear that there may even be a fourth report on its way. And it follows that, even more than usual, there is an important filtering exercise in which the Court must engage so far as concerns the assertions and evidence before it at this provisional measures stage. All that is relevant for present purposes is Nicaragua's case, and its evidence, on whether there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court gives its final decision<sup>38</sup>. Nicaragua's points, such as on corruption on the part of various contractors two or three years ago, or on whether the road as

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<sup>38</sup>See *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; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 392, para. 129.

initially built was accompanied by an environmental impact assessment, may conceivably be relevant when it comes to the merits; but they offer little if any assistance in terms of whether, as of today, there is the requisite real and imminent risk.

3. Secondly, Nicaragua has now had some 23 months to collate its evidence on real and imminent risk, which makes it all the more remarkable that the evidence — when one drills down to what is potentially relevant data, as opposed to general proposition — comes to no more than

- (a) a large number of photographs of alleged slope failures, and so-called “deltas” of sediment;
- (b) two limited sampling exercises; and, of course,
- (c) the captivating video, and stills, taken of a plastic culvert that Nicaragua has apparently dragged into the river from some Costa Rican side-stream, some two weeks after Nicaragua had made its provisional measures request.

4. I shall come back to the details shortly, but the point for now is that Nicaragua has had nearly two years to submit detailed evidence on the sediment content of the river pre- and post-construction of the road, together with detailed evidence of how an increased sediment load is creating a real and imminent risk to navigation, to identified species within the river’s ecosystem, and to human health. But, despite the impressionistic picture that Nicaragua presented to you yesterday, accompanied by reference to a limited number of passages from Dr. Kondolf’s report of 30 October, that necessary evidence is wholly lacking on Nicaragua’s side. Much was made by my friend Professor McCaffrey yesterday of the accretion of sediment, a supposed death, he said, by a thousand cuts<sup>39</sup>. But it was, perplexingly, accretion in the abstract, and he gave you none of the data that you need to assess whether increased sediment from the road adds materially to what is already a sediment-heavy river, and whether this, in turn, creates a risk of irreparable prejudice.

5. Thirdly, and by contrast, the necessary studies on increased sediment load in the San Juan have been carried out by Costa Rica’s experts. Now that work, of course, has not been done overnight, but it has been underway for many months, as part of the research needed for the Counter-Memorial that you’re going to be receiving in around six weeks. And the focus of the research has not just been on how much sediment may come from the road, but how much there is

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<sup>39</sup>CR 2013/28, p. 23, para. 1 (McCaffrey).

already in the river — because, of course, you cannot even begin to consider actual or potential impacts to the river until you have identified the relevant baseline conditions. If — and this struck me as being notably defensive — Nicaragua’s case on risk is of death by a thousand cuts, then that risk cannot be made out by submitting evidence in the abstract of cuts numbers 999 and number 1000, which in effect is all that Nicaragua has done. You have to look at what happened beforehand to see if these alleged additional cuts will have any material impact. And that has been Costa Rica’s approach — to engage in a detailed study of past and current sediment loads, and monitoring of sedimentation from the road, as contained in the reports carried out by the Department of Hydrology at Costa Rica’s Institute of Electricity and by the Department of Civil Engineering at the University of Costa Rica, all as requested by Costa Rica’s independent expert Professor Thorne, who has also submitted a report.

6. These reports are at tabs 17-19 of the judges’ folder, and I’ll return to them shortly, but what I hope is going to be helpful to the Court is that, when it comes to looking in greater detail at the expert evidence, it will become clear that this is not a request that is likely to turn on whether the Court prefers the evidence of expert X or expert Y. Rather, the evidence submitted respectively by Costa Rica and by Nicaragua is different in scope and approach; and, when it comes to the issue of risk of irreparable prejudice, there are material gaps in data and monitoring that Nicaragua has seemingly chosen not to fill.

7. And this leads to my fourth introductory point, which is that, stepping back for a moment, such gaps in Nicaragua’s evidence are entirely as one would expect. If Nicaragua really had a hard-edged case on real and imminent risk, that case would have been vigorously pursued when Nicaragua’s Application was made almost two years ago, or at the very latest when its Memorial was lodged in December of last year. But of course there was nothing — merely a reservation of rights, coupled with the fig leaf of a request that the Court order some measures of its own accord. States faced with real risks of irreparable prejudice do not hesitate to pursue what — and I fear this is another fig leaf — Nicaragua now chooses to characterize as costly and time-consuming provisional measures proceedings<sup>40</sup>. Of course they just get on with it. In Nicaragua’s prior failure

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<sup>40</sup>CR 2013/28, p. 12, para. 4 (Argüello).

to pursue a provisional measures request with the usual vigour speaks volumes as to the reality, that is, the absence of the risks that it is belatedly alleging.

### **B. Nicaragua's case on irreparable prejudice**

8. Now, with those four introductory points in mind, I turn to the details of Nicaragua's case on irreparable prejudice which, as set out in its Request of 11 October 2013, is to the effect that there has been "a surge in the San Juan River's sediment load requiring Nicaragua to take active efforts, including dredging", and that there is "irreparable damage that is being inflicted on the river and its surrounding environment, including on navigation and the health and the wellbeing of the population living along its margins"<sup>41</sup>.

9. So far as concerns the alleged surge, this should be easy for Nicaragua to evidence through sampling and monitoring. There either has been a marked jump in sediment content of the river since the initial construction of the road in 2011, or there has not. And it is Nicaragua's sovereign river, so it has had every opportunity to conduct and submit the relevant sampling data. But it has submitted nothing by way of data to support the existence of the alleged surge.

10. By contrast, Costa Rica's experts have compared records of measured suspended sediment concentration in periods prior to and subsequent to construction of the road. So far as concerns the pre-construction period, the available records are from 1974-1976, and in fact were recorded jointly by the two parties, and were, as I understand it, relied on in Nicaragua's Counter-Memorial in the *Navigational Rights* case (at para. 1.1.8). The methodology followed in effecting the necessary comparison is detailed in section 2 of the Institute of Electricity report at tab 18 of your folders, and the comparison has also been made by Professor Thorne in his report at tab 17.

(a) If I can ask you to turn to Professor Thorne's report at tab 17, and to go to page 8. One sees there, toward the top of the page the heading "Is there evidence of a surge in sediment load in the Río San Juan since December 2010?".

(b) And Professor Thorne says:

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<sup>41</sup>Letter from Nicaragua to the ICJ, 11 Oct. 2013, Ref. HOL-EMB-196.

“To ascertain whether there is evidence to support Nicaragua’s assertion that there has been a surge in the San Juan River’s sediment load since construction of the Road, I examined available records of measured Suspended Sediment Concentration (SSC) in the Río San Juan — Río Colorado system prior to and following construction of the Road.”<sup>42</sup>

(c) And if I can ask you then to turn to paragraphs 18-19, which are on page 10. One sees there below figure 2:

“If additional sediment from the Road had caused a surge in the rate of sediment transport in the Río San Juan, this would reflect in Figure 2 through increases in the SSCs measured since 2010 and a corresponding upward shift in the 2010-2013 suspended sediment rating curve compared to that for 1974-1976. [It is a very straightforward comparison.] It is clear from Figure 2 that this is not the case.

On the contrary, the highest measured concentration (SSC > 600 mg l<sup>-1</sup>) was actually observed during the period *prior to* construction of the Road and the distribution of 27 of the 31 post-Road measured concentrations in Figure 2 coincides with that of the pre-Road data. Not only is there no statistically significant difference between the pre- and post-Road suspended sediment rating curves, Figure 2 reveals them to be practically identical. This suggests that any differences between pre- and post-Road SSCs measured at these stations are the result of random chance.”<sup>43</sup>

11. So in short, there is no evidence of any surge, and that point is reinforced when one considers the relative increase in river sediment content that the road leads to, even on the figures of Nicaragua’s expert, Dr. Kondolf.

12. If I can ask you to stay with Professor Thorne’s report for the moment, still at tab 17 of your folders, and move onto paragraph 56 which is at page 23 of the report.

(a) And you see there under the heading “Estimated annual load of Road-related sediment supplied to the Río San Juan”:

“According to the data and calculations presented in the 2012 Kondolf Report (page 46), the average total quantity of sediment supplied to the Río San Juan by the Road annually is 87 000 to 109 000 m<sup>3</sup> y<sup>-1</sup>. As explained in paragraph 31 above, this estimate includes all potential sources of sediment input considered significant in the 2012 Kondolf Report (a finding not revisited in Annex 2) [and that is a reference to Dr. Kondolf’s reports of this October], including surface erosion and mass wasting.”<sup>44</sup>

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<sup>42</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, tab 17 of Costa Rica’s judges’ folders, para. 15.

<sup>43</sup>*Ibid.*, paras. 18-19. See also Comparison of Sediment Load in the San Juan River before and after Route 1856, tab 20 of Costa Rica’s judges’ folders.

<sup>44</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, tab 17 of Costa Rica’s judges’ folders, para. 56.

Now, Professor Thorne says that Dr. Kondolf's figures are wrong, and I'll come back to that later; but the important point for now is that Professor Thorne is taking the figures of Nicaragua's expert, Dr. Kondolf, and overleaf you can see at paragraph 61, Professor Thorne has to go through the process of converting these figures in  $\text{m}^3$ , into metric tonnes in order to be able to effect the comparison with the sediment load that this already in the river. And he converts the figures to 157,180 to 182,030 tonnes per year. Still Dr. Kondolf's figures. And then of course these figures must be compared to the annual average sediment load in the river so that one can start to consider issues of impact — the key issue before you today: whether there is a real and imminent risk of irreparable prejudice.

(b) Moving on to paragraph 63, at the top of page 25, there is a reference there to the ICE, that is the Institute of Electricity, Report:

“ICE monitor sediment transport at multiple gauging stations within the basin of the Río San Juan, including the Delta Colorado (Station 691104) on the Río Colorado immediately downstream of the Delta (see Figure 1). According to their records, and as explained in the ICE Report, the average annual total sediment load (that is suspended load plus bed load) carried by the Río San Juan between December 2010 and June 2013 was around 9 133 000 t yr<sup>-1</sup>. In the ICE Report, it is estimated that at the Delta, 8 470 000 t yr<sup>-1</sup> pass to the Río Colorado and 663 000 t yr<sup>-1</sup> to the lower Río San Juan.”

Professor Thorne then starts to draw conclusions, at paragraphs 64 and 65.

#### **“5.5.4 Input of Road-derived sediment to the Río San Juan**

The sediment derived from erosion related to the Road as estimated by Dr. Kondolf, makes up 1 or 2% of the total sediment load carried by the Río San Juan which is obviously too small a proportion to have a significant impact on the River.

Assuming that 10% of the additional sediment enters the lower Río San Juan suggests that the average annual input of Road-derived sediment to the lower Río San Juan is 15 718 to 18 203 t y<sup>-1</sup>, which constitutes 2 or 3% of the total load in the lower Río San Juan downstream of the Delta.”

Now it is important of course to pause here, because I may need to emphasize the downstream of the sector of the road that is at issue, the waters and the sediment load divide, with approximately 90 per cent — I believe those are Nicaragua's figures — going into the Rio Colorado in Costa Rica, and 10 per cent going into the Lower San Juan. So, this diversion of the waters and their sediment load must of course be taken into account. Professor Thorne's Report continues, at paragraph 66:

### “5.5.5 Potential impact on sedimentation in the lower Río San Juan

The lower Río San Juan is approximately 30 km long and it has an average channel width around 90 m, giving it a bed area of about 2.7 million m<sup>2</sup>. Using Dr. Kondolf’s estimate of sediment delivery to the Río San Juan (87 000 to 109 000 m<sup>3</sup>y<sup>-1</sup>), conservatively assuming that 10% of this enters the lower Río San Juan (8 700 to 10 900 m<sup>3</sup>y<sup>-1</sup>), and supposing that all of the Road-related sediment were deposited on the bed of the lower Río San Juan (with none at all deposited on the floodplains and in the wetlands or passing through to the Caribbean Sea, which is extremely conservative), the average increase in the rate of aggradation of the bed would be 3 to 4 mm y<sup>-1</sup>.”

He continues at paragraph 67:

“It is immediately obvious that the addition of even the quantity of additional Road-derived sediment estimated by Dr. Kondolf to the total annual sediment load of the lower Río San Juan could not have impeded navigation or required Nicaragua to take active efforts, including dredging, to maintain the capacity and quantity of the River’s waters.”<sup>45</sup>

(c) And of course it follows that the accretion that Professor McCaffrey referred to yesterday is entirely illusory. And it is not just that it is counter to Costa Rica’s evidence that I am just taking you to now; it is unsupported even by Nicaragua’s evidence.

(d) For good measure, if I can just take you to how Professor Thorne concludes in his report— you will there, at the top of page 26, under the heading “Inputs of Road-derived sediment are not just insignificant, they are undetectable”.

And one goes down then, for the conclusion, to paragraphs 72 and 73:

“The increase of 1 or 2% predicted based on Dr. Kondolf’s estimated range for delivery of road-derived sediment to the Río San Juan falls well within the range of natural variability of sediment loads in the River represented by a confidence interval of +/- 20%, meaning that even if such a change in load were to occur it would be indiscernible and statistically undetectable in records of measured loads.

The bed of the lower Río San Juan is formed in mobile sand, self-organised into ripples and dunes with amplitudes ranging from centimetres up to a metre or more, respectively. The bed also features pools and bars that cause in-channel depths to vary from several metres to a metre or less. It follows that a change in the rate of sedimentation by 3 or 4 mm y<sup>-1</sup> (which is one and a half to two times the diameter of a single sand grain) would be imperceptible in the field and immeasurable using even high precision sonar equipment.”<sup>46</sup>

13. So much, one might also say, for Mr. Reichler’s contention that there is urgency because the sediments are “accumulating to dangerous levels that have already harmed the river irreparably,

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<sup>45</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, tab 17 of Costa Rica’s judges’ folders, paras. 63-67.

<sup>46</sup>*Ibid.*, paras. 72-73.

and threaten to cause further irreparable harm”<sup>47</sup>. Where, one must ask, is the evidence to support that contention?

14. It follows that one can deal in very short order with the alleged risks to navigation. These are illusory. Sediment increases that equate to 1-2 times the diameter of a grain of sand do not risk impacting on Nicaragua’s navigation on the Lower San Juan.

15. One can deal in equally short order with the alleged irreparable damage to the health and wellbeing of the population living on the margins of the San Juan River. Nicaragua has not troubled to go beyond the bare assertion that is to be found in its Request of 11 October, and there is no evidence of any kind to support this facet of alleged irreparable prejudice.

16. That leaves the alleged irreparable damage to the San Juan River and its environment.

17. The Court already has the big point on this, which is that the river is already adapted to carrying a heavy sediment load, and such increased sediment as the road has led to is very small in relative terms, even on Dr. Kondolf’s figures on sediment coming from the road.

18. However, and this is the point that follows from the detailed monitoring exercise carried out by the University of Costa Rica at tab 19 of your judges’ folder, Dr. Kondolf’s figures are a significant over-estimate. The research work of the University of Costa Rica is summarized and considered at Section 5.3 of Professor Thorne’s report. As one can see from paragraph 32 of that report, nine of the most active sites for erosion and landslides have been selected for monitoring by the University of Costa Rica.

19. The conclusions are then summarized at paragraphs 43-44, and this is at page 18 of Professor Thorne’s report, where he says,

“Monitoring of landslide and gully erosion reported by UCR above suggests that the rate of land surface lowering estimated in the 2012 Kondolf Report is probably too high by a factor of five. Further, UCR field monitoring indicates that landslides and gullies on average cover around 10 to 15% of the slopes with these features, so the 40 to 50% estimate of the area of the Road on which this erosion is occurring which is adopted in the 2012 Kondolf Report would also appear to be significantly too high.

In my experience, including my inspections of the Road in February and May 2013, of land surface lowering due to landslides and gullies averaging  $1 \text{ m y}^{-1}$  is too high and it is unlikely to be accurate. Also, the assumption that landslides and gullies cover 40 to 50% of slopes and other disturbed areas overstates the extent of

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<sup>47</sup>CR 2013/28, p. 38, para. 6 (Reichler).

these features. Conversely, the monitored rates and areas affected as summarised in Table 3 [that is a table that is taken from the data in the University of Costa Rica report] are entirely reasonable and, in my opinion, more reliable.”<sup>48</sup>

20. Professor Thorne then addresses, at section 5.4, at page 20 of tab 17, the question of whether the calculated delivery rates for road-derived sediment based on the result of field monitoring are sufficient to cause significant or irreversible damage to the Rio San Juan. The answer, as appears from paragraphs 52-54 of his report, is “no”.

21. Again, Nicaragua has not provided you with evidence to the contrary that is based on actual monitoring, or actual measurements of sediment increases in the river.

22. You do have Professor McCaffrey’s image of 5,000 dumper trucks pouring their loads of sediment into a sink<sup>49</sup>, but that is at best an inaccurate analogy because it implies the use of the river for waste disposal, whereas Nicaragua’s evidence is all about alleged failures in construction and mitigation measures, not deliberate tipping by Costa Rica of sediment into the river. It is also an unhelpful analogy for Nicaragua, as talk of the river as a sink leads naturally to the question of what happens next with the plumbing. And the answer to that question is that the waters of the river and the sediments they carry split downstream, with around 90 per cent going into Costa Rica and 10 per cent remaining in the Lower San Juan. So if the road were causing risk of irreparable prejudice to the environment, which it is not, that risk would be felt by Costa Rica also, and it is not.

23. Now, you have been shown various photographs, but these do not evidence real and imminent risk of irreparable prejudice.

24. I take the photos of the sediment deltas that you were shown yesterday<sup>50</sup>. These are said to be caused by the road. Well, maybe yes, maybe no; but the important point for now is that such deltas are also to be found on the Nicaraguan side of the river, where they can have nothing whatsoever to do with the road.

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<sup>48</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, tab 17 of Costa Rica’s judges’ folders, paras. 43-44.

<sup>49</sup>CR 2013/28, pp. 35-36, paras. 37-39 (McCaffrey).

<sup>50</sup>*Ibid.*, p. 30 (McCaffrey).

25. Now I refer you to the photographs at pages 28-32 of Professor Thorne's report, some of which are now up on the screen, and you can see, there again, these sand sediment deltas on the Nicaraguan side of the river.

26. Further, these deltas are not harmful: one can see that from paragraph 77 of Professor Thorne's report (from the end of the fifth line on page 33) — where he says:

“The limited size and wide spacing of the tributary deltas I observed in the Río San Juan in May 2013 means that they do not harm the River. Indeed, to the contrary, tributary bars and deltas are beneficial to the aquatic and riparian ecosystems because, for example, they provide fresh habitats and open niches for pioneer plant species . . .”<sup>51</sup>

27. You were also shown photographs of erosion and what were said to be various slope failures<sup>52</sup>. But what matters is how much of the sediment is in fact reaching the river, and whether it risks causing irreparable harm there.

28. The high point of Nicaragua's case, in this respect, is at page 2 of Dr. Kondolf's report of 30 October, which was put up on your screens, and quoted at various junctures by Nicaragua's counsel. And, to remind you, what he says is as follows:

“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.”<sup>53</sup>

29. Now, there are two points to make about this.

30. The first is that this is not a region where there are hurricanes or tropical storms. I am sure that Nicaragua will be doing its homework on this overnight, but this is the map, which is actually of historical hurricane tracks, prepared by the United States National Oceanic and Atmospheric Administration — it is also at tab 22 of your judges' folder — and what you can see from that is how the hurricanes pass to the north of the area that we are now concerned with. As

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<sup>51</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, tab 17 of Costa Rica's judges' folders, para. 77.

<sup>52</sup>CR 2013/28, pp. 29-30 (McCaffrey).

<sup>53</sup>G. Mathias Kondolf, *Continued Impacts from Erosion from Rte 1856, Costa Rica, to the Río San Juan, Nicaragua*, 30 Oct. 2013, Ann. 2 to letter from Nicaragua to the ICJ, 1 Nov. 2013, Ref. HOL-EMB-223, p. 2.

Professor Thorne explains, at paragraph 83 of his report: “if this region were to suffer a tropical storm or a hurricane, not only would this be devastating, it would be unprecedented”<sup>54</sup>.

31. Secondly, we obviously want the Court to review Dr. Kondolf’s recent reports with great care, but we have been struck by how much has been taken from his report of December 2012, which did not then precipitate a provisional measures request from Nicaragua, and also by how many of the propositions in the new reports are entirely general.

32. For example, Professor McCaffrey relied on page 7 of Dr. Kondolf’s report of 30 October, where he says that: “Increased delivery of coarse sediment to rivers [plural] can result in significant changes to river processes, causing aggradation of the river channel . . .”<sup>55</sup> Well, no doubt. But that is not evidence that there is a risk of this aggradation so far as concerns increased sediment from the road into the San Juan, and indeed the evidence which is specific to this case shows that there is no risk of this at all, let alone any risk of irreparable prejudice as a result.

33. Similarly, at page 7 of Dr. Kondolf’s report of 30 October, it is said that: “The delivery of massive volumes of sediment to rivers has resulted in significant ecological damage.”<sup>56</sup> Again, maybe, yes. But again, that tells one nothing about whether the specific alleged volumes of sediment in this case have created a risk of irreparable prejudice so far as concerns the particular river at issue, the San Juan River.

34. A further example is given at paragraph 79 of Professor Thorne’s report. This is at the bottom of page 33. He explains as follows:

“On page 8 (paragraph 3) Dr. Kondolf alludes to the finding reported by Reid and Dunne (2003) that ‘road-related sediment can dominate the sediment budget in many rivers’. As a general proposition and in the abstract, I agree with this statement. But Reid and Dunne were not referring to the Río San Juan. In Attachment CR-1 [and that is a reference to the Institute of Electricity report], ICE have constructed a sediment budget specific to this River: the Río San Juan. The result is depicted in Figure 11 (reproduced from Attachment CR-1), which illustrates that the contribution of road-related sediment is tiny in the context of this River. Road-related sediment

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<sup>54</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, tab 17 of Costa Rica’s judges’ folders, para. 83.

<sup>55</sup>CR 2013/28, p. 32, para. 26 (McCaffrey).

<sup>56</sup>G. Mathias Kondolf, *Continued Impacts from Erosion from Rte 1856, Costa Rica, to the Rio San Juan, Nicaragua*, 30 Oct. 2013, Ann. 2 to letter from Nicaragua to the ICJ, 1 Nov. 2013, Ref. HOL-EMB-223, p. 7.

may dominate the sediment budget in many rivers, but the Río San Juan is not one of them.”<sup>57</sup>

35. There are two instances where Dr. Kondolf relies on specific sampling data, and I wish to look briefly at these.

36. The first is at page 11 of his 30 October Report, where he relies on three samples of water taken from the river which are said to show high sediment content resulting from run-off from the road after a brief intense downpour. Costa Rica’s experts have looked at — not three, but rather — 2,409 samples from the river and its Costa Rican tributaries. And, as Professor Thorne observes at paragraph 81, “the concentrations in the plume of muddy-water are not high in the context of SSC’s routinely observed in runoff draining to the Río San Juan, or even in the River itself”<sup>58</sup>. And he then goes on to explain how, in any event, such concentrations will be quickly dissipated.

37. The second instance is at page 13 of Dr. Kondolf’s Report, where he states that a colleague collected periphyton samples — I understand that these are some samples of certain algae and bacteria and detritus — and those were collected from the river: four from the sites on the Costa Rican bank said to be impacted by sediment run-off from the road; and five from what is described as “relatively undisturbed landscapes” on the Nicaraguan bank<sup>59</sup>. It appears that the result of this analysis showed that there was a higher periphyton biomass in the samples collected from the Costa Rican side, providing what Dr. Kondolf then describes as “one indication of the negative ecological effects of sediment eroded from Rte 1856 upon the Río San Juan”<sup>60</sup>. It is not said by Dr. Kondolf to constitute evidence of risk of irreparable harm and, further, as Professor Thorne points out at paragraph 82 of his report, there is no explanation in Dr. Kondolf’s Report as to whether the samples used from either side of the river were actually comparable.

38. By contrast, so far as concerns real and imminent risks of irreparable prejudice to the environment, what one would expect to be seeing, in particular in light of Professor McCaffrey’s

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<sup>57</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, tab 17 of Costa Rica’s judges’ folders, para. 79.

<sup>58</sup>*Ibid.*, para. 81.

<sup>59</sup>G. Mathias Kondolf, *Continued Impacts from Erosion from Rte 1856, Costa Rica, to the Río San Juan, Nicaragua*, 30 Oct. 2013, Ann. 2 to Letter from Nicaragua to the ICJ, 1 Nov. 2013, Ref. HOL-EMB-223, p. 13.

<sup>60</sup>*Ibid.*, p. 13, para. 2.

reference to 46 endangered species in the broader region<sup>61</sup>, is evidence of how identified individual species are being adversely affected, and why there is a risk of irreparable prejudice. But there is precisely none of that evidence before you.

39. Nicaragua's legal team did place great weight on a plastic culvert, which appears around a dozen times in the transcript, and was singled out for special video treatment. Perhaps in the second round, it will be explained how this culvert, as to which there is no evidence of how it found its way into a small side-stream, establishes a real and imminent risk of irreparable prejudice. We are rather baffled.

40. I wish finally to touch on two miscellaneous points before handing over to Mr. Ugalde to look at the issues on urgency, no doubt after the morning break.

41. First, my friend Professor Pellet drew your attention yesterday to two decisions of the Central American Court of Justice: a preliminary decision in January 2012, and a further decision of June 2012. He said that the CACJ had ordered Costa Rica to suspend further works on the road, and that it had held Costa Rica in contempt of its order by failing to suspend the works<sup>62</sup>.

42. But the simple point is that Costa Rica is not a party to the Statute of the Central American Court of Justice<sup>63</sup>. For this reason, Costa Rica did not participate in those proceedings; for this reason, Costa Rica is not bound by any orders of the CACJ and, likewise, no weight can be accorded to such orders by this Court. I should add that the Counter-Memorial will address in rather more detail this surprising attempt by the CACJ to impose its jurisdiction on Costa Rica.

43. Secondly, a new case was enthusiastically embraced by Mr. Reichler yesterday — to the effect that it is the completion of works, as announced by Costa Rica's Minister of Public Works and Transportation in March of this year, that establishes the requisite risk of irreparable prejudice and urgency<sup>64</sup>. The document relied on is now at tab 23 of your folders: we put it there in full because Mr. Reichler had only put in some very limited extracts. Now Mr. Ugalde will look at this from the perspective of urgency, shortly, but the question I have to ask is where is the evidence that

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<sup>61</sup>CR 2013/28, p. 34, para. 30 (McCaffrey).

<sup>62</sup>*Ibid.*, p. 65, para. 51 (Pellet).

<sup>63</sup>See Extract from CACJ website, "The challenge is having Panama and Costa Rica join", available at [portal.ccej.org.ni/ccj2/Publicar/tabid/88/EntryId/3/-El-reto-es-que-Panama-y-Costa-Rica-se-integren.aspx](http://portal.ccej.org.ni/ccj2/Publicar/tabid/88/EntryId/3/-El-reto-es-que-Panama-y-Costa-Rica-se-integren.aspx), tab 24 of Costa Rica's judges' folders.

<sup>64</sup>CR 2013/28, p. 38, para. 7 (Reichler).

any of the works in the Action Plan may cause irreparable prejudice? For example — if I may ask you just to turn to pages 10-14 of this report — you can see there a reference to two phases of mitigation works. So is it these mitigation works, and the details then set out in the pages that follow, that are causing Nicaragua such concern? It is all quite unclear; but what is clear is that there is no evidence before you which identifies how the remedial and other work specified in this document give rise to a risk of irreparable prejudice — as opposed in fact to addressing the erosion and construction issues that had previously been the focus of all Nicaragua’s criticism.

### **C. Conclusion**

44. Mr. President, Members of the Court, that concludes my remarks. I thank you for your kind attention, and I ask that the floor be given to Mr. Ugalde, perhaps after the morning break.

The PRESIDENT: Thank you very much, Mr. Wordsworth. I think everybody is going to benefit from a 15-minute coffee break. The sitting is suspended. Afterwards I will give the floor to Mr. Ugalde. Thank you.

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

The PRESIDENT: Please be seated. The hearing is resumed and, Mr. Ugalde, I give you the floor.

Mr. UGALDE:

#### **NICARAGUA’S REQUEST DOES NOT MEET THE REQUIREMENT OF URGENCY**

1. Mr. President, distinguished Members of the Court: it is an honour to appear before the Court on behalf of Costa Rica this morning. I will address the absence of the second of the essential conditions for the indication of provisional measures, that of urgency. I shall be brief.

2. This Court has consistently held that a party seeking provisional measures must show that “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”<sup>65</sup>. There must be a risk, in the sense that if measures are not indicated, a right *pendente lite* will be irreparably prejudiced.

3. Nicaragua’s Request does not and cannot meet the established requirement of urgency. This is for three reasons: first, Nicaragua’s Request is not based on any new facts or events; secondly, Nicaragua’s Request has been made twice before — and rejected — and nothing has happened since to create an imminent risk of irreparable prejudice; and thirdly, there is indeed *no* imminent risk of irreparable prejudice. I will deal with each of these issues in turn.

4. Before I do so, and in order to give some perspective, I take the liberty of showing some footage of the actual conditions of the river — and I am showing some *two minutes of footage* — the entire 17-minute video has been filed with the Registry. Photographs and video footage filed by Costa Rica show the condition of the river less than a week ago. As the images now on your screen demonstrate, the river is running its normal course. No road or any part of any road has fallen into the river or is about to. The course of the river has not changed in any way. It is the same river, running its ordinary course, even though we are at the height of the rainy season, as Nicaragua stated in its Request<sup>66</sup>. And, as I will now show, there is no situation of imminent risk which would justify the indication of provisional measures in this case.

#### **A. Nicaragua’s Request is not based on any new facts or events**

5. Turning to the first of the reasons why Nicaragua’s Request must fail for lack of urgency, it is apparent that Nicaragua’s Request is not based on the discovery of any new facts, or the imminent occurrence of any new events. In this respect, Nicaragua’s Request is unlike any other case in which the Court has indicated provisional measures. Every other provisional measures request has been preceded by the occurrence of some event, or some new fact. This is clear from a short survey of some of the Court’s decisions.

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<sup>65</sup>*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; see also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 392, para. 129; Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II), p. 548, para. 47.*

<sup>66</sup>Letter from Nicaragua to the Court, 11 Oct. 2013, Ref. HOL-EMB-196, p. 3.

- (a) For example, in 2000, in *Democratic Republic of the Congo v. Uganda*, fighting between Ugandan and other foreign troops was resumed, and this precipitated the request for provisional measures by the Congo<sup>67</sup>. The Court held that “persons, assets and resources present on the territory of the Congo, particularly in the area of conflict, remain extremely vulnerable” and that there was “present urgency in the situation”<sup>68</sup>.
- (b) In 2011, in the *Certain Activities* case, Costa Rica’s request was preceded by the occupation of its territory by Nicaraguan military forces, and the carrying out of works thereon, including the creation of an artificial *caño*<sup>69</sup>. The Court indicated provisional measures, referring to the “real and present risk of incidents liable to cause irremediable harm”<sup>70</sup>.
- (c) In 2011, in *Interpretation of the Judgment in Preah Vihear*, Cambodia’s request was preceded by serious armed incidents between it and Thailand in the border area, causing fatalities and injuries<sup>71</sup>. The Court referred to the instability of the situation in the relevant area and the potential that it could deteriorate, and it held that the requirement of urgency was met<sup>72</sup>.

6. All requests, including the Request made by Costa Rica in September this year, follow the same pattern — that is to say, some new event has occurred or at the very least some new fact has been discovered, which is said to have given rise to an imminent risk of irreparable prejudice of the rights at issue in the case.

7. In contrast, Nicaragua’s Request in this case was not preceded by the discovery of any new fact, or the occurrence of any new relevant event.

8. Of course, Nicaragua’s Request was in one sense preceded by an event: the filing of Costa Rica’s Request for new provisional measures in the *Certain Activities* case. In response to Costa Rica’s Request, and apparently on the basis of some litigation strategy, Nicaragua hastily

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<sup>67</sup>*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 114, para. 9.

<sup>68</sup>*Ibid.*, p. 128, para. 43.

<sup>69</sup>*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)*, pp. 10-11, paras. 13-19.

<sup>70</sup>*Ibid.*, p. 24, para. 75.

<sup>71</sup>*Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 539, para. 8.

<sup>72</sup>*Ibid.*, p. 551, paras. 55-56.

submitted an incomplete Request on Friday 11 October — literally on the eve of the hearing for the provisional measures requested by Costa Rica in the *Certain Activities* case<sup>73</sup>. It submitted no evidence with that Request, it did not identify with any specificity the rights which its Request was intended to protect. It did not submit a report of the May 2013 site visit to which it referred<sup>74</sup>; nor, I note, did Nicaragua then submit the report of Dr. Kondolf dated 12 October, which it provided to Costa Rica only last Friday<sup>75</sup>. That Nicaragua’s Request was indeed made for some procedural end, and that it was *not* motivated by any situation of urgency, is strongly suggested by the fact that Nicaragua asked the Court to hear both Requests simultaneously<sup>76</sup>.

9. Mr. President, Members of the Court, it hardly need be said that the filing by Costa Rica of a Request for new provisional measures in the *Certain Activities* case does not give rise to a situation of urgency such as would justify the indication of provisional measures in this, the *Road* case. Yet the filing of Costa Rica’s Request is the only thing which “happened” before Nicaragua elected to file its Request. Nicaragua’s Agent confirmed this fact. He said yesterday:

“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.”<sup>77</sup>

10. This statement by the Agent of Nicaragua is remarkable, because it also suggests that the true reason for their Request was not because of urgency, or because of the rainy season, or because of any event that might be said to risk irreparable prejudice to Nicaragua’s rights. The only reason Nicaragua filed this Request was that the Court was going to hold the hearings on Monday 14 October, on Costa Rica’s Request in the *Certain Activities* case. That is what the Agent said.

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<sup>73</sup>Letter from Nicaragua to the Court, 11 Oct. 2013, Ref. HOL-EMB-196.

<sup>74</sup>Referred to in Letter from Nicaragua to the Court, 11 Oct. 2013, Ref. HOL-EMB-196, pp. 2, 3.

<sup>75</sup>G. Mathias Kondolf, *Confirmation of Urgent Measures to Mitigate Erosion and Sediment Delivery of Rte 1856, Costa Rica, into the Río San Juan, Nicaragua*, 12 Oct. 2013, Ann. 1 to Nicaragua’s letter to the Court of 1 Nov. 2013, Ref. HOL-EMB-223.

<sup>76</sup>Letter from Nicaragua to the ICJ, 11 Oct. 2013, Ref. HOL-EMB-196, p. 3.

<sup>77</sup>CR 2013/28, p. 12, para. 4 (Argüello).

11. Notwithstanding this, you heard yesterday from Nicaragua a completely new reason which apparently motivated its Request. Nicaragua explained that it actually filed its Request because of an event which it never mentioned in its Request.

12. Relying upon a timetable set out in a powerpoint presentation prepared by the Costa Rican Ministry of Public Works and Transportation<sup>78</sup>, Nicaragua now claims that it brought this Request because Costa Rica “recently announced” that it would be recommencing construction on the road, in order to complete the construction between October and December 2014<sup>79</sup>. The presentation that Nicaragua relied upon is one which is accessed through a link given in an official Costa Rican press release. Nicaragua submitted the press release to the Court last Thursday 31 October, as Annex 2<sup>80</sup>. Nicaragua did not mention the press release as the source for the link to the Ministry of Public Works presentation, and it is clear why: the press release is dated 14 March 2013. The presentation of the Costa Rican Ministry of Public Works and Transportation was made on the same day as the press release, that is, nearly eight months ago.

13. Indeed, the date of the “recent announcement” was not the only thing Nicaragua omitted to mention to you yesterday. In fact, Nicaragua has already complained to the Court on two occasions about this very announcement. When it submitted its Request for the modification of your 2011 Order, in June this year, Nicaragua stated that: “Costa Rica has announced the recommencement of the construction of Road 1856.”<sup>81</sup> And when Nicaragua did so, it reminded the Court that it had already complained about this announcement, when it wrote to the Court on 28 February this year. On that date, Nicaragua reported to the Court that “the Government of Costa Rica has announced that the work on Road 1856 is about to be restarted, as has been confirmed by the Minister of Public Works”<sup>82</sup>. It attached to its letter three annexes showing that the work was

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<sup>78</sup>Costa Rican Minister of Public Works and Transportation, CONAVI, National Route 1856 Action Plan for Completion, 2013, submitted as An. 1 to Nicaragua’s letter to ICJ, 4 Nov. 2013, Ref. HOL-EMB-225, and reproduced in Costa Rica’s judges’ folders, tab 23.

<sup>79</sup>CR 2013/28, p. 38, para. 7 (Reichler).

<sup>80</sup>Letter from Nicaragua to the ICJ, 31 Oct. 2013, Ref. HOL-EMB-220, Ann. 2, “Government Strong on Comprehensive Development of the Boundary Strip Guarantees Conclusion of Route 1856”, 14 Mar. 2013, p. 2.

<sup>81</sup>Request by Nicaragua that the Court’s Order of 8 March 2011 in the case concerning *Certain Activities carried out in the Border Area (Costa Rica v. Nicaragua)* be modified or adapted to the Situation Created by the Joinder of the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 14 June 2013, para. 45, tab 28 of Costa Rica’s judges’ folders.

<sup>82</sup>Letter from Nicaragua to the ICJ, 28 Feb. 2013, Ref. 28022013-01, p. 2, tab 29 of Costa Rica’s judges’ folders.

about to be recommenced: those annexes are reports dated 25 and 31 January, and 3 February 2013<sup>83</sup>. They pre-date Nicaragua's Request for provisional measures by nearly nine months. Nicaragua's letter is at tab 29 of your folders.

14. So, the so-called "recent announcement" which motivated Nicaragua's Request of three weeks ago, and which Nicaragua contends "most underscores the urgency and immediacy of Nicaragua's request"<sup>84</sup>, was based on information which has been known to Nicaragua since January this year. That alleged motivation was not mentioned by Nicaragua in its Request<sup>85</sup>. We only knew about it until Monday this week<sup>86</sup>. And the reason it was never mentioned — of course — is because it was not the reason why Nicaragua made this Request. This is an attempt by Nicaragua, at the eleventh hour, to re-characterize its litigation strategy, and it does not stand up to scrutiny. Professor Kohen will return to this shortly.

**B. Nicaragua's Request is a repetition of the two requests it already made,  
both of which failed**

15. This leads me to the second reason why Nicaragua does not meet the standard of urgency required by this Court. Nicaragua's Request is a repetition of the two requests it already made, both of which were rejected by the Court.

16. The Court will recall that since it filed its Application in December 2011, nearly two years ago, Nicaragua has been half-heartedly claiming that there is a situation of urgency relating to the Border Road. Its Application referred to the imminent danger this road posed<sup>87</sup>. It reserved the right to bring a provisional measures request, in view of the urgency of the situation<sup>88</sup>. Nicaragua then informed the Court that it would not be in a position to file its Memorial until a year after its

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<sup>83</sup>Ann. 1-3 to the letter from Nicaragua to the ICJ, 28 Feb. 2013, Ref. 28022013-01, tab 29 of Costa Rica's judges' folders.

<sup>84</sup>CR 2013/28, p. 38, para. 7 (Reichler).

<sup>85</sup>Letter from Nicaragua to the ICJ, 11 Oct. 2013, Ref. HOL-EMB-196.

<sup>86</sup>See Costa Rican Minister of Public Works and Transportation, CONAVI, National Route 1856 Action Plan for Completion, 2013, submitted as Ann. 1 to Nicaragua's letter to the ICJ, 4 Nov. 2013, Ref. HOL-EMB-225, and reproduced in Costa Rica's judges' folders, tab 23.

<sup>87</sup>Nicaragua's Application in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 22 Dec. 2011, paras. 1 and 36.

<sup>88</sup>*Ibid.*, para. 55.

Application<sup>89</sup>. When Nicaragua submitted its Memorial on 19 December 2012, it asked the Court to grant provisional measures *proprio motu*, in view of urgency<sup>90</sup>. This was a year after Nicaragua's Application. The Court declined to do so<sup>91</sup>.

17. In May this year, Costa Rica made a Request for the modification of the 2011 Order in the *Certain Activities* case, based on new events in the disputed territory<sup>92</sup>. Apparently, in response, Nicaragua made its own request for modification, referring again to the measures that it had asked for in its Memorial, and the same measures it is asking for today<sup>93</sup>. At that time, Nicaragua stated that "Costa Rica has announced the recommencement of the construction of Road 1856"<sup>94</sup>, and it invoked this fact as a new factual situation justifying modification of your 2011 Order<sup>95</sup>. Again, the Court declined to indicate the measures requested by Nicaragua<sup>96</sup>.

18. In dealing with "urgency", Mr. Reichler said that:

"since filing its Application Nicaragua has exhausted every other avenue available to it, before a variety of international organizations and forums . . . Nicaragua had hoped that these efforts would avoid the need to impose on the Court the burden of these hearings. But they have all been unsuccessful . . ."<sup>97</sup>

Well, no one has ever suggested that there is some obligation on States to exhaust other available remedies before approaching this Court under Article 41 of the Statute, and there is of course nothing in Article 41 to that effect. States that have good grounds for seeking provisional measures

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<sup>89</sup>See Court's Order of 23 January 2012 in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, p. 2.

<sup>90</sup>*Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 19 Dec. 2012, MN, pp. 252-253, para. 4.

<sup>91</sup>See letter from the ICJ to Costa Rica, 11 Mar. 2013, Ref. 142641.

<sup>92</sup>Costa Rica, Request 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 (Costa Rica v. Nicaragua)*, 21 May 2013.

<sup>93</sup>Request by Nicaragua that the Court's Order of 8 March 2011 in the case concerning *Certain Activities carried out in the Border Area (Costa Rica v. Nicaragua)* be modified or adapted to the situation created by the Joinder of the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 14 June 2013; tab 28 of Costa Rica's judges' folders.

<sup>94</sup>Request by Nicaragua that the Court's Order of 8 March 2011 in the case concerning *Certain Activities carried out in the Border Area (Costa Rica v. Nicaragua)* be modified or adapted to the situation created by the Joinder of the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 14 June 2013, para 45, tab 28 of Costa Rica's judges' folders.

<sup>95</sup>*Ibid.*, paras. 49-51, tab 28 of Costa Rica's judges' folders.

<sup>96</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Requests for the Modification of the Order of 8 March 2011 Indicating Provisional Measures*, Order of 16 July 2013, paras. 26-29.

<sup>97</sup>CR 2013/28, p. 38, para. 5 (Reichler).

pursue these as they consider necessary to protect their rights at issue in a given dispute, and not by reference to a non-existent obligation of exhaustion or some perceived convenience of the Court.

19. Now, Nicaragua requests substantially the same measures it has already asked for. On both occasions its requests have been rejected. And since then, what has happened? What has given rise to urgency in the sense of imminent risk of irreparable prejudice to Nicaragua's rights? Certainly not the announcement that Costa Rica intends to recommence construction of the road, which was known to Nicaragua well in advance of its last attempt to obtain provisional measures, by way of modification of the Court's existing Order. In any event, Nicaragua has not submitted a single piece of evidence to explain how the resumption of construction works on the road gives rise to any risk of irreparable prejudice. The reality is that the Request was precipitated not by any new fact or event, but by Costa Rica's wholly unrelated Request in the *Certain Activities* case. It follows that Nicaragua's request must fail for lack of urgency.

### **C. Nicaragua has failed to show the requisite risk of irreparable prejudice**

20. Mr. President, this brings me to the third reason why Nicaragua's Request does not meet the standard of urgency. Simply said, Nicaragua cannot show that there is *any* risk of irreparable prejudice to its rights, let alone "a real and imminent risk"<sup>98</sup>.

21. Mr. Wordsworth has explained to you that Nicaragua has failed to show the requisite risk of imminent prejudice to its rights, and I will not traverse that ground in detail. The position can be stated in short order.

(a) There is no real and imminent risk of prejudice to Nicaragua's rights in respect of the environment, because the contribution of sediment to the river from the road is not only insignificant, it is imperceptible — as the technical and expert studies submitted by Costa Rica demonstrate.

(b) There is no real and imminent risk of prejudice to Nicaragua's rights in respect of navigation because, on a worst-case analysis, the evidence shows that the maximum contribution of road-related sediment to the bed of the river could be, at most, twice the width of a grain of

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<sup>98</sup>*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; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 392, para. 129.

sand. This does not put at peril Nicaragua's rights of navigation on the river, and much less its disappearance, as Nicaragua would have you believe.

(c) Third, Nicaragua asserted in its Request that there was a risk of prejudice to its rights in respect of the health and wellbeing of the population living along the margins of the San Juan River, but it has not provided any evidence of any such risk, and because of the absence of any such evidence, it appears to have abandoned it.

22. Mr. President, distinguished Members of the Court, Nicaragua has shown no urgency. The river will not be destroyed as a result of Costa Rica improving its road. The river will not be destroyed by Costa Rica allowing its police and border inhabitants with a meaningful way of communication. Nicaragua's constant repetition of its requests, with increasing insistence, does not somehow attribute urgency to those requests, such as would justify the indication of provisional measures under Article 41.

23. Mr. President, Members of the Court, I thank you for your kind attention. Mr. President, I ask that you call on Professor Marcelo Kohen to conclude Costa Rica's first round argument today.

The PRESIDENT: Thank you, Mr. Ugalde. Je passe la parole au professeur Kohen. Vous avez la parole, Monsieur.

M. KOHEN :

#### **UNE DEMANDE OPPORTUNISTE ET TOTALEMENT INJUSTIFIÉE**

1. Monsieur le président, Mesdames et Messieurs de la Cour, la demande en indication de mesures conservatoires déposée par le Nicaragua dans la soirée du 11 octobre 2013 restera gravée dans les annales de la pratique juridictionnelle internationale à plus d'un titre. *Premièrement*, parce qu'elle a sans doute été la demande du genre la plus annoncée, tout en étant celle qui a le plus tardé à accoucher. Cela en dit long déjà sur le caractère soi-disant «urgent» de cette demande. *Deuxièmement*, parce qu'il s'agit de la même demande répétée sous des formes différentes, les tentatives préalables ayant essuyé autant d'échecs. *Troisièmement*, parce que, malgré la longue période de réflexion que le Nicaragua s'est donnée pour se décider à demander formellement et

normalement des mesures conservatoires, l'écrit nicaraguayen ne remplit pas, loin s'en faut, les conditions minimales fixées par le Statut et par le Règlement de la Cour. *Quatrièmement*, parce que la Partie nicaraguayenne est venue devant vous un vendredi soir vous priant d'entendre sa demande à partir du jour ouvrable suivant. Nous conviendrons tous et toutes que la situation n'était pas la même que celle, par exemple, de l'Allemagne dans l'affaire *LaGrand*.

2. Ces quatre traits qui caractérisent la demande du Nicaragua montrent plutôt la façon dont un Etat ne devrait pas agir devant vous en matière de mesures conservatoires. Quatre caractéristiques qui cachent à peine les véritables motifs qui sous-tendent la démarche de la Partie demanderesse, et sur lesquels je reviendrai dans un instant.

3. Mon exposé sera divisé en quatre parties. La première partie montrera en quoi la demande nicaraguayenne est abusive. La deuxième aura trait aux droits revendiqués par le Nicaragua qu'il cherche prétendument à préserver. La troisième partie démontrera qu'aucune des trois mesures demandées n'est justifiée, et la quatrième partie, enfin, exposera de quelle manière les droits du Costa Rica *pendente lite* risqueraient d'être gravement atteints si ces mesures venaient à être indiquées.

#### **A. La demande nicaraguayenne du 11 octobre est abusive**

4. Je commence donc par expliquer le caractère abusif de la demande nicaraguayenne. Quatre raisons fondamentales justifient cette affirmation. *Primo*, parce qu'il s'agit de la quatrième ou cinquième fois que le Nicaragua demande ces mesures, sous des formes différentes. *Secundo*, parce qu'aucun fait nouveau entraînant une aggravation de la situation existante au début de l'affaire ne viendrait justifier cette demande. *Tertio*, parce que, de l'aveu même du Nicaragua, sa demande en indication de mesures conservatoires a été déposée uniquement parce que le Costa Rica a à son tour demandé l'indication de nouvelles mesures. *Quarto*, parce que la demande déposée le 11 octobre ne remplit même pas formellement le minimum exigé par l'article 41 du Statut et les articles 73 et 76 du Règlement de la Cour.

5. En effet, cette demande n'indique nullement quels sont les droits que le Nicaragua souhaiterait protéger en attendant la décision sur le fond. Elle n'indique pas non plus quelles seraient les conséquences éventuelles de son rejet. Elle contient une explication plus que succincte

— et je suis extrêmement généreux avec cette qualification — des motifs avancés — et — fait remarquable pour une demande en indication de mesures conservatoires relative à des prétendus dommages environnementaux — elle n’a été accompagnée d’aucune — je dis bien, *aucune* — preuve à l’appui. La demande même de tenir, dans ces conditions, les audiences immédiatement et conjointement avec celles fixées par votre Cour pour la demande costa-ricienne en mesures conservatoires atteste du manque total de sérieux de la démarche du Nicaragua. Je cite la demande nicaraguayenne [projection n° 1] :

«The measures indicated below are known and will not take Costa Rica by surprise. Nicaragua has been pointing out the need for information sharing and remedial measures from the moment the road began, and it has requested them in one way or another in both cases that have been joined and are presently before the Court.»<sup>99</sup>

[Fin de la projection n° 1.]

6. Monsieur le président, Mesdames et Messieurs les juges, il s’agit en effet, dans cette affaire, de la quatrième ou cinquième fois que le Nicaragua demande d’une manière ou d’une autre les mesures que nous examinons aujourd’hui. Première et deuxième fois : dans la requête introductive d’instance, aux paragraphes 54 et 55 et dans une lettre au greffier déposée en même temps que la requête. Le demandeur y prie en effet la Cour d’ordonner au Costa Rica de communiquer au Nicaragua l’évaluation de l’impact sur l’environnement des travaux de construction routière<sup>100</sup>. Troisième fois : la demande assez insolite formulée par le demandeur à la Cour pour que ce soit la Cour *proprio motu* qui ordonne les mesures conservatoires en question<sup>101</sup>. Quatrième fois : la demande nicaraguayenne du 14 juin 2013 visant à élargir les mesures conservatoires indiquées par votre Cour dans l’affaire *Costa Rica c. Nicaragua* en vue de les appliquer dans l’affaire *Nicaragua c. Costa Rica*<sup>102</sup>. Cinquième fois : la demande en indication de mesures conservatoires du 11 octobre qui constitue une répétition de la demande précédente. La

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<sup>99</sup> Demande en indication de mesures conservatoires, 11 octobre 2013, p. 4.

<sup>100</sup> *Construction d’une route au Costa Rica le long du fleuve San Juan*, requête introductive d’instance enregistrée au Greffe de la Cour le 22 décembre 2011, p. 33, par. 53-54 ; lettre de l’agent de la République du Nicaragua au greffier de la Cour internationale de Justice, *ibid.*, p. 123.

<sup>101</sup> Letter from Nicaragua to the Court requesting the indication provisional measures *proprio motu*, 19 décembre 2012, réf. 02-19-12-2002.

<sup>102</sup> Letter from Nicaragua to the Court, attaching Nicaragua’s request for modification of the provisional measures indicated by the Court in Certain Activities, 14 juin 2013, réf. HOL-EMB-111.

seule différence est que les mesures demandées il y a quatre mois sont maintenant explicitement mentionnées, alors que dans la demande précédente, elles constituaient l'explication de ce que le Nicaragua entendait inclure dans son texte proposé afin de modifier les mesures indiquées par la Cour<sup>103</sup>.

7. Pour justifier la tenue de ces audiences et la manière plutôt chaotique d'agir en matière de mesures conservatoires, nos adversaires ont excipé hier d'un argument pour le moins étonnant. On pourrait le qualifier celui de «l'épuisement des voies de recours internationaux». Ils ont amèrement rappelé que le Nicaragua s'est adressé à plusieurs organisations internationales, puis à la Cour elle-même, lesquelles n'ont pas donné suite aux demandes nicaraguayennes<sup>104</sup>. Et voilà pourquoi ils sont à présent venus devant vous, c'est-à-dire après avoir épuisé toutes les autres voies. Curieuse manière de justifier une demande en mesures conservatoires ! Le Nicaragua n'a pas voulu tirer la conséquence logique qui s'ensuivait de cette absence de réaction des organisations internationales concernées et de votre propre Cour. Et pourtant cette conséquence saute néanmoins aux yeux. C'est peut-être que le Nicaragua a d'autres visées avec sa demande, visées qui n'ont rien à voir avec ce que prévoit l'article 41 de votre Statut.

8. Monsieur le président, cette manière de procéder du demandeur défie ouvertement l'article 75, paragraphe 3, du Règlement qui précise que «[l]e rejet d'une demande en indication de mesures conservatoires n'empêche pas la partie qui l'avait introduite de présenter en la même affaire une nouvelle demande fondée sur des faits nouveaux». Or, Monsieur le président, Mesdames et Messieurs les juges, les mesures conservatoires demandées par le Nicaragua ne sont ni nouvelles — ce sont encore et toujours les mêmes — ni fondées sur des faits nouveaux. Le Nicaragua insiste depuis le début de cette instance sur l'existence d'une obligation de notification que le Costa Rica conteste, et impute à ce dernier les mêmes faits qu'auparavant.

9. Le seul élément de la demande du 11 octobre au soir qui pourrait éventuellement s'apparenter à un «fait nouveau» est la référence faite à «l'avènement du plus fort de la saison des pluies». Mais cela ne constitue pas du tout un «fait nouveau», Monsieur le président. Le Nicaragua n'ignorait pas en décembre 2012 ou en juin 2013 que la saison des pluies allait

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<sup>103</sup> Nicaraguan Request of Modification of Provisional Measures of 14 June 2013, par. 51 et 52.

<sup>104</sup> CR 2013/28, p. 12, par. 4 (Argüello) ; p. 38, par. 5 (Reichler).

recommencer. Mesdames et Messieurs les juges, nous sommes à la troisième saison des pluies depuis que les travaux de construction ont commencé. Même la requête nicaraguayenne du 22 décembre 2011 a été déposée en pleine saison des pluies ! A moins que nous ignorions que la saison des pluies 2013-2014 est annonciatrice d'un nouveau déluge universel, il n'y a rien de nouveau à signaler à l'arrivée de la saison des pluies qui puisse justifier la demande nicaraguayenne. Le ton dramatique employé par nos contradicteurs hier peut avoir sans doute été inspiré par la fresque de Michel-Ange, mais même s'il pleut sur le San Juan ou à La Haye — pas ce matin ! — nous ne sommes pas encore devant un tel événement catastrophique imminent qui justifierait d'indiquer des mesures conservatoires.

10. L'équipe nicaraguayenne s'est probablement aperçue de la faiblesse intrinsèque de la demande et est alors partie à la recherche d'autres «faits nouveaux». Qu'a-t-elle trouvé ? Apparemment, deux choses. La première, il y a une semaine à peine. Des morceaux d'un tuyau de drainage qu'elle a soi-disant «repêchés» dans les eaux du San Juan. La deuxième, celle-ci découverte hier seulement, le fait que la reprise des travaux de construction serait enfin le fait nouveau qui pourrait justifier la demande au point de vue de l'article 75, paragraphe 3, du Règlement.

11. Nous avons déjà expliqué ce matin que ni l'une ni l'autre de ces faits allégués ne justifieraient l'indication de mesures conservatoires, ni même l'opportunité de les demander. J'ajoute simplement deux petits commentaires. Le rapport qui accompagne les photographies des débris que le Nicaragua vous a montrées mille fois hier précise quelque chose de très intéressant. Je cite [projection n° 2] : «The San Juan River MARENA Delegation implements monthly waterway patrolling on the San Juan River with the participation of MARENA forest rangers and technical specialists accompanied by the Army of Nicaragua.»<sup>105</sup> Très bien, Monsieur le président. Deux ans de travaux de construction se sont écoulés, des patrouilles fluviales de ce genre se déroulent tous les mois, et tout ce que l'on a trouvé, c'est un morceau d'un tuyau de drainage qui, d'après les photographies et la vidéo fournies par le Nicaragua, serait plutôt extrait du territoire

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<sup>105</sup> Letter to the Registrar of the Court from His Excellency Carlos Argüello Gómez, Agent of the Republic of Nicaragua, 31 October 2013, Ref. HOL-EMB-220, annexe 1, Ministry of Environment and Natural Resources (MARENA) San Juan River Territorial Delegation, «Technical Waterway Patrol on the San Juan River on 27 October 2013», English translation, p. 1.

costa-ricien ? Est-ce que cela justifie de quelque manière que ce soit de demander des mesures conservatoires ? [Fin de la projection n° 2.]

12. Quant à la reprise des travaux, si c'était la véritable cause pour demander des mesures conservatoires, pourquoi le Nicaragua ne l'a pas manifesté dans sa demande ? Pourquoi le Nicaragua n'a pas demandé des mesures conservatoires les fois précédentes que les travaux ont été suspendus ?

13. Cette attitude abusive du Nicaragua peut être contrée de plusieurs manières. L'une d'entre elle consisterait à constater qu'il s'agit d'une demande déjà formulée et qu'il n'existe pas de faits nouveaux qui la justifient. Une autre reviendrait à considérer que l'une ou plusieurs des conditions exigées pour l'indication de mesures conservatoires ne sont pas remplies. Le Costa Rica a confiance en votre sagesse, Mesdames et Messieurs les juges, pour trouver le moyen le plus approprié compte tenu des circonstances de l'espèce.

#### **B. Les éventuels droits que le Nicaragua cherche prétendument à préserver**

14. Monsieur le président, étant donné que la demande en indication de mesures conservatoires ne dit mot sur les prétendus droits du Nicaragua qui exigeraient des mesures urgentes pour parer à un risque de dommage irréparable, les conseils nicaraguayens ont essayé de corriger quelque peu le tir hier. Il s'agirait alors du droit à la souveraineté et à l'intégrité territoriales, du droit de ne pas subir un dommage transfrontière significatif et du droit de recevoir une évaluation de l'impact sur l'environnement des travaux<sup>106</sup>.

15. Mesdames et Messieurs les juges, la souveraineté et l'intégrité territoriales du Nicaragua ne sont nullement en cause ici. Nul ne conteste la souveraineté nicaraguayenne des eaux et du lit du fleuve San Juan. Nul n'entreprend aucune activité sur le territoire du Nicaragua. A supposer même que les allégations du demandeur fussent fondées (*quod non*), il pourrait s'agir tout au plus d'une violation de l'obligation de ne pas causer des dommages transfrontières significatifs, mais en aucun cas de violations à la souveraineté ou à l'intégrité territoriale du Nicaragua.

16. M<sup>e</sup> Reichler s'est insurgé hier contre l'utilisation du terme «invasion» pour qualifier l'action et les menaces nicaraguayennes qui motivèrent le décret d'urgence en vertu duquel la

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<sup>106</sup> CR 2013/28, p. 25, par. 8 (McCaffrey) ; p. 47, par. 31 (Reichler).

route 1856 a été construite. Il a même parlé de surréalisme<sup>107</sup>. Mais son camarade Stephen McCaffrey n'a pas hésité à utiliser ce même terme d'«invasion» pour se référer aux prétendues conséquences sur le territoire nicaraguayen de la construction de la route 1856. Il a aussi parlé de l'«occupation» et de l'«assaut» que subirait le territoire nicaraguayen du fait de l'action de son voisin<sup>108</sup>. Comme vous le savez, Monsieur le président, l'armée nicaraguayenne est toujours en territoire costa-ricien, devenu litigieux par la revendication postérieure à son occupation par le Nicaragua. Le président nicaraguayen revendique toujours Guanacaste, malgré l'existence d'un traité de limites en vigueur depuis plus d'un siècle et demi. Tout cela ne relève pas du surréalisme. Alors que, d'après le conseil nicaraguayen, le Costa Rica aurait envahi le Nicaragua par sédimentation !

17. Quant au prétendu droit du Nicaragua d'être notifié de l'évaluation de l'impact sur l'environnement, le Costa Rica conteste que dans les circonstances particulières de l'espèce cette obligation s'impose à lui. Il suffirait de dire maintenant que mêmes les instruments internationaux qui imposent cette obligation prévoient également que des exceptions sont possibles. Je citerai comme exemple l'article 19 de la convention sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation<sup>109</sup>. J'ajouterai que le Nicaragua est le responsable de la situation et a par ailleurs empêché et frustré toute consultation éventuelle. L'agent costa-ricien a rappelé ce matin que la note du ministre des affaires étrangères du Costa Rica à son homologue nicaraguayen du 29 novembre 2011, faite dans un esprit de coopération, reçut comme réaction la saisine de votre Cour moins d'un mois plus tard. Quoi qu'il en soit, Monsieur le président, la question de savoir s'il existe une obligation de notification dans le contexte actuel relève du fond et il est regrettable que le Nicaragua l'introduise par voie de procédure incidente. Le Costa Rica s'expliquera au moment approprié, c'est-à-dire dans son contre-mémoire le mois prochain.

18. Enfin, quant au droit de ne pas subir des dommages transfrontières significatifs, mes collègues vous ont déjà montré ce matin que le Nicaragua n'a pas apporté la preuve d'un véritable

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<sup>107</sup> CR 2013/28, p. 48, par. 33 (Reichler).

<sup>108</sup> *Ibid.*, p. 24, par. 1 ; p. 28, par. 15 (McCaffrey).

<sup>109</sup> Convention sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation, adoptée par l'Assemblée générale des Nations Unies le 21 mai 1997, non encore en vigueur.

risque de préjudice irréparable et donc encore moins de la nécessité urgente de prendre des mesures pour l'éviter.

### **C. Aucune des mesures demandées n'est justifiée**

19. Monsieur le président, je vais à présent examiner les trois mesures demandées par le Nicaragua pour démontrer qu'aucune d'entre elles n'est justifiée.

20. La première mesure demandée consiste à imposer au Costa Rica de fournir l'évaluation de l'impact sur l'environnement des travaux de construction routière et des rapports et évaluations concernant les mesures pour atténuer les prétendus dommages significatifs qui pourraient être causés au fleuve<sup>110</sup>.

21. Le Nicaragua persiste et signe, pour la cinquième fois sur cette question. Toutes les fois précédentes, votre Cour n'a pas donné suite à ces demandes. Les raisons de ce refus sont compréhensibles.

22. Outre le fait évident que la production d'un moyen de preuve ne saurait en soi éviter un préjudice irréparable — dont le risque de toute évidence n'existe pas par ailleurs —, une telle mesure préjugerait gravement du fond de l'affaire. En effet, cette question ne peut être résolue qu'au stade du fond<sup>111</sup>. A supposer même qu'il y ait une violation de l'obligation de fournir une évaluation d'impact sur l'environnement (*quod non*), la réaction ne serait pas l'indication d'une mesure conservatoire, mais une décision sur le fond avec les conséquences que vous estimerez éventuellement appropriées. Ce que la Cour permanente a dit dans l'affaire de l'*Usine de Chorzów* par rapport au Gouvernement allemand s'applique ici au Gouvernement nicaraguayen : «la demande du Gouvernement allemand ne peut être considérée comme visant l'indication des mesures conservatoires, mais comme tendant à obtenir un jugement provisionnel adjugeant une partie des conclusions de la susdite requête»<sup>112</sup>.

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<sup>110</sup> Demande en indication de mesures conservatoires présentée par le Nicaragua, 11 octobre 2013, p. 4.

<sup>111</sup> *Demande en interprétation de l'arrêt du 15 juin 1962 en l'affaire du Temple de Préah Vihear (Cambodge c. Thaïlande) (Cambodge c. Thaïlande), mesures conservatoires, ordonnance du 18 juillet 2011, C.I.J. Recueil 2011 (II), p. 546, par. 41 ; Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009, p. 155, par. 74.*

<sup>112</sup> *Usine de Chorzów, ordonnance du 21 novembre 1927, C.P.J.I. série A n° 12, p. 10 (texte anglais : «Considering that the request of the German Government cannot be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application above mentioned.»)*

23. Qui plus est, Mesdames et Messieurs les juges, dans la mesure où le Costa Rica a déjà présenté une preuve technique assez abondante — plus substantielle, plus sérieuse et plus crédible que celle de la Partie demanderesse —, qui montre aussi bien l'absence de préjudice significatif au fleuve San Juan, que les mesures prises pour éviter tout préjudice. Le mois prochain, le Costa Rica déposera son contre-mémoire où cette évaluation scientifique sera étoffée. C'est tout dire sur, non seulement le caractère infondé de cette demande comme mesure conservatoire, mais aussi sur son inutilité pratique.

24. La seconde mesure conservatoire demandée par le Nicaragua requiert que votre Cour impose immédiatement au Costa Rica des mesures dites «d'urgence» ... tellement urgentes qu'elles ont déjà été formulées dans le mémoire, au chapitre 6 «Remedies», paragraphe 6.8, il y a deux ans. Exactement les mêmes. Il s'agit des «quatre tâches» mentionnées par le rapport Kondolf joint au mémoire, en version réduite. Elles font aussi partie du *petitum* nicaraguayen dans le mémoire, comme point 4<sup>113</sup>.

25. On aurait pu s'attendre à ce que les deux nouveaux rapports Kondolf déposés vendredi dernier contiennent de nouveaux éléments qui expliquent comment durant ces deux années la situation s'est aggravée au point de rendre le risque plus réel. Bien évidemment, il n'en est rien. La preuve scientifique fournie par le Costa Rica démontre que l'impact de la construction de la route en territoire costa-ricien est négligeable<sup>114</sup>.

26. En sus du fait qu'aucune nécessité urgente de prendre ces mesures pour éviter un préjudice irréparable n'a été démontrée, le Costa Rica a déjà pris un certain nombre de dispositions afin d'éviter tout impact dommageable sur le San Juan, dispositions qui vont même au-delà de ce que le Nicaragua demande. [Projection n° 3.] Vous avez à l'écran et à l'onglet n° 31 de vos dossiers un tableau comparatif montrant, d'une part, la deuxième mesure conservatoire demandée par le Nicaragua et, d'autre part, l'action concrète que le Costa Rica a déjà accomplie et continue d'accomplir. Si quelque chose a changé dans la situation factuelle depuis l'introduction de

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<sup>113</sup> *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, mémoire du Nicaragua, 19 décembre 2012, Submissions, p. 252.

<sup>114</sup> *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, demande en indication de mesures conservatoires, documentation présentée par le Costa Rica le 1<sup>er</sup> novembre 2013, annexes, annexe CR-1, Costa Rican Institute of Electricity (ICE), «Report on Hydrology and Sediments for the Costa Rican River Basins draining to the San Juan River», août 2013, p. 32-34.

l'instance en 2011, ce n'est précisément pas l'aggravation de la situation, mais, bien au contraire, l'amélioration qualitative et quantitative des mesures prises par le Costa Rica pour éviter tout préjudice. La deuxième mesure demandée devient non seulement injustifiée mais aussi sans aucun objet. [Fin de la projection n° 3.]

27. La troisième mesure demandée par le Nicaragua est sans doute la plus osée et la plus outrancière et, de ce fait, doit être rejetée sans ambages. Il s'agit ni plus ni moins d'empêcher le Costa Rica d'améliorer son système de communication routière sur son territoire par le seul fait que le Nicaragua a introduit une instance en 2011 et qu'il en fait une nouvelle fois la demande de suspension des travaux en 2013. Cette demande impliquerait aussi d'adjudger provisoirement au Nicaragua d'ores et déjà ce qu'elle demande au fond, au point *a*) du paragraphe 51 de sa requête et au point 2 i) de ses conclusions dans son mémoire.

28. M<sup>e</sup> Reichler a affirmé que cette suspension ne porterait aucun préjudice au Costa Rica<sup>115</sup>. Cela est de toute évidence faux. Si on laisse de côté le fait que la capacité souveraine de décision du Costa Rica sur son réseau routier en serait sérieusement ébranlée, cela aurait des conséquences économiques très graves pour un projet qui se trouve en pleine exécution. Le même conseil nicaraguayen vous a dit que le *statu quo ante* n'est pas possible<sup>116</sup>, contrairement à ce que le Nicaragua lui-même vous demande dans sa requête et dans son mémoire<sup>117</sup>. Mais la Partie adverse que souhaite-t-elle ? Disons-le une fois pour toutes : garder la route n° 1856 dans un état inachevé. Voilà ce que vous demande le Nicaragua. Est-ce cela même la meilleure manière de préserver l'écologie du fleuve San Juan ? Il saute aux yeux que le véritable objectif du Nicaragua est d'empêcher que le Costa Rica possède une route dans sa région frontalière.

29. Hier la Partie adverse a, à plusieurs reprises, fait référence à l'affaire des *Usines de pâte à papier*. Elle a oublié un élément important que votre Cour a mentionné aussi bien lors de son ordonnance du 8 juillet 2006 que dans son arrêt sur le fond. Les situations sont bien entendu différentes. Le statut du fleuve Uruguay a trait à l'utilisation d'un cours d'eau partagé et

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<sup>115</sup> CR 2013/28, p. 47-48, par. 32 ; p. 49, par. 37 (Reichler).

<sup>116</sup> *Ibid.*, p. 45, par. 27.

<sup>117</sup> *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, requête introductive d'instance enregistrée au Greffe de la Cour le 22 décembre 2011, p. 30, par. 50 ; MN, p. 241-242, par. 6.31, p. 251, Submission 2 ii).

établit un mécanisme très développé de coopération bilatérale. Contrairement à l'affaire argentino-uruguayenne, il n'est pas question ici d'une quelconque utilisation du fleuve par le Costa Rica. Même dans l'affaire des *Usines de pâte à papier*, tout comme préalablement dans l'affaire du *Passage par le Grand-Belt*, la Cour est arrivée à la conclusion selon laquelle, *pendente lite*, il n'existait aucune obligation de suspendre les travaux objets de contestation entre les Parties, la partie qui les entreprend le faisant à ses propres risques et périls quant aux conséquences sur le fond<sup>118</sup>. La même solution s'impose ici à plus forte raison où il n'est pas question d'une activité sur une ressource naturelle partagée mais de la construction d'une route en territoire costa-ricien. Il y va des droits du Costa Rica, que le Nicaragua feint d'ignorer complètement dans cette affaire et dans cet incident. J'en viens à présent à eux.

#### **D. Les droits du Costa Rica subiraient un grave préjudice si les mesures demandées étaient indiquées**

30. Mesdames et Messieurs les juges, si les mesures conservatoires demandées sont ordonnées, un grave préjudice sera porté aux droits du Costa Rica. Le Costa Rica possède le droit souverain d'élargir son infrastructure routière sur son territoire. Seul le Costa Rica peut décider, sans aucune ingérence externe, quelle est la meilleure manière de poursuivre le développement durable de toutes et chacune des régions du pays, d'assurer leur intégration effective au reste du territoire, d'asseoir la sécurité du pays, de rendre effective la communication des communautés éloignées dans la région frontalière et de pourvoir à leur protection ainsi qu'à la fourniture des services publics à leur égard. Le Nicaragua, qui a tout fait pour empêcher que ces services puissent être rendus par le biais de la navigation sur le fleuve San Juan, contrairement aux droits reconnus au Costa Rica par le traité de limites de 1858 et la sentence Cleveland de 1888, ne peut pas à présent et également empêcher que le Costa Rica assure la communication et la sécurité des différentes communautés riveraines à partir du propre territoire costa-ricien.

31. Certes, le Costa Rica reconnaît, respecte et — je suis autorisé à le dire — est formellement et solennellement engagé à continuer de respecter l'obligation de ne pas causer un

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<sup>118</sup> *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. 133, par. 78. *Passage par le Grand-Belt (Finlande c. Danemark)*, mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 19, par. 31. *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, C.I.J. Recueil 2010 (I), p. 69, par. 154, déclaration du juge Skotnikov, *ibid.*, p. 132, par. 3.

préjudice transfrontalier significatif. Il appartient toutefois au Costa Rica, et à lui seul, de décider quelles sont les mesures nécessaires à adopter sur son territoire en vue d'empêcher que des actions, toujours sur son territoire, ne causent un préjudice significatif au territoire voisin. Pour cette seule raison, les mesures demandées — même dans le cas où les conditions requises pour leur indication étaient remplies, ce qui est loin, très loin, d'être le cas ici, devraient être rejetées. Le Costa Rica a, de sa propre initiative, pris les mesures de remédiation nécessaires pour éviter tout préjudice au fleuve San Juan. Le Nicaragua, qui n'a pas démontré l'existence d'un risque de préjudice irréparable et *a fortiori* la nécessité urgente des mesures pour l'éviter, ne peut pas décider de ce qui doit être fait en territoire costa-ricien.

### **E. Conclusion**

32. Monsieur le président, nous avons inutilement assisté hier à des plaidoiries sur le fond avant la lettre. En arrivant à ma conclusion, je résume tout d'abord la situation ainsi : il s'agit d'une demande répétitive et abusive sans la moindre preuve d'existence de faits nouveaux ou d'aggravation de la situation existante au moment de la requête ; pas de preuve d'un quelconque risque de préjudice irréparable au fleuve San Juan ; pas de preuve que des droits nicaraguayens à la souveraineté territoriale, à la navigation, à la santé de la population, à la flore et la faune du Nicaragua ou autres, seraient affectés et requerraient une action urgente.

33. Comme vous l'avez constaté tout au long de cette matinée, Mesdames et Messieurs les juges, la réalité est bien différente du tableau dressé par la Partie adverse. Le Costa Rica n'a aucun intérêt à nuire au fleuve San Juan. D'une part, parce que le Costa Rica souhaite pouvoir exercer son droit perpétuel de libre navigation établi par le traité de limites de 1858. D'autre part, parce que nuire aux eaux du San Juan, c'est nuire aux eaux du fleuve costa-ricien le plus important dans la région frontalière avec le Nicaragua, le fleuve Colorado, qui reçoit presque 90 % des eaux qui coulent dans le San Juan. C'est dire l'artificialité de cette affaire et à plus forte raison l'artificialité de cette demande biscornue en mesures conservatoires.

34. Je voudrais également formuler un commentaire important sur la tactique de la Partie adverse. Le Nicaragua a requis des demandes reconventionnelles et la jonction des instances dans le but de retarder votre décision sur la question de la souveraineté et de l'occupation d'Isla Portillos

dans l'affaire relative à *Certaines activités menées par le Nicaragua dans la région frontalière*. Maintenant et avec la même volonté dilatoire, le Nicaragua décide de demander des mesures conservatoires totalement injustifiées.

Hier même, Monsieur le président, et malgré votre annonce de la convocation prochaine à une audience pour la lecture de votre ordonnance sur les mesures demandées par le Costa Rica<sup>119</sup>, mon collègue Alain Pellet vous a invité d'une manière à peine voilée à «vous prononcer par une ordonnance commune sur les deux demandes en indication de mesures conservatoires»<sup>120</sup>. Comme vous le voyez, Mesdames et Messieurs les juges, il ne s'agit pas d'une simple spéculation de la Partie costa-ricienne. Les véritables objectifs poursuivis par la Partie adverse ne se cachent plus.

35. Par ailleurs, il existerait d'autres conséquences, ou «dommages collatéraux», si je puis dire, si la demande nicaraguayenne venait à prospérer. Le standard élevé établi par la Cour pour indiquer des mesures conservatoires se verrait diminué, ce précédent ouvrant aussi la voie à la possibilité de demander plusieurs fois les mêmes mesures conservatoires par le simple fait d'en modifier la description ou d'invoquer des faits nouveaux artificiels ou de demander une fois *proprio motu* et une autre fois normalement. La démarche nicaraguayenne vise non seulement à porter atteinte aux droits costa-riciens, mais elle nuit également à la bonne administration de la justice.

36. Contrairement aux efforts nicaraguayens, le Costa Rica souhaite vivement que ces deux instances jointes soient finalisées le plus vite possible. Ce sera la meilleure manière d'asseoir les droits en cause. S'il est vrai que le Nicaragua se souciait sincèrement du sort du fleuve San Juan, il aurait dû prôner la plus grande célérité procédurale. Il en a malheureusement été autrement.

37. Pour toutes les raisons que nous avons mises en avant au cours de cette audience, le Costa Rica considère que la demande nicaraguayenne d'indication en mesures conservatoires doit être rejetée. Ainsi s'achève, Monsieur le président, Mesdames et Messieurs les juges, le premier tour des plaidoiries du Costa Rica. Au nom de toute la délégation, je vous remercie de la bienveillante attention que vous nous avez portée ce matin.

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<sup>119</sup> CR 2013/28, p. 11 (Tomka).

<sup>120</sup> *Ibid.*, p. 51, par. 3 (Pellet).

Le PRESIDENT : Merci, Monsieur le professeur. Ceci met fin au premier tour des plaidoiries du Costa Rica. La Cour se réunira demain à 10 heures pour entendre le Nicaragua en son second tour de plaidoiries. L'audience est levée.

*L'audience est levée à 12 h 45.*

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