

*CR 2013/24*

**International Court  
of Justice**

**Cour internationale  
de Justice**

**THE HAGUE**

**LA HAYE**

**YEAR 2013**

*Public sitting*

*held on Monday 14 October 2013, at 10 a.m., at the Peace Palace,*

*President Tomka presiding,*

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

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**VERBATIM RECORD**

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**ANNÉE 2013**

*Audience publique*

*tenue le lundi 14 octobre 2013, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Tomka, président,*

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

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**COMPTE RENDU**

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*Present:*      President Tomka  
                 Vice-President Sepúlveda-Amor  
                 Judges Owada  
                         Keith  
                         Bennouna  
                         Skotnikov  
                         Caçado 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  
Keith  
Bennouna  
Skotnikov  
Cançado 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 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, Special 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. James Crawford, A.C., S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, Barrister,

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva; associate 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,

*as Advisers.*

***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,

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

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*comme agent ;*

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

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

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*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,

*comme conseillers.*

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

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

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

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

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Mme Clara E. Brillembourg, avocat au cabinet Foley Hoag LLP, Washington D.C., membre des barreaux du district de Columbia et de New York,

*comme conseils adjoints.*

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

Judge Abraham, for reasons which he has explained to me, is unfortunately prevented from being present today on the Bench.

Each of the Parties in the present case, the Republic of Costa Rica and the Republic of Nicaragua, has availed itself of the possibility afforded to it by Article 31 of the Statute of the Court to choose a judge *ad hoc*. Costa Rica has chosen Mr. John Dugard and Nicaragua, Mr. Gilbert Guillaume. Judges Guillaume and Dugard were each installed as judge *ad hoc* in 2011, during the phase of the case devoted to the Request for the indication of provisional measures submitted by the Republic of Costa Rica on 18 November 2010.

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I shall now very briefly recall the procedure so far followed in this case. On 18 November 2010, the Government of Costa Rica filed in the Registry of the Court an Application instituting proceedings against the Government of Nicaragua for “the incursion into, occupation of and use by Nicaragua’s army of Costa Rican territory”, as well as for “serious damage inflicted to its protected rainforests and wetlands”, “damage intended [by Nicaragua] to the Colorado River” and “the dredging and canalization activities being carried out by Nicaragua on the San Juan River”. According to Costa Rica, these activities were connected to the construction of a canal (referred to in Spanish as *caño*) across Costa Rican territory from the San Juan River to Laguna los Portillos.

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



By an Order of 8 March 2011 made in that case, the Court indicated the following provisional measures to both Parties:

- “(1) Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security;
- (2) Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;
- (3) Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;
- (4) Each Party shall inform the Court as to its compliance with the above provisional measures.”

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

At the time of the filing of its Memorial, Nicaragua requested the Court, *inter alia*, to “examine *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures”. By letters dated 11 March 2013, the Registrar informed the Parties that the Court was of the view that the circumstances of the case, as they presented themselves to it at that time, were not such as to require the exercise of its powers under Article 75 of the Rules of Court to indicate provisional measures *proprio motu*.

At a meeting held by the President of the Court with the representatives of the Parties on 19 September 2012, the Parties agreed not to request the Court’s authorization to file a Reply and a Rejoinder.

On 23 May 2013, Costa Rica, with reference to Article 41 of the Statute of the Court and Article 76 of the Rules of Court, filed with the Registry a request for the modification of the Order indicating provisional measures of 8 March 2011. In its written observations thereon, Nicaragua asked the Court to reject Costa Rica’s request, while in its turn requesting the Court to modify or adapt the Order of 8 March 2011 on the basis of Article 76 of the Rules of Court.

By an Order of 16 July 2013, the Court found that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011. By the same Order, the Court also reaffirmed the provisional measures indicated in its Order of 8 March 2011, in particular the requirement that the Parties “shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve”.

On 24 September 2013, Costa Rica, with reference to Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court, filed in the Registry a new Request for the Indication of Provisional Measures in the present case. Costa Rica clarified that it was not seeking the modification of the Order of 8 March 2011, but rather that its request was “an independent [one] based on new facts”.

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

Costa Rica, in outlining the facts which led it to bring the present request, states that since the Court’s Order of 16 July 2013 on the Parties’ requests to modify the measures indicated in its Order of 8 March 2011, it has found out about “new and grave activities by Nicaragua in the disputed territory”, through the receipt of satellite imagery of that area. In particular, Costa Rica contends that Nicaragua has commenced construction of two new artificial *caños* in the disputed territory.

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

The REGISTRAR:

“Costa Rica respectfully requests the Court as a matter of urgency to order the following provisional measures so as to prevent further breaches of Costa Rica’s territorial integrity and further irreparable harm to the territory in question, pending the determination of this case on the merits:

- (1) the immediate and unconditional suspension of any work by way of dredging or otherwise in the disputed territory, and specifically the cessation of work of any kind on the two further artificial *caños* in the disputed territory, as shown in the satellite images attached [to the Request];

- (2) that Nicaragua immediately withdraw any personnel, infrastructure (including lodging tents) and equipment (including dredgers) introduced by it, or by any persons under its jurisdiction or coming from its territory, from the disputed territory;
- (3) that Costa Rica be permitted to undertake remediation works in the disputed territory on the two new artificial *caños* and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory; and
- (4) that each Party shall immediately inform the Court as to its compliance with the above provisional measures not later than one week of the issuance of the Order.”

The PRESIDENT: According to Article 74 of the Rules of Court, a request for the indication of provisional measures shall have priority over all other cases and the Court, if it is not sitting, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency. The date of the hearing must be fixed in such a way as to afford the Parties an opportunity of being represented at it. Consequently, the Parties were informed that the date for the opening of the oral proceedings contemplated in Article 74, paragraph 3, of the Rules of Court, during which they could present their observations on the Request for the Indication of Provisional Measures, had been set for today, 14 October 2013.

Subsequently, in a letter addressed to the Registrar dated 10 October 2013, Nicaragua stated that, in its view, the new Provisional Measures requested by Costa Rica were superfluous because they were already being complied with voluntarily by Nicaragua. Nicaragua further committed itself to abide by them. Costa Rica, for its part, by a letter dated 11 October, informed the Court, that it sought confirmation from Nicaragua that it agreed to an Order on provisional measures being issued by the Court with the consent of both Parties. In the affirmative, Costa Rica stated that the time and expense of a hearing before the Court could be avoided. In reply by a letter also dated 11 October 2013 Nicaragua reiterated its view that Costa Rica’s Request for provisional measures was moot since the measures requested had in essence already been implemented. In addition, Nicaragua pointed out that by its actions taken in response to alleged unauthorized activity in the disputed territory it was faithfully carrying out the Court’s Order of 8 March 2011 and that there was no need for an additional Order on the same subject-matter.

On 11 October 2013 Nicaragua filed its own Request for Indication of Provisional Measures in the case concerning *Construction of a Road in Costa Rica along the San Juan River*

(*Nicaragua v. Costa Rica*). The Court is at present considering this Request and the Parties will be informed of the decision of the Court as far as the procedure to be followed later, hopefully today.

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

Costa Rica will present its first round of oral observations on its Request for the indication of provisional measures this morning. Nicaragua will present its first round of oral observations on that Request on Tuesday 15 October, at 10 a.m. The Parties will be later informed about the organization of the second round.

Before giving the floor to His Excellency Ambassador Edgar Ugalde, Agent of the Republic of Costa Rica, I shall draw the attention of the Parties to Practice Direction XI, which states, *inter alia*, that Parties should:

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

I shall now give the floor to His Excellency Ambassador Edgar Ugalde Álvarez, Agent of Costa Rica.

M. ÁLVAREZ :

1. Monsieur le président, distingués Membres de la Cour, c'est un honneur de me présenter aujourd'hui une nouvelle fois devant vous en tant que représentant du Costa Rica. Plus de deux ans se sont écoulés depuis notre demande urgente en indication de mesures conservatoires, qui faisait suite à l'occupation illégale, l'utilisation et la transformation de notre territoire par le Nicaragua. J'ai signalé à l'époque qu'en bafouant la frontière terrestre avec le Costa Rica, frontière pleinement et clairement établie conformément au droit international, depuis plus d'un siècle et acceptée comme telle par les deux pays, le Nicaragua violait le droit international et mettait en péril la coexistence pacifique de nos deux pays.

2. En 2010, lorsque nous nous sommes présentés devant vous afin de vous demander d'ordonner des mesures conservatoires, le Nicaragua occupait le territoire de Isla Portillos, qui appartient au territoire du Costa Rica, et était en train de mettre à exécution un projet consistant à transformer cette partie de notre territoire. Ce projet comprenait la construction d'un *caño* artificiel entre le fleuve San Juan et la lagune Los Portillos, connue en anglais sous le nom de *Harbor Head Lagoon*. Ce *caño* artificiel est indiqué en rouge dans la partie inférieure du croquis cartographique affiché sur les écrans et reproduit à l'onglet n° 2 de vos dossiers.

3. En mars 2011, en réponse à la demande urgente du Costa Rica, votre Cour a indiqué des mesures conservatoires, et demandé aux deux Parties de s'abstenir d'envoyer ou de maintenir tous agents, notamment civils, de police et de sécurité, sur le territoire litigieux, y compris sur le *caño* artificiel construit par le Nicaragua vers la fin de l'année 2010, à l'exception des agents costa-riciens en charge de l'environnement.

4. Malheureusement, le Costa Rica est contraint de vous solliciter encore une fois, des mesures conservatoires afin d'obtenir la protection urgente de sa souveraineté territoriale et de ses droits internationaux, en conséquence de nouvelles actions injustifiées du Nicaragua. A l'heure où nous parlons, le Nicaragua entreprend un nouveau projet de transformation d'une autre partie du territoire du Costa Rica, à nouveau dans le secteur nord de Isla Portillos. Sur le croquis cartographique affiché sur les écrans, vous pouvez constater en rouge deux nouveaux *caños* artificiels entre le fleuve San Juan et la mer des Caraïbes. Le Nicaragua a commencé la construction de ces deux nouveaux *caños* cette année entre les mois de juillet et de septembre. Le Costa Rica a fait cette découverte il y a seulement quelques semaines.

5. Les travaux du Nicaragua sont d'ores et déjà à un stade avancé et sont actuellement en cours. Si les travaux continuent, il y a un risque imminent qu'ils causent un dommage irréparable supplémentaire sur le territoire du Costa Rica.

6. Dès que le Costa Rica a découvert que le Nicaragua était en train de construire deux nouveaux *caños* sur le territoire du Costa Rica, notamment sur le territoire litigieux qui faisait l'objet des mesures conservatoires indiquées par la Cour en 2011, le Costa Rica a immédiatement protesté auprès du Nicaragua, et lui a demandé d'expliquer sa conduite. Le Costa Rica a également demandé au Nicaragua d'arrêter immédiatement toutes activités de construction sur les deux

nouveaux *caños* ainsi que toutes autres activités de construction sur le territoire litigieux, et de lui promettre ensuite que toutes les activités de construction avaient cessé et qu'elles ne reprendraient pas leur cours. Le Costa Rica a inclus dans sa demande des preuves irréfutables de l'existence des nouveaux *caños*, clairement indiqués par les images satellite.

7. Regrettablement, la réponse du Nicaragua a été tout à fait insuffisante, allant même jusqu'à refuser de reconnaître ses propres actions dans la région. En conséquence, le Costa Rica n'a pas eu d'autre choix que celui de demander de façon urgente la protection de ses droits par cette Cour.

8. Monsieur le président, les actions du Nicaragua ne sont ni ponctuelles ni accidentelles. Le Nicaragua s'est engagé dans une campagne constante et de longue date consistant à braver ses obligations internationales vis-à-vis du Costa Rica, en se moquant du principe de bonne foi. Le Nicaragua continue d'envoyer des groupes de ressortissants nicaraguayens sur le territoire litigieux, malgré les mesures conservatoires que vous avez indiquées le 8 mars 2011 et les préoccupations que vous avez exprimées dans votre ordonnance du 16 juillet 2013, selon lesquelles «la présence de ressortissants nicaraguayens sur le territoire litigieux comporte un risque d'incidents susceptibles d'aggraver le présent différend». Comme vous l'avez signalé, cette situation «est exacerbée par la taille réduite du territoire concerné et le nombre de ressortissants nicaraguayens y étant présents de manière régulière». Et pourtant, il s'avère que le Nicaragua est allé encore plus loin puisqu'il est en train de construire deux nouveaux *caños* dans le secteur nord de Isla Portillos — zone pour laquelle vous aviez ordonné des mesures conservatoires le 8 mars 2011. Si vous ne preniez pas des mesures visant à empêcher le Nicaragua de continuer ses travaux, il y aurait un réel risque que le Nicaragua impose effectivement comme *fait accompli* un dommage irréparable pour le Costa Rica et pour cette Cour, avant que celle-ci puisse rendre son arrêt final et obligatoire.

9. Monsieur le président, les droits que le Costa Rica cherche à protéger sont parmi les plus importants dans les relations internationales : le droit à la souveraineté et le droit à l'intégrité territoriale. Votre Cour a déjà reconnu que «le titre de souveraineté revendiqué par le Costa Rica sur l'ensemble du territoire de Isla Portillos est plausible». Avec l'occupation du territoire du Costa Rica en novembre 2010, le Nicaragua a revendiqué ce territoire pour la première fois dans l'histoire, et en conséquence ce territoire fait l'objet du litige entre les parties dans l'affaire

*Certaines activités menées par le Nicaragua dans la région frontalière.* En s'engageant dans ces actions illicites dans la région de Isla Portillos, le Nicaragua a causé et continue de causer un dommage irréparable aux droits du Costa Rica. Il existe un risque de dommage irréparable supplémentaire, y compris à travers la déviation du fleuve San Juan, qui semble précisément être l'intention du Nicaragua derrière la construction de ces nouveaux *caños*. Dans ces circonstances, de nouvelles mesures conservatoires sont nécessaires, plus particulièrement afin de prévenir un préjudice irréparable supplémentaire sur les droits souverains du Costa Rica, et par voie de conséquence, afin d'éviter l'imposition d'un *fait accompli* sur nous tous.

10. Monsieur le président, je vais désormais, si vous me le permettez, vous présenter le programme du premier tour de l'exposition des arguments du Costa Rica de ce matin. Pour commencer, M. Sergio Ugalde présentera les faits concernant les actions illicites du Nicaragua sur le territoire litigieux entre juin et septembre 2013. M. Samuel Wordsworth démontrera que la requête du Costa Rica est d'une urgence réelle afin d'éviter un préjudice irréparable sur les droits du Costa Rica. Le professeur James Crawford expliquera ensuite les mesures conservatoires demandées. Enfin, le professeur Marcelo Kohen expliquera les conséquences d'un refus éventuel de votre honorable Cour d'ordonner des mesures conservatoires.

Monsieur le président, Mesdames et Messieurs les juges, je vous remercie infiniment de votre aimable attention. Monsieur le président, je vous prie de donner la parole à M. Ugalde. Merci.

The PRESIDENT: I thank the Agent for Costa Rica. May I ask Mr. Ugalde to continue. You have the floor, Sir.

Mr. UGALDE:

#### **THE FACTS**

1. Mr. President, Members of the Court, it is a great honour to appear before you once again, and a privilege to do so on behalf of Costa Rica.

2. Mr. President, my task this morning is to present the facts surrounding the new activities that Nicaragua is carrying out in Costa Rican territory; in fact, in the "disputed territory", as you

called it, *ex hypothesi*, an area which is subject to your Order on provisional measures of 8 March 2011.

3. The Court is well acquainted with the circumstances giving rise to the dispute in these proceedings, and therefore there is no need to discuss the background facts in any great detail. It suffices to recall that as a result of Nicaragua's illegal military occupation, use and partial destruction of Costa Rican territory in the northern part of Isla Portillos, Costa Rica initiated proceedings on 18 November 2010 and, at the same time, made a request for the indication of provisional measures. The Court considered Costa Rica's request and ordered provisional measures<sup>1</sup>.

#### A. The "disputed territory"

4. Mr. President, distinguished Members of the Court, you will recall that, in your Order of March 2011, you defined the "disputed territory" as:

"the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon (hereinafter the 'disputed territory')"<sup>2</sup>.

5. You will see this area depicted on the image now displayed on your screens, and at tab 4 of your folders. The "disputed *caño*" to which you referred — which I will call the "2010 *caño*", to distinguish it from the new *caños* — is the red line near the middle of the image. The disputed territory runs from the right bank of that *caño* to the outlet of the San Juan in the Caribbean Sea. As is clearly indicated on the same image you have before you, the two new artificial *caños* which prompted Costa Rica's request to the Court today are visible towards the top of the image. They are on Isla Portillos between the right bank of the 2010 *caño* and the Caribbean Sea. They are, without a doubt, on the disputed territory.

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<sup>1</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. 6.*

<sup>2</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. 19, para. 55.*



6. In its Order of 8 March 2011, the Court decided that Costa Rica's rights of sovereignty over the entirety of Isla Portillos were plausible<sup>3</sup>, and found that continued activities on Isla Portillos by Nicaragua "would be likely to affect" the rights asserted by Costa Rica<sup>4</sup>.

7. Furthermore, the Court considered that Nicaragua "intend[s] to carry out certain activities, if only occasionally, in the disputed territory" and that this "creates an imminent risk of irreparable prejudice to Costa Rica's claimed title to sovereignty . . . and to the rights deriving therefrom"<sup>5</sup>. As a result, the Court decided to indicate the first provisional measure, according to which "[e]ach Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security"<sup>6</sup>.

8. The Court also required the Parties to report to it their compliance with the Order on provisional measures. Accordingly, since April 2011, Costa Rica has filed six reports<sup>7</sup> evidencing Nicaragua's policy and practice of sending to the "disputed territory", and maintaining thereon, its citizens. These persons have been carrying out additional activities on the disputed territory, a fact that is acknowledged by Nicaragua<sup>8</sup>. Nicaragua has organized, directed and sponsored their presence there. Costa Rica also reported to the Court new camps Nicaragua erected on the disputed territory<sup>9</sup>. The photograph tendered by Costa Rica as evidence of this fact is at tab 5 of your folders.

9. Prompted by the fact that the Government of Nicaragua is sending to and maintaining thousands of its nationals in the disputed territory, on 23 May 2013 Costa Rica filed a Request for the Modification of the 2011 Order on Provisional Measures<sup>10</sup>. On 16 July 2013, the Court

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<sup>3</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. 19, para. 58.

<sup>4</sup>*Ibid.*, p. 20, para. 60.

<sup>5</sup>*Ibid.*, p. 24, para. 75.

<sup>6</sup>*Ibid.*, p. 27, para. 86 (1).

<sup>7</sup>See Reports submitted by Costa Rica to the International Court of Justice on 8 Apr. 2011, Ref. ECRPB-029-11; 13 Apr. 2011, Ref. ECRPB-030-11; 23 June 2011, Ref. ECRPB-039-11; 3 July 2012, Ref. ECRPB-026-12; 21 Nov. 2012, Ref. ECRPB-045-12 and 15 March 2013, Ref. ECRPB-016-13.

<sup>8</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Written Observations on the Request by Costa Rica for the Modification of the Court's Order of 8 March 2011, 14 June 2013, para. 29. See also CMN, para. 7.19.

<sup>9</sup>See Report submitted by Costa Rica to the International Court of Justice on 15 Mar. 2013, Ref. ECRPB-016-13.

<sup>10</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for the Modification of the Order of 8 March 2011 Indicating Provisional Measures, 23 May 2013.

concluded that, as the facts presented themselves at that time, it was not necessary to modify its Order of 8 March 2011<sup>11</sup>. However, the Court made plain its concern about “the presence of organized groups of Nicaraguan nationals in the disputed area” in large numbers<sup>12</sup>. Only weeks after the Court expressed its concern in this regard, the Nicaraguan press boasted that by August 2013, over 10,000 Nicaraguans had been sent to the disputed territory<sup>13</sup>.

### **B. Nicaragua’s new activities on the disputed territory**

10. Mr. President, since the Court’s Order of 16 July 2013, alarming new events have occurred. Nicaragua has made new attempts to alter the geography of Costa Rica by constructing, not merely one, but two new artificial *caños*. With these new artificial *caños*, Nicaragua intends to create a new outlet of the San Juan River into the Caribbean Sea, cutting across Costa Rican territory in the process.

11. In late August this year, Costa Rican police became aware of unusual activity and noise in the area, including noises made by chainsaws cutting down trees. They alerted other Costa Rican authorities around 30 August 2013. Upon receiving this news, the Costa Rican Foreign Ministry requested a Costa Rican company that supplies satellite imagery to obtain current images of the disputed area from satellite operators. Due to heavy cloud cover in the area, particularly at this time of year, it is difficult to obtain clear images, and the first clear image of the disputed territory could not be taken until 5 September 2013. It was provided to Costa Rica on 13 September 2013.

12. That image, which is at tab 6 of your folders and is now on your screens, clearly shows two channels in the northern corner of the disputed territory. The opening to the left shows a small *caño*. The opening to the right, shows a much larger *caño*. On this eastern *caño*, two vessels are also visible, one of which is clearly a dredger. The Nicaraguan camps, which Costa Rica reported

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<sup>11</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, para. 36.

<sup>12</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, 16 July 2013, para. 37.

<sup>13</sup>See the reports referred to in Diplomatic Note sent by Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 17 Sept. 2013, Ref. DM-AM-536-13, Att. PM-1.

to the Court in its report of 15 March 2013<sup>14</sup>, are also clearly visible. It has become apparent why Nicaragua decided to install its camps at this location.

13. In order to confirm that these were two new openings, Costa Rica reviewed satellite images from 2010, 2011, 2012 and 30 June 2013, which you will find at tabs 7 to 10 of your folders. In none of these images are the two new *caños* visible. As you can see on the screen, at tab 11 of your folders, when superimposed, the infrared image from 30 June 2013 and the infrared image from 5 September 2013 show clearly what took place: two new *caños* appear in the image of 5 September on what was — on 30 June — untouched wetland. There is also no sign of the two new *caños* in satellite images obtained from previous years, including images annexed to Nicaragua's Counter-Memorial<sup>15</sup>. An additional image taken on 14 September 2013, at tab 12 of your folders, confirms that the Nicaraguan dredger remains in the eastern *caño*, as it was on 5 September.

14. As a result of this discovery, Costa Rica immediately wrote to Nicaragua requesting an explanation for the construction of these new *caños*. Costa Rica also requested that Nicaragua immediately cease all construction activities in the disputed territory, and that it provide an immediate assurance that such construction activities will not be recommenced, and that Nicaragua keep the disputed territory clear of any person emanating from Nicaraguan territory<sup>16</sup>. So that there could be no possible confusion as to the activities of which Costa Rica complained, Costa Rica attached to its letter the relevant satellite images, together with co-ordinates of the location of the newly built *caños*.

15. On 17 September 2013, Costa Rica notified Nicaragua<sup>17</sup>, the Court<sup>18</sup>, and the Ramsar Secretariat<sup>19</sup> that it was necessary for Costa Rican personnel charged with the protection of the

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<sup>14</sup>Letter from Costa Rica to the ICJ, Ref. ECRPB-016013, 15 Mar. 2013.

<sup>15</sup>See, e.g. CMN, Ann. 135 (2007 Satellite Image) and Ann. 136 (2010 Satellite Image). See also CMN Fig. 6.8 (Jan. 2011 image), p. 330.

<sup>16</sup>Diplomatic Note sent by Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 17 Sept. 2013, Ref. DM-AM-536-13, Att. PM-1.

<sup>17</sup>See Diplomatic Note sent by Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 17 Sept. 2013, Ref. DM-AM-537-13, Att. PM-2.

<sup>18</sup>See Note sent by Ambassador Jorge Urbina, Co-Agent of Costa Rica, to His Excellency Mr. Philippe Couvreur, Registrar of the International Court of Justice, 17 Sept. 2013, Ref. ECRPB-059-13, Att. PM-3.

environment to carry out a site visit to the “disputed territory”, pursuant to the Court’s Order of 8 March 2011, in order to avoid irreparable prejudice being caused to the wetland. As the Court is well aware, Costa Rica has obligations under the Ramsar Convention in respect of the wetland in Isla Portillos, and construction activities such as those which are apparent from the satellite imagery Costa Rica has obtained are activities which may cause irreparable prejudice to the wetland, the protection and preservation of which Costa Rica is responsible for. Costa Rica explained that, depending on weather conditions, Costa Rican personnel would try to reach the area by navigating on the San Juan, or by conducting an overflight.

16. On 18 September 2013, weather conditions permitted Costa Rica to carry out a site visit. Costa Rican personnel attempted to access the disputed territory by hiring a private boatman to navigate on the San Juan River. However, when the Costa Rican personnel reported to the nearest Nicaraguan post, known as “Delta”, Nicaraguan army officers detained Costa Rica’s personnel and prevented them from navigating on the river<sup>20</sup>.

17. Other Costa Rican personnel charged with the protection of the environment hired a private helicopter, and were able to carry out an overflight of the “disputed territory”. Given the possible presence of Nicaraguan military personnel in the area, and the threat this presence posed to the security of the Costa Rican personnel involved, the overflight over the disputed territory was of extremely short duration, approximately three minutes. However, during this overflight, it was possible to observe and record the harm which is being caused to the disputed territory as a consequence of Nicaragua’s activities therein. These observations are recorded in a report of 18 September 2013 which was submitted with Costa Rica’s Request<sup>21</sup>.

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<sup>19</sup>See Note sent by Ambassador Manuel B. Dengo, Permanent Representative of the Republic of Costa Rica to the United Nations Office and other international organizations in Geneva, to Mr. Christopher Briggs, Secretary General to the Ramsar Convention, 17 Sept. 2013, Ref. MPCR-ONUG/2013-407, Att. PM-4.

<sup>20</sup>Report of Costa Rican Ministry of Environment and Energy (MINAE) and the National System of Conservation Areas (SINAC), 18 Sept. 2013, Att. PM-6, p 2; and Diplomatic Note sent by Gioconda Ubeda Rivera, Acting Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 24 Sept. 2013, Ref. DM-D VM-550-2013, Att. PM-20.

<sup>21</sup>Report of Costa Rican Ministry of Environment and Energy (MINAE) and the National System of Conservation Areas (SINAC), 18 Sept. 2013, Att. PM-6.

18. The series of photographs taken from the helicopter are reproduced at tabs 13 to 17, shown on your screens, and they show the larger of the two new *caños*, constructed in a straight line, with a width varying between 20 to 30 metres, measuring nearly 300 metres. At the top of your screen you see the Caribbean Sea, and the narrow strip of beach separating it from a small lagoon which is at the northern end of the newly constructed *caño*. On the banks of this new *caño*, you can see that vegetation has been recently removed. Some tall trees remain intact, as you see from the shadows on both banks. They assist to conceal the construction works from the view of Costa Rican police on undisputed Costa Rican territory. In the middle of the photograph, you see a Nicaraguan dredger working to enlarge and deepen the *caño*. Towards the bottom left of the photograph, you see a dredger pipe, placed in the direction of the San Juan River. This suggests that sediment generated through the construction of the *caño* is being deposited into the San Juan River to block the main channel of the River, and thereby redirect its waters into the new *caño*. At the top right of the photograph, on the beach just beyond the vegetation, you see what appear to be Nicaraguan Army camps, including a rudimentary observation tower. This area is now enlarged on your screens, visible at tab 14, and you see the structures and the observation tower clearly. These new camps are akin to those Nicaraguan military camps placed in the occupied territory back in 2011<sup>22</sup>, which you can see at tab 15.

19. On the photograph now on your screens, at tab 16, you can see the northern part of the *caño* in close-up, and tree stumps can be seen in middle of the channel. It appears that not all tall trees there were lucky to survive. You also see, at the top of the photographs, a trench which is being dug from the small lagoon across the beach.

20. You can now see at tab 17, in close-up, a photograph of the dredger. At the time this photograph was taken, on 18 September 2013, the dredger was in use. This is apparent because the cutter head (the black structure towards the bottom of the dredger) is deployed, and the pipe at the rear of the dredger, towards the top of the photograph, is trailing through the water<sup>23</sup>. Thus on 18 September, Nicaragua was continuing its construction work on the *caños*.

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<sup>22</sup>See Photographs showing the presence of Nicaraguan troops in Isla Los Portillos after oral hearings on Provisional Measures, 19 January 2001, MCR Annex 223.

<sup>23</sup>See also Professor Colin Thorne, *Report on the Impact of the Construction of the two New Caños on Isla Portillos*, Attachment PM-33, p. 3, para. 4.1 (d).

21. On 18 September 2013, Nicaragua's Foreign Minister responded to Costa Rica's letter. In the letter Nicaragua refused to accept the fact that these *caños* were being built — despite having in its possession undeniable evidence in the form of satellite imagery which Costa Rica attached to its letter, which I have shown to you today. It refused to cease the work or to give any of the assurances requested by Costa Rica.

22. Mr. President, the facts I just presented to you are unquestionable. They speak clearly of deliberate activities undertaken by Nicaragua in contempt of the Court's authority, and the basic tenets of international law.

23. Mr. President, Members of the Court, on 24 September, Costa Rica found itself in the following situation:

- (a) One: It had received clear evidence that Nicaragua was constructing two *caños* on Costa Rican territory, in Isla Portillos, on the disputed territory which is the subject of the Court's Order.
- (b) Two: It provided that evidence to Nicaragua and asked Nicaragua to cease the works, and to provide assurances that it would not recommence them.
- (c) Three: Nicaragua refused to provide those assurances, blaming any alleged appearance of *caños* — and dredgers, apparently — on the rain. Indeed, it even denied the construction of the new *caños*, in the face of indisputable evidence in satellite images.
- (d) Four: Nicaragua then suggested, through Mr. Pastora, that it was indeed carrying out works in the disputed territory, but that this work was cleaning "aquatic plants", not constructing and dredging *caños*.

24. In these circumstances, and in order to stop a new *fait accompli* from being imposed, Costa Rica was compelled to file this new Request for the indication of provisional measures on 24 September.

### **C. Events after Costa Rica's Provisional Measures Request**

25. Mr. President, on the late afternoon of last Thursday, 10 October, Costa Rica received a communication from Nicaragua, transmitted by the Registrar<sup>24</sup>. In that letter, sent more than three weeks after Costa Rica notified Nicaragua about the *caños*, Nicaragua managed to fabricate a

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<sup>24</sup>Letter from Nicaragua to the ICJ, 10 October 2013, Ref. HOL-EMB-193, attached to Letter from the ICJ to Costa Rica, 10 October 2013, Ref. 142571.

different explanation of the facts. It suggested that it is all the fault of Mr. Pastora. But Mr. Pastora *is* Nicaragua. He acts on behalf of the Government of Nicaragua. He was appointed by Commander Ortega, the Nicaraguan President, to carry out, in Nicaragua's name, the dredging of the San Juan and Isla Portillos, the very same activities that Nicaragua's Agent and counsel have so staunchly defended throughout these proceedings. In the letter dated 22 September 2013 from Nicaragua's National Port Authority, Pastora is addressed as "Government Delegate for the Dredging Works"<sup>25</sup>.

26. Notwithstanding last Thursday's denials, on Friday, a day later, Nicaragua, in its letter to the Court, acknowledged that unauthorized activities were, indeed, carried out by Nicaragua<sup>26</sup>. As a matter of fact, in documents filed by Nicaragua on that day, it is now found that a 20 September report prepared by the technical manager of Nicaragua's National Port Authority (the Government agency in charge of the dredging operations), states that "cleaning works began in August in order to guarantee the natural flow of the San Juan River into the river mouth Delta. These works include the use of a suction dredger."<sup>27</sup> This is remarkable news. It is remarkable because it clearly shows that this was a Nicaraguan Government sanctioned operation, and because it squarely contradicts the statement made by Nicaragua's Foreign Minister on 18 September, and the statement made to the Court on Thursday by Nicaragua's Agent. On Thursday, Nicaragua's Agent stated: "As Nicaragua advised Costa Rica by Diplomatic Note on 18 September, it 'has not authorized any type of work in the disputed area and has not sent personnel there'. Nicaragua formally reiterates this statement."<sup>28</sup> That is simply not true. The Nicaraguan Government *did* know and *did* authorize personnel and equipment to carry out these works in August.

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<sup>25</sup>Letter from the Executive President of the National Port Authority to the Government Delegate for the Dredging Works of the San Juan de Nicaragua, Ref. PE-VSM-0592-09-2013, 22 September 2013, Annex 8 to Letter from Nicaragua to the ICJ, 11 October 2013, Ref. HOL-EMB-197, attached to Letter from the ICJ to Costa Rica, 11 October 2013, Ref. 142609.

<sup>26</sup>Letter from Nicaragua to the ICJ, 11 October 2013, Ref. HOL-EMB-197, attached to Letter from the ICJ to Costa Rica, 11 October 2013, Ref. 142609, p. 1.

<sup>27</sup>Letter from the Technical Manager of the National Port Authority to the Executive President of the National Port Authority, Ref. GT-LAQG-0886-09-2013, 20 September 2013, Annex 3 to Letter from Nicaragua to the ICJ, 11 October 2013, Ref. HOL-EMB-197, attached to Letter from the ICJ to Costa Rica, 11 October 2013, Ref. 142609.

<sup>28</sup>Letter from Nicaragua to the ICJ, 11 October 2013, Ref. HOL-EMB-197 (reference omitted), attached to Letter from the ICJ to Costa Rica, 11 October 2013, Ref. 142609.

27. On Friday, Nicaragua stated that it had suspended all works and removed all machinery and personnel on 23 September, which apparently makes it all good. It should be noted, however, that Nicaragua did not give any such explanation to Costa Rica, or to the Court, until the very last minute on Friday. It said nothing when the Court scheduled these hearings, and, before Friday, it said nothing to Costa Rica or to the Court about its alleged belated compliance with the Order.

28. Mr. President, this evidence proves beyond doubt the deliberate activities which Nicaragua has carried out, in complete disregard of the rights of Costa Rica and the Court's authority. We trust the Court will view these new developments for what they truly are: acts in defiance of Costa Rica's rights and of the Court's authority, by which Nicaragua is seeking to refashion the border, at whatever cost.

29. Mr. President, that concludes my presentation today. I wish to thank you and the Members of the Court for your attention this morning. Mr. President, I ask that you now call upon Mr. Samuel Wordsworth.

Mr. WORDSWORTH:

## THE CRITERIA FOR THE INDICATION OF PROVISIONAL MEASURES

### 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 criteria for the indication of provisional measures and their application in this case. These criteria are very well known to you.

(a) first, of course, the existence of the Court's prima facie jurisdiction over the dispute must be established<sup>29</sup>;

(b) secondly, Costa Rica must show that there is a risk of irreparable prejudice, and that the measures sought are necessary "in order to ensure that irreparable prejudice shall not be caused to rights which are the subject of dispute in [the] judicial proceedings"<sup>30</sup>;

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<sup>29</sup>*Anglo-Iranian Oil Co Case, Order 5 July 1951, I.C.J. Reports 1951*, pp. 89 and 93; *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 137, para. 14; *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. 17, para. 49.



- (c) thirdly, the rights requiring protection must be asserted “at least plausibl[y]”<sup>31</sup>; and
- (d) fourthly, we 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>32</sup>.

2. As to the first and the third criteria, there can be no dispute at all. The Court has already concluded in its 2011 Order that it had prima facie jurisdiction<sup>33</sup> and, since then, Nicaragua has expressly accepted the Court’s jurisdiction<sup>34</sup>. Likewise, the Court has already said that Costa Rica’s title to sovereignty claim is plausible<sup>35</sup>. So, it is on the second and the fourth criteria that I will have to devote a little bit more time.

3. The relevant legal standards on irreparable prejudice and urgency are very well known to this Court, and I need not dwell on those. But I do need to take you to some of the evidence, although I emphasize that the Court is not of course being asked to reach any definitive findings. The key questions go to risk — risk of irreparable prejudice, and risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision. And of course in this context we accept that risk means a real and imminent risk, not some insignificant or speculative risk.

### **B. Risk of irreparable prejudice to Costa Rica’s rights in dispute**

4. I turn first to the rights forming the subject of the pending proceedings. The relevant rights are as stated at paragraph 21 of Costa Rica’s Request for Provisional Measures of

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<sup>30</sup>*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. 388, para. 118; *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. 63.

<sup>31</sup>*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57; *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. 18, para. 53.

<sup>32</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.

<sup>33</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. 18, para. 52.

<sup>34</sup>CMN, paras. 1.5-1.8.

<sup>35</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. 19, para. 58.

24 September — these are rights to sovereignty over the northern sector of Isla Portillos, to territorial integrity, and to non-interference with its lands and environmentally protected areas.

5. Stepping back, all Costa Rica is seeking to preserve is the *status quo ante* pending resolution of the territorial dispute. On conclusion of these proceedings, Costa Rica wishes to exercise sovereignty over territory where the San Juan River remains on its existing course, not diverted to the east, and likewise it wishes to exercise sovereignty over Ramsar protected wetlands, not de-forested areas where the environment has already been significantly impacted by the Nicaraguan works that have been taking place, apparently since July or August of this year.

6. Now, certain aspects of the risk of irreparable prejudice to Costa Rica's rights are straightforward. Let me take you to paragraph 75 of the Court's Order of 8 March 2011, where the Court was also dealing with Nicaraguan works on a *caño* in the disputed area. Nicaragua had said that it had withdrawn its troops, that it did not intend to station troops or personnel in the area, and that any ongoing works in the area were confined to the planting of trees. The Court, however, recalled that there were competing claims over the disputed territory, and continued —

“whereas this situation creates an imminent risk of irreparable prejudice to Costa Rica's claimed title to sovereignty over the said territory and to the rights deriving therefrom”<sup>36</sup>.

7. Precisely the same applies today. So that is one aspect to the current Request, so far as concerns risk of irreparable prejudice.

8. But there is a second aspect, concerning diversion of the course of the River San Juan and related environmental impacts. The basic facts here are as follows:

(a) first, Nicaragua has again been seeking to alter the course of the San Juan River. It contests that; but the explanations that it is putting before you are inconsistent and implausible. My good friend Professor Crawford will be coming back to some of the details;

(b) secondly, the *caño* that Nicaragua has excavated this time — and I am going to be focusing on the channel to the east that you have just seen up on your screens — this *caño* to the east is much shorter and much wider than the *caño* that Nicaragua was excavating in 2010 and 2011. It has been dug by machine, not by hand. In simple terms, the new route to the Caribbean Sea

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<sup>36</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. 24, para. 75.*

is short, direct, and was very nearly complete when the photographs that you have just seen were taken three or four weeks ago. And of course, the new route goes straight through part of the disputed territory;

- (c) thirdly, there is a marked shift in gradient between the existing meandering river course and the new *caño*. I shall show you the details in a moment, but the gradient of the new *caño* is four times steeper than that of the existing river course. One does not have to be an engineer or a physicist to work out which way the water is likely to flow; and
- (d) finally, and as follows from all the above, there is a real and imminent risk that waters from the San Juan River will be diverted, and also that it would be practically impossible to restore them to their former course.

9. Now, to make these points good, I want to take you to the two expert reports that have been put before you in support of Costa Rica's current Request — and you will find both of these in your judges' folder, in the tab in fact, with my name on it.

10. The first report I want to take you to is at tab 19, and this is the Technical Assessment carried out by the University of Costa Rica, the Centre for Research in Sustainable Development, the Department of Engineering<sup>37</sup>; and I am going to this first, as it introduces some basic engineering principles in terms of how you divert the course of a river.

- (a) And perhaps this is rather basic — as when it comes down to it, the report is explaining that you either dig a new channel that is as wide and deep as the existing watercourse, and then divert, or you build what is called a pilot channel. This is a smaller channel, which lets the tractive force of the river, in essence, that is the power of the river's flow and its erosion processes, it lets that do some of the work in bringing about the diversion.
- (b) And what the evidence shows — and I just want to take you to a passage from page 10 of tab 19 — it shows the significant risk that the eastern *caño* will enable diversion of the river's course, even if it is seen as a pilot channel — some of the background is set out at the top of page 10:

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<sup>37</sup>University of Costa Rica Centre for Research in Sustainable Development, Department of Civil Engineering, "Technical assessment of the artificial canals on Isla Portillos", October 2013, Attachment PM-19.

“The United States Army Corps of Engineers’ experience dictates that for a pilot channel to scour and enlarge its cross-section the ratio of tractive force in the pilot channel to that in the river should be greater than 1.5 for channels cut in sandy material, and greater than 2 for channels cut in more erosion resistant materials. Attractive force ratio less than 1 is expected to lead to closure of the pilot channel due to insufficient sediments transport capacity. In other words, if the tractive force is strong enough the flow will erode the bottom and sides of the pilot channel, causing the river to switch its alignment from its natural course to a new, artificial course following the alignment of the pilot channel.”<sup>38</sup> [Judges folder, tab 19, p. 10.]

So, obviously, having read that, one wonders what is the tractive force at issue when it comes to this particular diversion.

(c) Now, Costa Rica’s experts have not had access to the disputed area to carry out a detailed assessment of the precise tractive force. But they are able to establish the change in gradient in the *caño*, and to assess its width.

(d) The change in gradient is easy to establish. Along the existing route to the river, it is 1800 metres to the Caribbean Sea. Along the *caño*, it is just 450 metres. And of course, the Caribbean Sea is at the same sea level no matter which exit route is taken, so the *caño* route is four times steeper, four times shorter; it therefore follows four times steeper. That is all explained at page 11 of this report. One is therefore going to expect some significant tractive force. So far as concerns the respective widths of the existing river and the *caño*, the report explains at page 11, and this is the second paragraph:

“The average widths of the San Juan River downstream from Point 8 [Point 8 is effectively the diversion point] and the new canal to the east were measured in the satellite image to be 65 m and 30 m, respectively. These widths are sufficient to consider both water bodies as being ‘wide’ for the purpose of calculating the tractive force. Therefore, if the depths of the San Juan River and the canal to the east are about the same, the tractive force ratio between the new canal (pilot channel) and the natural course of the River is 4. Even if the San Juan River is assumed to be twice as deep as the new canal to the east, the tractive force ratio between them would be 2 and would therefore still be sufficient to force a shift in the River’s alignment.”<sup>39</sup> [Judges’ folder, tab 19, p. 11.]

(e) So sufficient tractive force, it appears. And, from the figure at page 12 of the report (which we have now put up on the screen), one can get a flavour of the width of the *caño*, and also its proximity to the Caribbean Sea.

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<sup>38</sup>*Ibid.*, Attachment PM-19, p. 10 (reference omitted).

<sup>39</sup>*Ibid.*, Attachment PM-19, p. 12.

(f) Moving to page 14 of this report, one can see that there is a significant risk of rapid and irreparable change. The report explains (and this is the last sentence on page 14):

“Once the dredge completes its work and these obstructions are removed there is a significant risk that, during the high flow period later this year, a rapid and irreparable change in the course of the San Juan River will come about as the eastern channel becomes fully operational as a pilot channel.”<sup>40</sup> [Judges’ folder, tab 19, p. 14.]

(g) So that is very clear. And it is important to emphasize that there are two further factors for the Court to bear in mind.

(h) First, it is not just the downstream sector of the San Juan River that would be impacted through a change of course. As this report explains, there would likely be upstream impacts too, including in terms of increased scour and lowering of the channel bed elevation upstream, and aggravated bank erosion. One can see that from page 15 of the report.

(i) Secondly, it is not as if one can reverse the effects of a diversion simply by turning off the tap, or by switching, as I can, between the bath and shower option on the mixer tap in my hotel bathroom. And one can see this on page 16 of the report:

“In our capacity, as civil engineers, we believe that remedial activities to close the mouth of the new canals appear necessary to avoid the risk of a shift in the San Juan River course. Notwithstanding, it is not possible to give any detailed answer as to the activities necessary to achieve the closure of the canals, as we have not been able to visit the area in question and carry out a detailed site inspection, which, in these circumstances, would be required. However, what can be said is that the San Juan is a significant sized river, even at this location, and that the change of course of the River could become permanent. Therefore, if the course of the River is altered, it would be extremely difficult, perhaps impossible to shift it back through civil engineering works, and any such works would anyway likely be at high environmental (and financial) cost, and would likely also involve works on the River’s current main channel.”<sup>41</sup> [Judges’ folder, tab 19, p. 16.]

11. I should like to take you now to the second expert report that Costa Rica has put before you, and that is the report of Professor Thorne dated 10 October 2013 (and that is at tab 20 of your bundle)<sup>42</sup>. And Professor Thorne has been asked to give his independent expert view on the potential impacts of construction of the two new *caños*, and he comes at this from the perspective of somebody with over 35 years of professional experience in matters relating to rivers, river

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<sup>40</sup>*Ibid.*, Attachment PM-19, p 14.

<sup>41</sup>*Ibid.*, Attachment PM-19, p. 16.

<sup>42</sup>Professor Colin Thorne, *Report on the Impact of the Construction of Two New Caños on Isla Portillos*, 10 October 2013, Attachment PM-33.

sedimentation and river morphology. And you can see his qualifications and terms of reference as set out at sections 2 and 3 of his report<sup>43</sup>.

12. The first point to take you to in Professor Thorne's report is a river morphologist's opinion on Nicaragua's case that these new *caños* are somehow the result of natural forces. I very much doubt you need this, but for good measure, this is from Section 4.1 of Professor Thorne's report at page 3 of tab 20.

“(a) Vegetation was cleared from strips of land in the Isla Portillos, at some time subsequent to late-June 2013, to create the corridors within which to construct the two 2013 *caños*.

(b) The two 2013 *caños* have been artificially constructed through excavation and dredging of formerly undisturbed terrain in the northern part of Isla Portillos. The *caños* are not the result of natural processes. They could not have been formed as a result of rainfall or erosion driven by other natural processes, especially given the short period of time between photographs taken in late-June and early-September 2013 that respectively show the relevant areas to be undisturbed and occupied by artificial channels.”<sup>44</sup> [Judges' folder, tab 20, p. 3.]

13. So there is no doubt at all about any of that. Professor Thorne then explains at paragraph 4.3 of his report that the works have already had a detrimental impact on the environment, on what is an environmentally protected and sensitive area. Then I want to take you briefly to a passage from 4.11, which is at page 7 of his report, half-way down on page 7:

“It is difficult to predict precise impacts on the ecosystem on the basis of the limited available information. However, there is certainly a real risk that diverting some portion of the flow in the Rio San Juan into the 2013 *caños* would have multiple impacts on the River, biota that inhabits the River as well as the ecological services it supplies. Flow diversion has the potential to produce multiple, consequential impacts on the right bank, wetland floodplains including, but not limited to: toe scour and/or bank instability in the Rio San Juan upstream of the *caños*, leading to channel and sinuosity adjustments and associated loss of benthic, riparian and floodplain habitats and ecosystems.”<sup>45</sup> [Judges' folder, tab 20, p. 7 of his report.]

14. Now, as to the risk that the current works will result in diversion, let me take you back to page 5 of the report and there you see at 4.4, Professor Thorne explains that:

“The shape and alignment of the new *caño* to the east suggest to me that it is intended to divert a portion of discharge from the Rio San Juan into a new course and,

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<sup>43</sup>*Ibid.*, Attachment PM-33, pp. 2-3.

<sup>44</sup>*Ibid.*, Attachment PM-33, p. 3, paras. 4.1 (a) and (b).

<sup>45</sup>*Ibid.*, Attachment PM-33, p. 7, para. 4.11.

in doing so, induce scouring of the bed and/or banks that will enlarge the *caño*.”<sup>46</sup>  
[Judges’ folder, tab 20, p. 5 of his report]

15. Now I have to say that from the perspective of Costa Rica’s legal counsel, this intention appears blindingly obvious, but it is important to see that this is also how an expert river morphologist sees matters.

16. Professor Thorne then compares the current works with those that Nicaragua carried out on the *caño* before the Court in 2011, and he explains that this new *caño* is much wider and was built using different engineering techniques. He continues at paragraphs 4.5 and 4.6 (I am still at page 5 here, the final sentence of 4.5):

“As a result, the risk that these works will succeed in diverting the natural course that the Rio San Juan currently takes to the sea is now much increased as compared with the earlier works.

This is the case because, should the eastern *caño* divert the course of the Rio San Juan (as appears to be intended from my assessment of the works), there is a significant risk that there will be no practical possibility of reversing the situation and restoring the River to its natural course.”<sup>47</sup> [Judges’ folder, tab 20, p. 5 of his report.]

17. So this is all very much in line with the views expressed by the University of Costa Rica report, and the same applies where one comes to the prospects of this eastern *caño* fulfilling the apparent intention of diverting the course of the Rio San Juan.

18. If I can take you to paragraph 4.7, on page 6 of tab 20, reading from the second sentence:

“In the case of the eastern *caño*, the trench already dug part way across the beach could be extended to achieve this with very little difficulty. Once the trench is completed, increasing wet season runoff from the catchment of the Rio San Juan will raise the elevation of the water surface in the River compared to that in the sea, creating the gradient necessary to drive flow through the *caño* with sufficient force to scour its bed and enlarge the ditch through the beach. Connecting the River to the Caribbean Sea via the eastern *caño* would provide a short cut to the sea for water flowing along the Rio San Juan. Through time, this short cut would convey progressively more of the flow, which would reduce the discharge in the San Juan River downstream of the *caño*, causing it to deposit silt, with a significant risk that it would close entirely at times of low runoff during the next and subsequent dry seasons.”<sup>48</sup> [Judges’ folder, tab 20, p. 6 of his report.]

So again, significant risk.

19. And, finally, Professor Thorne’s views are in line with those of the University of Costa Rica when it comes to upstream morphological impacts. He explains at paragraph 4.8 that,

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<sup>46</sup>*Ibid.*, Attachment PM-33, p. 5, para. 4.4.

<sup>47</sup>*Ibid.*, Attachment PM-33, p. 5, paras. 4.5-4.6.

<sup>48</sup>*Ibid.*, Attachment PM-33, p. 6, para. 4.7.

as one would expect, the “longer-term morphological consequences of the construction of the *caños* are difficult to predict on the basis of the available information”. However, he continues —

“what can be predicted is that should either or both of the *caños* capture a significant portion of flow in the Rio San Juan, as to which there is a significant risk, this could destabilize the channel of the River upstream. This risk will increase in the event that there is a flood in the River, which is more likely to occur in the coming months than in the dry season next year.”<sup>49</sup> [Judges’ folder, tab 20, p. 6.]

20. So, to draw all of this together, there is substantial evidence before you of actual adverse impact, and of the significant risk of irreparable prejudice to Costa Rica with respect to its asserted rights to sovereignty, to territorial integrity, and to non-interference with its lands and environmentally protected areas. The work on the eastern *caño* was nearly complete when Costa Rica last had its minimal access to the site — we simply do not know how matters stand today. But you have the experts’ views as to the significant risk of diversion, and also that there would be no practical possibility of reversing the diversion and restoring the river to its natural course.

21. Where, then, is the evidence to the contrary? There is none; and that presumably reflects the fact that the views of Costa Rica’s experts appear intuitively correct. And perhaps Nicaragua did not wish to let its experts anywhere near the new *caños*, not least as they would inevitably confirm the absurdity of the suggestion that the sudden appearance of the *caños* is the result of natural processes.

22. The only point that Nicaragua has, as we understand it, is to say that it has now stopped the works, and that it will make sure that these will not continue.

23. But that is no more an adequate response today than it was in 2011, when the Court correctly held that the situation created an imminent risk of irreparable prejudice.

24. And the situation here is much starker. For how can the Court place any weight on statements that the works have been stopped when, at one and the same time, Nicaragua’s explanation to Costa Rica is that there were never any works in the first place, and that the *caños* have appeared through natural causes, or that they are in any event nothing to do with Nicaragua. That is not just implausible; it undermines any suggestion that a mere assertion of “trust us, we

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<sup>49</sup>*Ibid.*, Attachment PM-33, p. 6, para. 4.8.



have stopped” could somehow be sufficient to address the risk of irreparable prejudice. It clearly could not.

25. Professor Crawford is going to deal with the detail of Nicaragua’s oscillating position. But the short point for now is that one does not look at issues of risk in the abstract. You have to look at where the risk is coming from, the originator of the risk, as it were; which, in this case, means that you have to look very carefully at Nicaragua and its past and recent conduct, at what it has been saying, and at what it has in fact been doing.

### **C. There is urgency requiring the indication of provisional measures**

26. I turn to the need for a showing of 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>50</sup>.

27. There is very little to add here, so I shall be brief. Just two points.

28. First, the Court found that there was urgency in the similar circumstances before it at the time of the 2011 Order<sup>51</sup>.

29. Secondly, the urgency is readily apparent, and supported by Costa Rica’s expert evidence. The works were nearly complete when Costa Rica was last able to get any view of them, some weeks ago; and to extend the trench across the beach and through to the Caribbean Sea can, as Professor Thorne noted, be achieved with “very little difficulty”<sup>52</sup> — it may already have been completed for all we know. The risks are then immediate, in particular as we are now entering the height of the rainy season, when flows in the River will be at their highest. There is no sense in which the matters now before you can be left until your final decision.

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<sup>50</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.

<sup>51</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. 24, para. 75.

<sup>52</sup>Professor Colin Thorne, *Report on the Impact of the Construction of Two New Caños on Isla Portillos*, 10 October 2013, Attachment PM-33, p. 6, para. 4.7.

#### **D. Conclusion**

30. Mr. President, Members of the Court, Costa Rica has had the most limited access to the disputed area, but through the photographs that you have been shown, and the expert evidence now before you—all of which is supported by a lay person’s intuitive appreciation of the situation—you have the materials to conclude without difficulty that there is a compelling case before you of real risk and urgency.

That concludes my remarks. I thank you for your kind attention, and I ask that the floor be given to Professor Crawford—perhaps after the break.

The PRESIDENT: Thank you, Mr. Wordsworth. The Court will now take a 20-minute break and after that I will give the floor to Professor Crawford. The hearing is suspended.

*The Court adjourned from 11.20 a.m to 11.45 a.m.*

The PRESIDENT: Please be seated. The hearing is resumed and the Court is ready to listen to your presentation, Professor Crawford. You have the floor.

Mr. CRAWFORD: Thank you, Sir.

#### **THE NEED FOR PROVISIONAL MEASURES**

##### **A. Introduction**

1. Mr. President, Members of the Court, last Friday evening, Nicaragua— at the very last moment— said that it had withdrawn from the disputed territory, though without admitting it had ever been there. It said that whether or not it had ever been there, it would not go back. It said it had instructed the Nicaraguan Army to be vigilant to ensure that it would not go back— though it still hasn’t admitted there was any being there in the first place. Still less has it apologized to the Court nor to Costa Rica for its egregious breach of your Provisional Measures Order. But now, or I should say once more, Nicaragua says to the Court “Trust us. We didn’t do it and we won’t do it again.”

2. The Peace Palace is 100 years old and you, Mr. President and Members of the Court, were not born yesterday. Nicaragua asks for another chance. But the first step is to admit the truth. This Nicaragua will not do. Its word is not to be trusted.

3. The proceedings were instituted by Costa Rica in 2010. On the same day, Costa Rica sought provisional measures for the withdrawal of Nicaraguan troops; the cessation of the construction of a canal; and other measures to protect its sovereign and territorial rights.

4. During those oral hearings, Nicaragua articulated for the very first time its claim to sovereignty over what became for the very first time the “disputed territory”. All Nicaraguan maps, including those presented to the Court in the *Navigational Rights* case, had shown that territory as part of Costa Rica. Engineer Alexander had unequivocally attributed it to Costa Rica. On the basis of this new and unsupportable claim, articulated more than three months after Nicaragua began digging the artificial *caño* in October 2010, Nicaragua argued that it was entitled to dig the *caño*<sup>53</sup>. The digging came first, the argument came later. As you carefully noted in your Provisional Measures Order, “the part of Isla Portillos in which the activities complained of by Costa Rica took place is *ex hypothesi* an area which, *at the present stage of the proceedings*, is to be considered by the Court as in dispute”<sup>54</sup>. You chose your words very carefully.

5. You granted two of the measures requested by Costa Rica, the Parties should refrain from sending any personnel to the disputed territory, with an exception for Costa Rican personnel charged with the protection of the environment<sup>55</sup>. You made no such exception for Nicaragua.

6. But Nicaragua gave three assurances to your Court: (1) that its operations in respect of the *caño* were “over and finished”; (2) that none of its armed forces was stationed on Isla Portillos; and (3) that it did not intend to send any troops or other personnel to the region nor to establish a

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<sup>53</sup>CR 2011/2, p. 13, para. 25 (Argüello) (“Nicaragua is not occupying Costa Rican territory. It is simply exercising the sovereignty over this small area that it has always exercised”); CR 2011/2, p. 52, para. 10 (Pellet) (“Le conte du canal (que le Nicaragua serait d’ailleurs parfaitement en droit en creuser)”).

<sup>54</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. 19, para. 56; emphasis added.

<sup>55</sup>*Ibid.*, p. 27, para. 86 (1).

military post there in the future<sup>56</sup>. In specific reliance on those assurances, you said there was no need to grant any of the other measures requested by Costa Rica<sup>57</sup>.

7. Mr. President, Members of the Court, at least two and a half of these assurances were either untrue or have been shown to be utterly unreliable. At the time it gave these assurances, Nicaraguan armed forces were stationed on Isla Portillos<sup>58</sup>. Since that time, work on the Pastora first *caño* has been continued, including by more than 10,000 Sandinista youth who have been officially brought to the area to further Nicaragua's policies. Moreover — and this is the third point — as Nicaragua's documents now confirm, Nicaraguan personnel have been in the disputed territory carrying out dredging and other works, as late as 18 September 2013<sup>59</sup>. I said two and a half; there are also what appear to be Nicaraguan military camps in the disputed territory, but we have not been able to verify them because we have only limited access to the territory.

8. In the light of Nicaragua's sending to the disputed territory and maintaining their thousands of persons who are carrying out activities in pursuit of its policies, in May this year we requested the modification of your 2011 Order<sup>60</sup>. In your Order of 16 July of this year, you declined this request, but you expressed concern about “the presence of *organized* groups of Nicaraguan nationals in the disputed area” in large numbers<sup>61</sup>. The word “organized” was likewise carefully chosen.

9. Between August and September this year, Nicaragua carried out substantial works in the disputed territory, and constructed two new artificial *caños*, with the assistance of at least one

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<sup>56</sup>*Ibid.*, p. 23, para. 71.

<sup>57</sup>*Ibid.*, p. 24, para. 74.

<sup>58</sup>MCR, Ann. 223; MCR, para. 3.53; Comments by Costa Rica on the Reply of Nicaragua to the questions put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 20 January 2011, Ref. ECRPB-017-11.

<sup>59</sup>See, e.g., Letter from the Technical Manager of the National Port Authority to the Executive President of the National Port Authority, Ref. GT-LAQG-0886-09-2013, 20 September 2013, Ann. 3 to Letter from Nicaragua to ICJ, 11 October 2013, Ref. HOL-EMB-197.

<sup>60</sup>Costa Rica's Request for the Modification of the Court's Order of 8 March 2011, 21 May 2013.

<sup>61</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, para. 37.

dredger. Costa Rica, as soon as it became aware of these activities, protested against Nicaragua's actions<sup>62</sup>.

10. Mr. President, Members of the Court, you have at tab 23 of your folders a table which shows what Nicaragua has said on relevant dates following our letter of protest of 16 September, compared to what Nicaragua now says are the facts. I stress that documents submitted to or through the Court constitute representations to the Court itself, and in this regard, the legal representatives of a country have a distinct obligation of good faith.

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<sup>62</sup>Diplomatic Note sent by Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 16 September 2013, Ref. DM-AM-536-13, Attachment PM-1.

## **B. Nicaragua's Oscillating Position**

11. Nicaragua's explanations so far have been hopelessly inconsistent.

### **Narrative No. 1: an apparition caused by the rain**

12. On 18 September, the Foreign Minister of Nicaragua said that the channels must have appeared because of heavy rain, if indeed they existed at all<sup>63</sup>. He said — and I quote — “we are in the heavy rain season, which normally alters the water levels in the entire area . . . it would not be abnormal for the aspect of some channels to have changed in the last few months”<sup>64</sup>. The weather forecast apparently read “cloudy with a chance of dredgers”.

13. But — and this was repeated only last week<sup>65</sup> — the Foreign Minister in that letter also asserted that “the Government of Nicaragua has not authorized any type of work in the disputed area and has not sent personnel there”<sup>66</sup>.

### **Narrative No. 2: “cleaning aquatic plants”**

14. On 18 September 2013, a different story was told by Commander Pastora, who is described in Nicaragua's Presidential Decree of 10 January 2012 as “Delegate of the Presidency of the Republic to the Commission for the Development of the San Juan River”<sup>67</sup>. Mr. Pastora can fairly be described as a repeat offender in so far as works in the disputed territory are concerned.

15. You will find extracts from his speech at pages 1 and 2 of tab 23. The statements he made on national televisions include the following:

“I have cleaned the Delta in the mouth of the San Juan River, I am cleaning and will clean all of this . . .”<sup>68</sup>

“this channel, it's a lie, it's not a channel”<sup>69</sup>.

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<sup>63</sup>Diplomatic Note sent by Samuel Santos López, Minister of Foreign Affairs, Nicaragua, to Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, 18 September 2013, Ref. MRE/DM/521/09/13, Attachment PM-5.

<sup>64</sup>*Ibid.*, Attachment PM-5.

<sup>65</sup>Letter from Nicaragua to the ICJ, 10 October 2013, Ref. HOL-EMB-193, p. 2, tab 25 of judges' folders.

<sup>66</sup>Diplomatic Note sent by Samuel Santos López, Minister of Foreign Affairs, Nicaragua, to Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, 18 September 2013, Ref. MRE/DM/521/09/13, Attachment PM-5.

<sup>67</sup>Nicaragua, Presidential Decree 01-2012, 10 January 2012, tab 25 of judges' folders, p. 8.

<sup>68</sup>Video interview of Mr. Edén Pastora, 18 September 2013, “Noticias Nicaragua”, Attachment PM-18.

“So we are clearing of aquatic plants all of this and we will clean until here [You can see that he is indicating the disputed territory from the graphic on the screen], so that the stream of water can flow directly as it did in the past.”<sup>70</sup>

“all of these are aquatic plants that we are cleaning out and we will separate them and leave free navigation . . . [W]e are cleaning here, here is the dredger and the cleaning work is done with a dredger, that’s why they call it dredging.”<sup>71</sup>

“I am the one who directs where we are going to clean the aquatic plants . . .”<sup>72</sup>

16. As Mr. Ugalde has shown you, the “aquatic plants” include quite tall trees, a genus of aquatic plant hitherto unknown to science. The Court has been provided with a complete copy of the press interviews plus transcripts<sup>73</sup>.

### **Narrative No. 3: partial disavowing of Pastora**

17. So that was where things stood on 24 September when Costa Rica filed its Request for New Provisional Measures. It had been told that the *caños* did not exist, that they had been created by the rain and that they were the result of cleaning aquatic plants.

18. And then — silence. On 1 October, Nicaragua did write to Costa Rica, but only to complain that Costa Rica had conducted an overflight of the disputed territory<sup>74</sup>. No mention of any of the correspondence filed on Friday evening. No explanation. Nothing.

19. This silence lasted until 10 October, last Thursday, when Nicaragua wrote to say that it “had no knowledge of Mr. Pastora’s *‘alleged activities’*” (emphasis added) in the disputed territory until he made the announcement on national television<sup>75</sup>. Although admitted by Mr. Pastora, those activities were still described by Nicaragua as “alleged” — a fantastic failure to face the facts. This information came a full 25 days after Costa Rica first wrote to Nicaragua to protest the construction of the *caños*, and 20 days after the “alleged” activities were reported to the President’s Office.

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<sup>69</sup>*Ibid.*, Attachment PM-18.

<sup>70</sup>Video interview of Mr. Edén Pastora, 18 September 2013, “100% Entrevistas”, Attachment PM-31, p. 2.

<sup>71</sup>*Ibid.*, Attachment PM-31, p. 3.

<sup>72</sup>*Ibid.*, Attachment PM-31, p. 4.

<sup>73</sup>Video interview of Mr. Edén Pastora, 18 September 2013, “Noticias Nicaragua”, Attachment PM-18; and Video interview of Mr. Edén Pastora, 18 September 2013, “100% Entrevistas”, Attachment PM-31.

<sup>74</sup>Diplomatic Note sent by Orlando Gomez, Vice-Minister of Foreign Affairs, Nicaragua, to Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, 1 October 2013, Ref. MRE/DM/DGAJST-VMOG/293/10/13, Attachment PM-22.

<sup>75</sup>Letter from Nicaragua to the ICJ, 10 Oc. 2013, Ref. HOL-EMB-193, p. 2, tab 25 of judges’ folders.

20. This is the very first time that Nicaragua had disclaimed the actions of Mr. Pastora. It has had multiple opportunities to do so and it has never done so before. In its Application commencing the present case, Costa Rica identified Mr. Pastora as “head of the dredging operations”<sup>76</sup>. Nicaragua said nothing to disavow it. In our first request for provisional measures we complained about his leading of the dredging operations<sup>77</sup>. Nicaragua did not respond. In the hearing on provisional measures, we referred to Mr. Pastora as head of the dredging operations<sup>78</sup>. Nicaragua referred to his statements<sup>79</sup> but never suggested that he was not acting on behalf of Nicaragua. In the second round, Nicaragua said that it did not believe that he was accurately quoted. It said that press reports of his statements were not to be believed<sup>80</sup>. It said that he was “helping his own country to recover the treasure of the San Juan river”<sup>81</sup>. It never disclaimed, on those multiple opportunities, that he was acting on behalf of, and with the full support of Nicaragua.

21. The narrative developed further — this is narrative three — on Friday evening, when we had nine pieces of correspondence filed with the Registry<sup>82</sup>. This correspondence was all completed some time *before* our request of 24 September. None of it was mentioned in Nicaragua’s letter of 1 October 2013. Nothing.

22. Now, I suppose the Court may hear from Nicaragua tomorrow two arguments. First, it will say that it did not authorize the work. In fact it said so already, I refer to tab 25 of your folders and I quote from the Agent:

“As Nicaragua informed Costa Rica by Diplomatic Note on 18 September, it *‘has not authorized any type of work in the disputed area and has not sent personnel there.’* Nicaragua formally reiterates this statement.”<sup>83</sup>

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<sup>76</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* case, Application, para. 6.

<sup>77</sup>*Ibid.*, Provisional Measures, 18 Nov. 2010, para. 6, referring to Att. PM1 (reproduced in MCR, Ann. 45) and Att. PM2.

<sup>78</sup>See, e.g., CR 2011/1, p. 29, para. 9 (Ugalde); CR 2011/1, p. 41, para. 15 (Kohen); pp. 63-64, para. 34 (Crawford); CR 2011/3, pp. 27-30, paras. 25-30 (Crawford).

<sup>79</sup>CR 2011/3, p. 42, para. 30 (Reichler).

<sup>80</sup>CR 2011/4, pp. 18-19, paras. 12-13 (Reichler).

<sup>81</sup>CR 2011/4, p. 36, para. 12 (Argüello).

<sup>82</sup>Letter from Nicaragua to ICJ, 11 Oct. 2013, Ref. HOL-EMB-197.

<sup>83</sup>Letter from Nicaragua to ICJ, 10 Oct. 2013, Ref. HOL-EMB-193 (ref. omitted), tab 25 of judges’ folders.



That statement was made originally, by the Foreign Minister, on 18 September, a statement evidently made in complete ignorance of the facts. Now it is repeated by the Agent in full knowledge of the facts.

23. In short the work conducted by Mr. Pastora, Government Delegate for the Dredging Works of the San Juan River, is somehow not attributable to the Government. That is the first argument. Second, it will say that the work has ceased and there is no longer any need for a provisional measures order. Let me deal with those two arguments.

### C. Attribution of the construction of the *Caños* to Nicaragua

24. First the first argument. The conduct of a person empowered to exercise governmental authority is an act of the State, even if that person exceeds authority or contravenes instructions — which we certainly do not accept was the case here. This long-standing rule of customary international law is codified in Article 7 of the ILC's Articles on State Responsibility. It was recognized by your Court in *Congo v. Uganda*<sup>84</sup>. It has been recognized by other international<sup>85</sup> and domestic courts<sup>86</sup>. It is elementary, *my dear Watson*. If it were not the rule, governments everywhere could authorize abuse, for in most cases there would be no practical way of proving that the agent had or had not acted upon orders<sup>87</sup>.

25. The case has talked about agents being “cloaked with governmental authority”<sup>88</sup>. Mr. Pastora is more than cloaked with governmental authority — he wears it like a wetsuit. He was appointed by the President of Nicaragua to carry out works on the San Juan<sup>89</sup>. The project he is carrying out has been approved by the Nicaraguan Ministry of Environment and Natural

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<sup>84</sup>*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports 2005, p. 242, para. 214; see also p. 251, para. 243.

<sup>85</sup>See, e.g., *Ilascu and others v. Moldova and Russia (Application No. 48787/99)*, Judgment, ECtHR, 8 July 2004, p. 73, para. 391 (“A State may also be held responsible even where its agents are acting ultra vires or contrary to instructions.”)

<sup>86</sup>See, e.g., *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another (Secretary of State for Constitutional Affairs and Another Intervening)*, Judgment of House of Lords, 14 June 2006, reported in 129 *ILR* 629, pp. 718-719; *Distomo Massacre Case (Greek Citizens v. Federal Republic of Germany)*, Case No. III ZR 245/98, Federal Republic of Germany, Federal Supreme Court (BGH), 26 June 2003, 129 *ILR* 513, p. 596.

<sup>87</sup>ILC Commentary to the Articles on State Responsibility, Commentary Art. 7, para. 3, *ILC Yearbook 2001*, Vol. II, Part Two, p. 45.

<sup>88</sup>*Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, 27 (1991) Iran-US C.T.R. 64, p. 92. See also ILC Commentary to the Articles on State Responsibility, Commentary Article 7, para. 7, *ILC Yearbook 2001*, Vol. II, Part Two, p. 46.

<sup>89</sup>Nicaragua, Presidential Decree 01-2012, 10 January 2012, tab 25 of Judges' folders, p 8.

Resources<sup>90</sup>. He is working with the National Port Authority, which Nicaragua has told the Court is the “government agency responsible for river transportation and ports”<sup>91</sup>. He was doing what he had done before, and what he intimates he intends to continue to do again. He is still in post. Where, you might well ask, were the instructions from the Government, before the letter of 22 September 2013, telling him not to dredge in the disputed area?

26. Moreover, he has said that he was acting under instruction. He said in his interview he was not “tak[ing] liberties”<sup>92</sup>.

27. There is also the position of the Army. Is the Court to believe that — in this intensively militarized sector of the San Juan — Nicaraguan officers were unaware of the dredging? It is actually striking that the Army’s vigilance so far has not extended to the dredger *Soberanía*, to Mr. Pastora’s team, to 10,000 Sandinista youth. It is only when Costa Rican boats appear on the San Juan that there is vigilance triggered. It is a strangely selective vigilance.

28. To summarize, Mr. Pastora had both actual and ostensible authority to do what he did, and no Nicaraguan document so far produced suggests otherwise. Moreover other organs and agencies of the Nicaraguan State knew, or must have known, what he was doing. If Nicaragua had really wanted to comply with your provisional measures Order, why was Commander Ortega’s order of 21 September 2013 not issued in 2011?

**D. Nicaraguan Assurances are insufficient, are not accepted by Costa Rica  
and should not be accepted by the Court**

29. I turn to the second argument. Nicaraguan assurances are insufficient, they are not accepted by Costa Rica, they should not be accepted by the Court. On Thursday afternoon last week Nicaragua told you that Costa Rica’s requested measures were “superfluous . . . because they are already being complied with by Nicaragua, and Nicaragua . . . further commits itself to abide by

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<sup>90</sup>See, e.g., Ministry of Environment and Natural Resources of Nicaragua (MARENA), “Specific Terms of Reference for the Preparation of the Environmental Impact Study for the Project ‘Dredging of the San Juan River’”, MCR, Ann. 159; Ministry of Environment and Natural Resources of Nicaragua (MARENA), DGCA Administrative Resolution Re: No. 038-2008, 22 December 2008, MCR, Ann. 160; Declaration of the Technical Manager of the National Port Company (EPN), Lester, Antonio Quintero Gómez, 16 December 2010, MCR, Ann. 164; and Affidavit of Hilda Espinoza Urbina, National Director of the Department of Environmental Quality at the Ministry of the Environment and Natural Resources of Nicaragua (MARENA), 20 December 2010, MCR, Ann. 165.

<sup>91</sup>CMN, para. 4.28; see also para. 2.52.

<sup>92</sup>Video interview of Mr. Edén Pastora, 18 Sept. 2013, “100% Entrevistas”, Att. PM-31, p. 4

them”<sup>93</sup>. On Friday morning, Costa Rica wrote to the Court proposing that the Parties agree to an order being made by consent<sup>94</sup>. But Nicaragua flatly refused, saying that an Order was not required. It asserted that its assurances were sufficient and, perplexingly, that Costa Rica had, by its proposal for a consent order, accepted that<sup>95</sup>. Of course we did no such thing. We proposed a consent order, approved by the Court, precisely because we cannot accept Nicaragua’s assurances. We merely sought to explore an avenue for avoiding the time and expense of this hearing. Nicaragua’s refusal, by contrast, tells you that it is not in earnest. Nicaragua’s assurances are not sufficient. We do not accept them, and there are six reasons — which I shall give you — why the Court should not accept them.

30. The first reason: Nicaragua has not admitted the facts. It has not faced up to the truth. The proposition that Mr. Pastora was “not authorized to perform any kind of work in the disputed area” is both irrelevant and, as far as appears, untrue. As a matter of the law of attribution, it is ridiculous, as I have shown. As a matter of fact, it is little better. Nicaragua produced an instruction dated 22 September 2013 ostensibly prohibiting Mr. Pastora from working in the disputed area<sup>96</sup>. Where are his earlier instructions? Nicaragua has them; you do not. Moreover Mr. Pastora is still in post as Government Delegate. He has not been repudiated, he has not been dismissed, he has not even been reprimanded. The sole communication from Nicaragua to Costa Rica between 18 September and 10 October was a letter protesting our overflight<sup>97</sup>. For Nicaragua the only sin is to be found out!

31. Second reason. Nicaragua has done this before, and promised not to do it again<sup>98</sup>, and has done it again. It is a repeat offender. Is the conduct which justified your first provisional

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<sup>93</sup>Letter from Nicaragua to the ICJ, 10 Oct. 2013, Ref. HOL-EMB-193, p. 2, tab 25 of judges’ folders.

<sup>94</sup>Letter from Costa Rica to the ICJ, 11 Oct. 2013, Ref. ECRPB-073-13.

<sup>95</sup>Letter from Nicaragua to the ICJ, 11 Oct. 2013, Ref. HOL-EMB-197, p. 3.

<sup>96</sup>Letter from the Executive President of the National Port Authority to the Government Delegate for the Dredging Works of the San Juan de Nicaragua, Ref. PE-VSM-0592-09-2013, 22 Sep. 2013, Ann. 8 to Letter from Nicaragua to ICJ, 11 Oct. 2013, Ref. HOL-EMB-197.

<sup>97</sup>Diplomatic Note sent by Orlando Gomez, Vice-Minister of Foreign Affairs, Nicaragua, to Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, 1 Oct. 2013, Ref. MRE/DM/DGAJST-VMOG/293/10/13, Att. PM-22.

<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. 23, para. 71.

measures Order, when repeated in even more threatening form, to be met by you with silence? What a victory for recidivism that would be!

32. Third reason. Nicaragua's assurances towards Costa Rica in the matter of the San Juan are not to be trusted. The Nicaraguan Agent told the Court in January 2011 that there were no Nicaraguan troops in Isla Portillos<sup>99</sup>. Nicaragua repeated that assurance on 18 January 2011 in its written reply to the Court, in response to a question asked by Judge Bennouna<sup>100</sup>. One day later, Nicaraguan troops were still encamped on Isla Portillos. We presented photographs from 19 January, showing their continued presence<sup>101</sup>. Another assurance given was that work on the first Pastora *caño* was "over and finished"<sup>102</sup>. But since you issued your Order on provisional measures, more than 10,000 Nicaraguan nationals have been sent — in an organized manner — to the disputed territory to carry out activities in pursuance of Nicaragua's policies. You have already expressed your concern about their presence on the disputed territory<sup>103</sup>.

33. Fourth reason. If you were to say nothing now, the authority of this Court would have been flouted, and would have been seen to be flouted. The authority of this Court, the principal judicial organ of the United Nations, is not to be mocked. Confidence in the Court, and in the authority of your rulings, would be eroded.

34. Fifth. Provisional measures, in particular the closing of the new *caño*, are urgent — a point already demonstrated by Mr. Wordsworth by reference to *evidence*, and which Professor Kohen will further develop. Nicaragua has no plans to close the *caño*, you may be sure about that. Yet Costa Rica's demands were not limited to mere evacuation — temporary or even permanent. We seek to restore the *status quo ante*, something to which we are entitled as a matter

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<sup>99</sup>CR 2011/2, 11 January 2011, p. 13, para. 28 (Argüello); CR 2011/4, 13 January 2011, p. 37, para. 15 (Argüello).

<sup>100</sup>Reply of the Republic of Nicaragua to the question put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 18 January 2011, Ref. 18012011-01, p. 6.

<sup>101</sup>Comments by Costa Rica on the Reply of Nicaragua to the question put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 20 January 2011, Ref. ECRPB-017-11. Photograph also exhibited as MCR, Annex 223.

<sup>102</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. 23, para. 71.

<sup>103</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, para. 37.

of international law given the binding character of your first provisional measures Order, and irrespective of your final decision on the merits.

35. And sixth, if Nicaragua is to be taken at its word, the provisional measures we seek will have little impact upon it. Your Order would be not to return to the disputed territory; Nicaragua says it will not do so. Your Order would be not to complete the *caño*; Nicaragua says it never planned to construct it anyway. Your Order would be to facilitate Costa Rica's closure of the *caño*; Nicaragua says the *caño* was never authorized. If Nicaragua is to be taken at its word, what has it to lose? Yet if Nicaragua is *not* to be taken at its word, what has Costa Rica to lose? A very great deal. The effective benefit of your first Order. The status quo. Costa Rica would run *alone* — unsupported by the Court — the risk that the *caño* could in the coming weeks and months perform its intended function in artificially changing the course of the river — with serious practical implications for the settlement of the present dispute. You only have to think for a moment about the actual situation on the ground to see what the implications would be of the change of the course of the river. Not to order provisional measures would be wholly unjust.

36. Mr. President, Members of the Court, before Professor Kohen explains further the consequences if an Order granting the measures we seek is not issued, I would like to say a brief word about procedure. There is of course another case on the Court's docket relating to a road constructed entirely within undisputed Costa Rican territory. It was constructed in order to give access to Costa Rican communities and posts, which access has been practically denied, if not made impossible, by Nicaragua following your Judgment in the *Navigational Rights* case.

37. On 22 December 2011, Nicaragua submitted an Application to the Court concerning this road. That is 22 months ago. Its Application referred to the imminent danger the road presented<sup>104</sup>. It reserved the right to bring a provisional measures request, in view of the urgency of the situation<sup>105</sup>. This was in December 2011. Nicaragua then informed the Court that it would not be in a position to present a Memorial for a whole year<sup>106</sup>. When it submitted its Memorial on

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<sup>104</sup>Nicaragua's Application in *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, 22 December 2011, paras. 1 and 36.

<sup>105</sup>*Ibid.*, para. 55.

<sup>106</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.

19 December 2012, it asked the Court to grant provisional measures *proprio motu*, in view of urgency<sup>107</sup>. This was a year later. The Court declined to do so<sup>108</sup>.

38. When Costa Rica requested modification of your provisional measures Order in the *Certain Activities* case in May this year, Nicaragua made yet another half-hearted attempt to obtain provisional measures relating to the road<sup>109</sup>. You rejected that request<sup>110</sup>. Last Friday evening, two days ago, Nicaragua submitted a request for provisional measures in the *Road* case that had taken it 22 months<sup>111</sup>. The measures requested are not provisional measures, they are provisional counter-measures. They have been requested more than 22 months after the Application which was said to be urgent. They have repeatedly been said to be urgent, they have not been brought before. Mr. President, in the circumstances that have occurred, Costa Rica has not had the opportunity — yet — to plead to the merits of the *Road* case. We are preparing our Memorial in relation to the Court schedule as laid down following Nicaragua's statement that it required a year. The Court has asked us if we are prepared to argue the provisional measures application this week. To argue it this week would require us to present argument on the run, on two days' notice, in relation to a case that has been fully pleaded by one party and not pleaded at all by the other. With respect, the Court cannot expect us to present argument in relation to a factual situation, without the opportunity to present evidence. If — as a result of discussions with the Registry — it proves possible for us to present evidence, in short order, we would consider that request. But it is unfair to require us to do so without the presentation of material evidence.

Mr. President, thank you for your patience.

The PRESIDENT: Thank you, Professor Crawford. Je passe la parole maintenant à Monsieur le professeur Kohen. Vous avez la parole, Monsieur.

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<sup>107</sup>MN in *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, 19 December 2012, pp. 252-253, para. 4.

<sup>108</sup>See Letter from ICJ to Costa Rica, 11 March 2013, Ref. 142641.

<sup>109</sup>Request by Nicaragua that the Court's Order of 8 March 2011 in *Certain Activities* case be Modified or Adapted to the Situation Created by the Joinder of the *Construction of a Road in Costa Rica* case, 14 June 2013.

<sup>110</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>111</sup>Letter from Nicaragua to ICJ, 11 October 2013, Ref. HOL-EMB-196.

M. KOHEN :

**LES CONSÉQUENCES DÉCOULANT D'UN HYPOTHÉTIQUE REFUS D'INDIQUER  
DES MESURES CONSERVATOIRES**

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un honneur renouvelé de comparaître devant vous aujourd'hui pour défendre les droits du Costa Rica. Je le fais une nouvelle fois en raison de comportements graves du Nicaragua, comportements qui exigent une réponse claire, urgente et dépourvue d'ambiguïté, si tant est que la justice et le droit international ont un sens.

2. L'article 73, paragraphe 2, du Règlement de la Cour requiert de la partie qui demande l'indication des mesures conservatoires d'expliquer les conséquences d'un éventuel rejet. Ce sera ma tâche à la fin de cette matinée.

3. Cette exigence du Règlement apparaît en effet d'une grande sagesse. C'est la question que l'on doit se poser afin de savoir si les circonstances exigent l'indication des «mesures conservatoires du droit de chacun», comme le prévoit l'article 41 du Statut<sup>112</sup>. C'est en fait à la lumière de l'examen des conséquences d'une décision de ne pas indiquer des mesures conservatoires que les conditions pour exercer ce pouvoir, déterminées par votre jurisprudence, doivent être appréciées.

4. Mes collègues vous ont montré que toutes ces conditions étaient en l'espèce réunies. L'existence d'une base de compétence et le *fumus boni iuris* ne sont plus à établir. C'est votre Cour elle-même qui a déjà établi le caractère plausible des droits que le Costa Rica souhaite protéger<sup>113</sup>. Mes collègues ont ainsi démontré le lien entre ces droits et les mesures demandées, ainsi que le *periculum in mora*, autrement dit le risque de préjudice irréparable et l'urgence nécessitant leur indication.

5. Mon exposé sera divisé en quatre parties :

— La première portera sur l'élément temporel dans l'évaluation de l'adoption des mesures conservatoires demandées, autrement dit la détermination de la situation sur le terrain au

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<sup>112</sup> Texte anglais : «provisional measures which ought to be taken to preserve the respective rights of either party».

<sup>113</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance, C.I.J. Recueil 2011 (I), p. 19, par. 55-58.*

moment où l'instance a été introduite, la situation actuelle et celle que l'on peut envisager au moment où l'arrêt sur le fond sera rendu ;

- La deuxième partie examinera ce qui pourrait se passer concrètement si votre Cour n'ordonne pas les différentes mesures conservatoires demandées par le Costa Rica ;
- La troisième partie aura trait à l'incapacité des mesures conservatoires actuellement en vigueur à faire face à la nouvelle situation créée par le Nicaragua avec la construction des deux nouveaux canaux ; et
- Finalement, la quatrième partie reviendra sur les prétendues assurances données par le Nicaragua, qui n'empêchent en aucun cas votre Cour d'ordonner des mesures conservatoires.

#### **A. L'élément temporel dans la détermination des mesures conservatoires**

6. Je commence donc par l'élément temporel. Quels sont les moments auxquels il faut se placer en vue d'évaluer le *periculum in mora pendente lite* ? Il y a deux moments clefs. La date du premier est connue, celle du deuxième demeure inconnue. La première est le 18 novembre 2010, date de l'introduction de l'instance où le Costa Rica a fait valoir ses droits au respect de sa souveraineté et intégrité territoriales ainsi qu'à son environnement dans des zones humides protégées dans la partie nord de Isla Portillos, en conformité avec la convention de Ramsar. La deuxième date sera le moment auquel la Cour rendra son arrêt. En effet, tant les juges internes que les juges internationaux prennent en considération la durée probable de la procédure dans l'évaluation du besoin des mesures conservatoires. La question fondamentale qui se pose est alors celle de savoir quel serait, à la fin de la procédure, l'état des droits à protéger tels qu'ils existaient au moment où cette procédure a commencé.

7. Comme vous le savez, Mesdames et Messieurs les juges, la phase écrite de cette affaire est terminée depuis votre rejet des demandes reconventionnelles du Nicaragua<sup>114</sup>, mais la suite reste subordonnée au sort de la procédure dans l'affaire concernant la *Construction d'une route au Costa Rica le long du fleuve San Juan*, après votre décision de joindre les deux instances<sup>115</sup>. De ce

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<sup>114</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua) ; Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, demandes reconventionnelles, ordonnances du 18 avril 2013.

<sup>115</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, jonction d'instances, ordonnances du 17 avril 2013.



fait, de longs mois devraient encore se passer avant qu'une décision sur le fond n'intervienne. Du fait du comportement du Nicaragua dont nous nous occupons aujourd'hui, cette prolongation de la date à laquelle votre arrêt déterminera qui détient la souveraineté sur la partie septentrionale de Isla Portillos ajoute un élément de risque supplémentaire pour les droits du Costa Rica. J'y reviendrai dans quelques instants.

8. La prise en compte des deux dates, celles du commencement et de la fin de la procédure, permettent d'établir une distinction importante entre la présente demande en mesures conservatoires et les mesures ordonnées par votre Cour le 8 mars 2011. La construction par le Nicaragua d'un canal artificiel à partir d'octobre 2010 a motivé la requête costa-ricienne du 18 novembre 2010. Donc, au moment de l'introduction de la requête, le premier «caño» était déjà présent sur le terrain. Par contre, les deux nouveaux canaux construits récemment viennent à modifier — j'insiste, à modifier radicalement dans l'extrême nord de Isla Portillos près de la mer des Caraïbes — la situation existante *pendente lite*.

9. Les faits qui motivent cette demande de mesures conservatoires se sont produits *durant la procédure et non au préalable*. Les mesures conservatoires visent ainsi à remédier à cette rupture du *statu quo*, rupture produite par l'une des Parties au détriment évident et grave des droits que l'autre fait valoir devant votre Cour. Dans l'attente de votre décision sur le fond quant à la souveraineté sur la partie nord de Isla Portillos, il est légitime que les Parties à la procédure s'attendent à ce que le territoire en question ne subisse pas de modifications matérielles altérant sa configuration physique, d'autant plus qu'en l'espèce, ces modifications risquent d'être matériellement irréversibles.

10. Cette différence par rapport au premier «caño» nicaraguayen appelle une approche distincte de celle employée pour les mesures conservatoires déjà indiquées dans cette affaire. Le 8 mars 2011, vous n'avez pas ordonné — et le Costa Rica n'avait pas demandé non plus —, de combler le premier «caño». Sans doute, certains ou certaines d'entre vous auraient pu penser que cela aurait supposé une sorte de préjugement sur un point qui divise les Parties, c'est-à-dire le fait de savoir si le «caño» est naturel ou artificiel. Aujourd'hui, ce problème ne se présente pas par rapport à ces deux nouveaux «caños». La preuve est accablante. Il n'y avait pas ces deux «caños»

ni lorsque le Costa Rica a commencé cette procédure en 2010, ni lorsque votre Cour a ordonné ses mesures conservatoires en 2011, ni lorsque le Nicaragua a déposé son contre-mémoire en 2012.

11. Comme vous l'aurez compris tout au long de cette matinée, ces deux nouveaux «caños», construits *pendente lite* et malgré vos mesures conservatoires, risquent de modifier de manière permanente la configuration physique de la région frontalière et appellent donc à des travaux de remédiation pour l'éviter. C'est la seule manière de permettre que votre décision sur le fond opère sur le territoire tel qu'il fut soumis à votre détermination et non sur une autre réalité géographique modifiée *ex professo* et en sa faveur par l'une des Parties.

### **B. Les effets de la non-indication de mesures conservatoires**

12. J'en viens donc à examiner maintenant les conséquences qui découleraient d'une décision de ne pas ordonner les mesures conservatoires demandées. Ces conséquences sont de deux types. Les premières sont celles relatives à la zone où les deux canaux ont été construits. Les deuxièmes sont celles liées au possible comportement nicaraguayen dans l'ensemble de la zone que vous avez «par hypothèse» dû «considérer comme contestée»<sup>116</sup>.

#### **a) Les risques relatifs aux canaux construits récemment**

13. Il découle de la documentation scientifique produite par le Costa Rica, ainsi que du reste de la preuve, que le Nicaragua a construit deux canaux réalisant la déviation des eaux du fleuve San Juan dans le but de modifier son cours et tout particulièrement son embouchure dans la mer des Caraïbes<sup>117</sup>. Cela a lieu en territoire costa-ricien soumis aux mesures conservatoires indiquées par la Cour en 2011.

14. Le type de construction des canaux employé par le Nicaragua entre juin et septembre 2013 engendre leur propre expansion dans le temps du fait de l'action érosive naturelle liée au flux des eaux qui se produit dans les canaux ainsi construits<sup>118</sup>. Il ne serait donc pas nécessaire pour le Nicaragua de faire quoi que ce soit une fois les travaux de construction terminés.

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<sup>116</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance, C.I.J. Recueil 2011 (I), p. 19, par. 56.*

<sup>117</sup> Oreamuno Vega, R et Villaobos Herrera, R., *Technical assessment of the artificial canals on Isla Portillos*, University of Costa Rica Centre for Research in Sustainable Development, Department of Civil Engineering, pp. 9-10 (Costa Rica, Further Documents Submitted to the Court, 9 October 2013, Attachment PM-19).

<sup>118</sup> *Ibid.*

Ne pas ordonner les mesures conservatoires implique donc — tout simplement, si je puis dire, ou plutôt très gravement — de permettre que l'œuvre d'ouverture des canaux et de déviation du fleuve San Juan dans son embouchure à la mer des Caraïbes en territoire litigieux atteigne naturellement son but.

15. Au moment où je vous parle, Mesdames et Messieurs les juges, nous ne savons pas si les travaux de construction des canaux ont été achevés. Nous ne savons pas non plus s'il est vrai que, comme le Nicaragua en a informé votre Cour jeudi dernier seulement, le Gouvernement nicaraguayen a retiré son personnel et son matériel<sup>119</sup>. Je constate par ailleurs que le Nicaragua est resté silencieux en ce qui concerne le sort des installations nicaraguayennes en territoire «contesté», et dont la présence fut aussi amplement documentée et leur retrait demandé<sup>120</sup>. Leur maintien constituerait sans aucun doute un signe tangible d'un éventuel retour.

16. Monsieur le président, le rapport du professeur Thorne — que vous avez à l'onglet n° 20 de votre dossier — explique le caractère irrémédiable qu'aurait la déviation du fleuve San Juan de son cours naturel à l'embouchure dans la mer des Caraïbes. Il souligne le caractère chimérique d'une tentative tardive de restauration de la situation préexistante<sup>121</sup>, par exemple — j'ajoute — une fois votre arrêt rendu. Le risque d'une modification permanente du cours du fleuve San Juan au détriment du Costa Rica est ainsi une possibilité réelle et concrète si les mesures conservatoires demandées ne sont pas indiquées.

**b) *Les risques relatifs à de nouveaux comportements nicaraguayens dans la région litigieuse***

17. Malheureusement, Monsieur le président, Mesdames et Messieurs les juges, les dangers ne s'arrêtent pas là. Si le Nicaragua n'a pas encore réussi à relier l'un des deux canaux construits à la mer des Caraïbes, cette opération serait relativement facile et rapide à mettre en œuvre à l'avenir. [Projection n° 1.]. Comme vous le voyez à l'écran, pour ce qui est du canal le plus oriental, il ne resterait plus qu'à le relier à la mer à travers la plage, cela ne nécessitant donc pas de procéder au préalable à l'abattage de la forêt existante aux alentours [fin de la projection n° 1].

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<sup>119</sup> Note (réf. HOL-EMB-193) en date du 10 octobre 2013 de l'agent du Nicaragua. Voir aussi note (réf. HOL-EMB-197) de l'agent du Nicaragua en date du 11 octobre 2013.

<sup>120</sup> Costa Rica, demande d'indication de nouvelles mesures conservatoires, annexe 15.

<sup>121</sup> Thorne, C., *Report on the Impact of the Construction of Two New Caños on Isla Portillos*, par. 4.6 (Costa Rica, 10 octobre 2013, annexe 33).

18. Mais ce n'est pas tout. Le Nicaragua, dans son contre-mémoire [projection n° 2] — vous voyez à l'écran une photo tirée du contre-mémoire<sup>122</sup> — ainsi que dans une correspondance récente<sup>123</sup>, insiste sur l'existence de plusieurs «caños» dans la région «contestée». Expérience faite, est-il vraiment exagéré de s'interroger sur les dangers de nouveaux travaux de prétendu «nettoyage» que le Gouvernement nicaraguayen et son délégué, le commandant Edén Pastora, affectionnent tellement ? Non seulement le Nicaragua voit des «caños» partout, mais son gouvernement et son délégué se croient en droit, à supposer même qu'ils aient un jour existé, de soi-disant les «nettoyer» qu'importe où ils se trouvent [fin de la projection n° 2].

19. L'expérience démontre aussi — il suffit de lire la réponse du ministre des affaires étrangères du Nicaragua à son collègue costa-ricien du 18 septembre dernier<sup>124</sup> — [projection n° 3] que le Nicaragua impute à la nature l'action que personne d'autre que le Nicaragua lui-même a provoquée sur le terrain. Si on relit le contre-mémoire du Nicaragua en perspective, donc à la lumière de ce qui se passe depuis le début du différend et même après votre indication de mesures conservatoires en 2011, il y a de quoi s'inquiéter fortement lorsque l'on y remarque les longues citations nicaraguayennes relatives à la perte de la souveraineté territoriale par l'action de la «nature»<sup>125</sup> [fin de la projection n° 3].

20. Monsieur le président, Mesdames et Messieurs les juges, toutes les conséquences possibles d'un éventuel rejet de la demande en mesures conservatoires conduisent à constater le *periculum in mora* et donc le besoin de les ordonner. La Cour permanente de Justice internationale, dans sa première ordonnance indiquant des mesures conservatoires, s'est référée à ce qui est désormais considéré comme la définition classique de la notion de préjudice irréparable. Le préjudice irréparable serait constitué lorsque la violation éventuelle des droits en cause «ne

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<sup>122</sup> CMN, p. 330, fig. 6.8.

<sup>123</sup> Note diplomatique en date du 18 septembre 2013 adressée au ministre des affaires étrangères et des cultes du Costa Rica par le ministre des affaires étrangères du Nicaragua (Costa Rica, demande d'indication de nouvelles mesures conservatoires, annexe 5).

<sup>124</sup> Costa Rica, demande en indication de nouvelles mesures conservatoires, annexe 5.

<sup>125</sup> CMN, p. 382-383, par. 6.173-6.177.

saurait être réparée moyennant le versement d'une simple indemnité ou par une autre prestation matérielle»<sup>126</sup>. C'est évidemment le cas ici.

21. Nous sommes ici dans une situation dans laquelle l'une des Parties, durant la procédure en cours, s'adonne à des dégradations matérielles du territoire litigieux. Je dis bien, *pendente lite*. Et j'utilise l'expression «dégradations matérielles» car il ne s'agit de rien d'autre que d'abattre des arbres et de la végétation existante, et d'excaver des canaux en utilisant cette fois-ci des machines (des dragueurs) — à la différence du «caño» de 2010 — pour dévier les eaux du fleuve San Juan. Le tout sur un territoire que vous avez considéré par hypothèse litigieux et sur lequel vous avez estimé que les droits du Costa Rica sont plausibles, même si l'on pourrait faire de nouveau valoir qu'ils sont bien plus que «plausibles»<sup>127</sup> — ce que nous ferons bien évidemment lors du débat sur le fond. [Projection n° 4.] Vous avez également constaté que le Costa Rica a assumé des obligations internationales de protection de l'environnement dans le territoire que le Nicaragua a occupé puis revendiqué en octobre 2010<sup>128</sup> [fin de la projection n° 4].

22. Il ne s'agit pas de la préservation *in abstracto* du droit du Costa Rica à la souveraineté territoriale. Le titre de souveraineté ne se perd pas du fait de l'action destructrice de l'autre Partie. Le but des mesures conservatoires est précisément d'éviter qu'un jugement sur le fond n'arrive trop tard sur le plan des faits. C'est cela, Mesdames et Messieurs les juges, la question fondamentale. Peut-on demander au Costa Rica d'attendre un jugement qui, certes, constaterait sa souveraineté, mais qui, sur le terrain, ne lui permettrait que de retrouver un territoire morcelé, coupé par des canaux artificiels et même devenu en partie aquatique, si le Nicaragua parvient à dévier le fleuve San Juan en territoire costa-ricien ? Si le Nicaragua réussit à imposer son action sur le terrain, Isla Portillos deviendra alors un chapelet de plusieurs îlots séparés par les canaux construits par le Nicaragua.

23. Si les mesures conservatoires ont un sens, que ce soit dans les ordres juridiques internes ou en droit international devant votre haute juridiction, c'est précisément pour éviter que les droits

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<sup>126</sup> *Dénonciation du traité sino-belge du 2 novembre 1865, ordonnance du 8 janvier 1927, C.P.J.I. série A n° 8, p. 7* ; texte en anglais : «as, however, in the event of an infraction . . . , such infraction could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form».

<sup>127</sup> CR/2011/1, p. 36-52 (Kohen).

<sup>128</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance, C.I.J. Recueil 2011 (I), p. 25-26, par. 80.*

en cause subissent une telle dégradation *pendente lite*. Il y va aussi d'une bonne administration de la justice.

24. Mesdames et Messieurs les juges, les conséquences d'un hypothétique rejet de la demande en mesures conservatoires montrent ainsi plutôt l'urgence de les indiquer. Le Costa Rica respecte et continuera de respecter votre ordonnance du 8 mars 2011 et, de ce fait, il se voit dans l'impossibilité d'exercer sa souveraineté dans cette partie de son territoire. Le Nicaragua, qui a modifié la situation existante en occupant le territoire, n'a pas fait de même et continue d'envoyer des agents gouvernementaux, et en première ligne, le responsable des travaux, le commandant Pastora, ainsi que de nombreux contingents de Nicaraguayens qui, de l'aveu même du défendeur<sup>129</sup>, s'adonnent à des activités soi-disant «environnementales». Par ailleurs, il est curieux — en réalité je devrais dire que tout cela est consternant — il est curieux, Monsieur le président, que depuis *trois ans* ces «environnementalistes» nicaraguayens continuent de planter des arbres dans une région dont l'agent du Nicaragua ne perd jamais une occasion de minimiser l'importance, en insistant sur son caractère inhabité, son étendue minuscule et sa nature de prétendu «marécage» («swampland» en anglais)<sup>130</sup>. Affirmation qui non seulement ne correspond pas tout à fait à la réalité mais qui dissimule à peine une vision dépréciative des zones humides protégées et qui prétend implicitement de ce fait sous-estimer la gravité de l'action nicaraguayenne en territoire étranger.

25. Mesdames et Messieurs les juges, dans la présente affaire, il n'est point nécessaire de spéculer sur la probabilité, l'imminence ou la réalité d'un *risque* de préjudice ou de dommage irréparable aux droits du Costa Rica. M<sup>e</sup> Wordsworth vous l'a déjà expliqué. La jurisprudence a considéré la condition d'urgence comme satisfaite lorsqu'«il est probable qu'une action préjudicielle aux droits de l'une ou de l'autre Partie sera commise avant» que la décision finale soit

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<sup>129</sup> CMN, p. 395, par. 7.28, p. 396-397, par. 7.32, p. 400-401, par. 7.43.

<sup>130</sup> Voir CR 2011/2, p. 11-12, par. 20 (Argüello), note réf. HOL-EMB-193 en date du 10 octobre 2013 adressée au greffier par l'agent du Nicaragua.

rendue<sup>131</sup>, ou lorsqu'il existerait un risque «réel» ou «imminent» qu'un préjudice irréparable à ces droits se produise<sup>132</sup>.

26. Ces préjudices ou dommages irréparables ne sont pas hypothétiques dans les circonstances d'aujourd'hui : ils sont en train de se produire chaque jour qui passe. A vrai dire, le seul risque qui demeure actuellement, c'est de voir ces dommages irréparables, sur une zone humide pour laquelle le Costa Rica a assumé des obligations internationales, de se perpétuer dans le temps et de s'aggraver, au point de devenir définitifs. Pour toutes ces raisons, Mesdames et Messieurs les juges, l'indication des mesures conservatoires demandées s'avère urgente et indispensable.

### **C. Les mesures conservatoires du 8 mars 2011 ne sont pas suffisantes**

27. Dans sa communication de vendredi soir, le Nicaragua soutient qu'il n'y a aucune raison d'adopter d'autres mesures conservatoires et que celles ordonnées par votre Cour le 8 mars 2011 seraient suffisantes<sup>133</sup>. Je vais expliquer à présent pourquoi la situation actuelle exige l'indication de nouvelles mesures conservatoires.

28. Il y a deux ans et demi, votre Cour a ordonné aux Parties de s'abstenir «d'envoyer ou de maintenir sur le territoire litigieux, y compris le *caño*, des agents, qu'ils soient civils, de police ou

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<sup>131</sup> Texte en anglais : «action prejudicial to the rights of either party is likely to be taken before such final decision is given». *Passage par le Grand Belt (Finlande c. Danemark)*, mesures conservatoires, ordonnance, C.I.J. Recueil 1991, p. 17, par. 23. Texte en anglais : «Whereas provisional measures under Article 41 of the Statute are indicated «pending the final decision» of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given» ; *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, p. 12, par. 47 ; *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, mesures conservatoires, ordonnance, p. 16, par. 63 ; *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, mesures conservatoires, ordonnance, C.I.J. Recueil 2009, p. 152-153, par. 62 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, mesures conservatoires, ordonnance, C.I.J. Recueil 2008, p. 392-393, par. 129 ; *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, mesures conservatoires, ordonnance, C.I.J. Recueil 2007 (I), p. 11, par. 32.

<sup>132</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, mesures conservatoires, ordonnance, C.I.J. Recueil 2011 (I), p. 16, par. 64. Texte en anglais : «Whereas the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision». Voir également *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, p. 12, par. 47 ; *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, mesures conservatoires, ordonnance, C.I.J. Recueil 2009, p. 152-153, par. 62 ; *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, mesures conservatoires, ordonnance, C.I.J. Recueil 2006, p. 13, par. 42.

<sup>133</sup> Note (réf. HOL-EMB-197) en date du 11 octobre 2013 adressée au greffier par l'agent du Nicaragua.

de sécurité»<sup>134</sup>. Que s'est-il passé ces dernières semaines ? Il ne s'agit pas d'une simple incursion d'agents nicaraguayens en territoire «litigieux» qu'il faudrait donc éviter de reproduire à l'avenir. Si tel avait été le cas, votre première mesure conservatoire aurait été suffisante. Non, Monsieur le président, ce qui s'est passé, c'est que le Nicaragua a engagé une action d'envergure dans ce territoire, avec des dragueurs et des tronçonneuses, et qui a requis des semaines pour être réalisée. Il ne suffirait donc pas de rappeler aux Parties l'obligation existante de ne pas envoyer des agents, il faudrait ordonner une mesure visant à ce que cesse tout travail de canalisation, dragage ou autre sur le territoire litigieux, et à ce qu'il n'y en ait pas de nouveaux à l'avenir. Cela exige aussi que soit indiqué le démantèlement de toute installation sur le territoire et l'abstention d'en introduire de nouvelles *pendente lite*. Il en va de même pour le matériel grâce auquel les travaux de canalisation ont été menés.

29. A ce propos, je voudrais, Monsieur le président, Mesdames et Messieurs les juges, attirer votre attention sur un autre aspect important de la situation. Comme vous le savez, le Nicaragua considère que ses citoyens sont en droit de se rendre sur le territoire litigieux et d'y poursuivre des activités de prétendue protection de l'environnement<sup>135</sup>. Ce n'est pas le moment d'examiner si cette présence est licite ou non, si les comportements de ces personnes peuvent ou non être attribués au Nicaragua. Nous le ferons au stade du fond. Supposons, aux fins du raisonnement sur les mesures conservatoires, que les faits sont comme le présente le Nicaragua, c'est-à-dire qu'il s'agit d'une ONG, Guardabarranco, qui agit sans suivre les instructions du gouvernement, ou que cette organisation ou ses composantes ne sont pas sous contrôle gouvernemental. Supposons, pour les besoins de notre exposé, si l'équipement reste sur place, si les installations demeurent en l'état, il n'y aura personne sur le territoire litigieux pour contrôler les agissements de ce groupe organisé de Nicaraguayens ni la façon dont ils pourraient faire emploi de tels installations et équipements. A nouveau, et indépendamment de l'analyse que l'on puisse faire de leur respect ou non par le Nicaragua, les mesures conservatoires de 2011 ne peuvent pas empêcher que des travaux de canalisation ou autres ne se poursuivent ou ne soient repris.

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<sup>134</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance, C.I.J. Recueil 2011 (I), p. 27, par. 86, point 1 du dispositif.*

<sup>135</sup> CMN, p. 390-398, par. 7.15-7.33.



30. Pour toutes ces raisons, le Costa Rica vous prie respectueusement, Mesdames et Messieurs les juges, d'indiquer les deux premières mesures conservatoires demandées, à savoir 1) la suspension immédiate et inconditionnelle de tous travaux de dragage ou autres dans le territoire litigieux et, en particulier, la cessation de tous travaux sur les deux nouveaux «caños» artificiels, et 2) l'obligation, pour le Nicaragua, de retirer immédiatement du territoire litigieux tous agents, installations (y compris celles de campement) et matériels (notamment de dragage) qui y ont été introduits par lui-même ou par toute personne relevant de sa juridiction ou venant de son territoire.

31. Dans votre ordonnance du 8 mars 2011, vous avez permis que des agents civils costa-riens chargés de la protection de l'environnement puissent être envoyés afin d'éviter qu'un préjudice irréparable ne soit causé au territoire litigieux<sup>136</sup>. Jusqu'à maintenant, leurs visites n'ont pu être que très brèves et affectées par une atmosphère de tension certaine motivée par la présence des Nicaraguayens sur place, ceux-ci n'ayant pas hésité à maltraiter ledit personnel environnemental lors de sa première visite<sup>137</sup>. La troisième mesure conservatoire demandée par le Costa Rica vise tout particulièrement le risque spécifique de préjudice irréparable résultant de la présence des deux nouveaux canaux et le besoin d'entreprendre des travaux, afin d'éviter que la déviation du fleuve San Juan en territoire costa-ricien ne devienne irrémédiable. Cela requiert davantage que l'envoi de personnel en charge de l'environnement. Cela requiert la réalisation de travaux d'une certaine importance afin de remédier à la situation, avec ce que cela nécessite en termes de main-d'œuvre et d'équipement. Ces travaux devraient se faire sans entraves ni menaces d'aucun type.

32. L'accès à cette zone s'avère extrêmement difficile par voie terrestre du fait de l'absence de routes dans la région et de la densité de la forêt. Le Nicaragua a récemment empêché l'accès des agents environnementaux costa-riens par voie fluviale, qui constitue la voie d'accès la plus simple, sûre et rapide, arguant que cette navigation ne tombe pas sous le coup du droit costa-ricien

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<sup>136</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance, C.I.J. Recueil 2011(I), p. 27, par. 86, point 2 du dispositif.*

<sup>137</sup> MCR, p. 268, par. 6.9.

de libre navigation reconnu par le traité de limites de 1858<sup>138</sup>. De nouveau, ces questions feront l'objet d'examen au stade du fond de cette affaire. Mais quelle que soit l'interprétation que l'on donne à ce droit de navigation, ce qui est vrai c'est que le Nicaragua ne devrait pas entraver — mais bien au contraire, devrait faciliter — les travaux de remédiation afin d'éviter que les deux nouveaux canaux n'entraînent de préjudices irréparables. Cela comprend l'accès à la région litigieuse par le fleuve San Juan, sans préjudice des positions des Parties à l'égard de l'étendue du droit costa-ricien de navigation.

#### **D. Les «assurances» nicaraguayennes n'empêchent pas l'indication de mesures conservatoires**

33. Monsieur le président, mon collègue James Crawford vous a démontré les flagrantes contradictions dans lesquelles le Nicaragua s'est enfermé en essayant de manière incongrue de justifier un comportement de toute évidence injustifiable, niant d'abord la matérialité des faits pour affirmer ensuite que son personnel s'est retiré et ne reviendra pas. Répétant ainsi exactement ce qu'il avait déjà fait en 2011 au moment des mesures conservatoires précédentes<sup>139</sup>. Mon estimé collègue vous a aussi expliqué pourquoi les prétendues «assurances» nicaraguayennes ne sont pas recevables dans la présente instance.

34. Nous ne venons pas ici au début d'une affaire pour nous référer à un comportement passé de l'Etat défendeur qui pourrait porter un préjudice irréparable aux droits revendiqués par le demandeur. La réalité est, Monsieur le président, que le Nicaragua avait l'obligation établie par votre Cour de s'abstenir d'envoyer du personnel à Isla Portillos et ne l'a pas fait. Ce n'est pas par ailleurs la première fois que le délégué gouvernemental pour les œuvres du fleuve San Juan, le

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<sup>138</sup> Note en date du 18 septembre 2013 adressée au ministre des affaires étrangères du Costa Rica, M. Castillo par le ministre des affaires étrangères du Nicaragua, M. Santos, (demande du Costa Rica en indication de nouvelles mesures conservatoires, annexe 5) ; demande du Costa Rica, par. 18.

<sup>139</sup> CR 2011/2, p. 13, par. 28 (Argüello) ; CR 2011/4, p. 37, par. 15 (Argüello) ; Reply of the Republic of Nicaragua to the question put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 18 January 2011, Ref. 18012011-01 ; Comments by Costa Rica on the Reply of Nicaragua to the question put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 20 January 2011, Ref. ECRPB-017-11 ; MCR, annexe 233.

commandant Edén Pastora, pénètre sur le territoire litigieux, comme nous l'avons prouvé dans nos rapports à la Cour sur la mise en œuvre des mesures conservatoires<sup>140</sup>.

35. La note que le Nicaragua a envoyée à la Cour le 10 octobre 2013, qui dresse un tableau selon lequel le gouvernement du président Ortega semblait ignorer les activités du délégué gouvernemental Edén Pastora et de son équipe de dragueurs, renforce en réalité le besoin d'indiquer des mesures conservatoires<sup>141</sup>. En supposant même que cette ignorance inexcusable fût vraie, elle témoignerait de l'incapacité du Nicaragua d'empêcher que ses propres organes entrent en territoire litigieux et s'adonnent à des activités de large envergure.

36. L'affirmation de dernière minute du Nicaragua [projection n° 5] selon laquelle son président aurait ordonné à Edén Pastora et son équipe de quitter la zone «contestée» le 21 septembre 2013<sup>142</sup> se heurte, à supposer que ce soit vrai, à un problème supplémentaire : pour le délégué gouvernemental aux travaux de dragage du San Juan, M. Pastora, [fin de la projection n° 5] [projection n° 6] la zone des nouveaux canaux ne fait pas partie du territoire litigieux, comme il l'a expliqué dans son entretien télévisé reproduit comme annexe PM-31, dont vous voyez un extrait à l'écran. Dès lors, compte tenu des instructions du président Daniel Ortega de continuer les travaux de «nettoyage» du delta du San Juan<sup>143</sup> à l'exception de la zone litigieuse et de l'interprétation de son délégué Edén Pastora quant à l'étendue du delta et de la zone objet du différend, il existe un risque que des travaux de déforestation, d'excavation et de dragage se poursuivent dans la zone nord de Isla Portillos si les mesures demandées ne sont pas ordonnées [fin de la projection n° 6].

37. Mesdames et Messieurs les juges, vous avez indiqué des mesures conservatoires le 8 mars 2011 [projection n° 7] parce que, parmi d'autres raisons, le Nicaragua avait mentionné qu'il comptait faire des travaux de replantation d'arbres dans la zone aujourd'hui litigieuse<sup>144</sup>. Votre

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<sup>140</sup> Rapport du Costa Rica à la Cour internationale de Justice, note réf. ECRPB-026 en date 3 juillet 2012.

<sup>141</sup> Note (réf. HOL-EMB-193) en date du 10 octobre adressée au greffier par l'agent du Nicaragua.

<sup>142</sup> Note (réf. SPPN-E-13-712) en date du 21 septembre 2013 adressée au président de l'autorité portuaire par le secrétaire des politiques publiques nationales, note réf. HOL-EMB-197 en date du 11 octobre 2013 de l'agent du Nicaragua. Annexe 6.

<sup>143</sup> Note (réf. SPPN-E-13-712) en date du 21 septembre 2013 adressée au président de l'autorité nationale portuaire par le secrétaire des politiques nationales, note réf. HOL-EMB-197 en date du 11 octobre 2013 de l'agent du Nicaragua. Annexe 6.

<sup>144</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance, C.I.J. Recueil 2011 (I), p. 23-24, par. 72 et p. 24, par. 75.*

mesure visait à empêcher cela. Le Nicaragua s'est engagé depuis lors, et l'a répété vendredi dernier même, à respecter votre ordonnance. Que s'est-il passé en réalité ? [Projection n° 7] Le Nicaragua a recouru à une «argutie», à savoir que la mesure conservatoire empêcherait les agents, mais pas les citoyens nicaraguayens d'entrer en territoire litigieux et de planter des arbres. Le Nicaragua vous a dit que les travaux dans la région litigieuse étaient finis<sup>145</sup> [fin de la projection n° 7]. [Projection n° 8.] La réalité démontre le contraire et le Costa Rica est malheureusement dans l'obligation de vous en informer régulièrement<sup>146</sup> [fin de la projection n° 8].

38. L'information du Nicaragua transmise à la Cour jeudi et vendredi derniers, selon laquelle son personnel serait parti et qu'il ne reviendra pas, s'inscrit clairement dans sa volonté d'obtenir de vous, Mesdames et Messieurs les juges, de laisser la situation en l'état actuel que le Nicaragua a créé. James Crawford vous a amplement montré les effets et le degré de crédibilité que ces informations méritent. L'expérience a déjà été faite, Monsieur le président. Ce qui est en jeu n'est pas seulement la préservation des droits du Costa Rica *pendente lite*. Il y va aussi du respect dû à la juridiction internationale.

### Conclusions

39. J'arrive maintenant à mes conclusions. Monsieur le président, Mesdames et Messieurs les juges, si vous n'indiquez pas les mesures conservatoires demandées, le Costa Rica recevra, lorsque vous rendrez votre décision sur le fond, un territoire, dans le meilleur des cas, dont la configuration aura été substantiellement modifiée et morcelée et, dans le pire des cas, aura en outre une partie de sa surface irrémédiablement submergée sous les eaux du fleuve San Juan.

40. [Projection n° 9] La convention de Ramsar débute avec le constat que «les zones humides constituent une ressource de grande valeur économique, culturelle, scientifique et récréative, dont la disparition serait irréparable»<sup>147</sup>. Chacun et chacune appréciera le traitement que le Nicaragua

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<sup>145</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance, C.I.J. Recueil 2011 (I), p. 23, par. 71.*

<sup>146</sup> Rapports présentés par le Costa Rica à la Cour internationale de Justice : le 8 avril 2011, réf. ECRPB-029-11 ; le 13 avril 2011, réf. ECRPB-030-11 ; le 23 juin 2011, réf. ECRPB-039-11 ; le 3 juillet 2012, réf. ECRPB-026-12 ; le 21 novembre 2012, réf. ECRPB-045-12 et le 15 mars 2013, réf. ECRPB-016-13.

<sup>147</sup> Convention relative aux zones humides d'importance internationale particulièrement comme habitats de la sauvagine (convention de Ramsar), 2 février 1971, entrée en vigueur le 21 décembre 1975, Nations Unies, *Recueil des traités*, vol. 245, p. 996.

inflige *pendente lite* à une zone humide inscrite comme telle par le Costa Rica [fin de la projection n° 9].

41. Mesdames et Messieurs les juges, les mesures conservatoires demandées ne cherchent pas à rompre un quelconque équilibre entre les Parties pendant la décision sur le fond. Au contraire, c'est leur indication qui permettra de maintenir cet équilibre, rompu par la construction par le Nicaragua de ces deux canaux sur le territoire litigieux alors que la phase écrite de l'affaire est terminée, et dans l'attente des audiences et de la décision sur le fond. Le Costa Rica ne demande pas davantage que le maintien de la situation factuelle telle qu'elle existait au début de l'affaire pendant la décision sur le fond.

42. Je vous remercie de l'attention que vous nous avez portée, Monsieur le président, Mesdames et Messieurs les juges, tout au long de cette matinée. Merci.

The PRESIDENT : Thank you, Professor Kohen. This brings to an end today's sitting. The Court will meet again tomorrow, Tuesday 15 October, at 10 a.m. to hear the first round of oral argument of Nicaragua. Any decision which the Court may take as far as the procedure is concerned will be communicated to the Parties. Thank you.

The sitting is adjourned.

*The Court rose at 12.55 p.m.*

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