

CR 2013/30

International Court  
of Justice

Cour internationale  
de Justice

THE HAGUE

LA HAYE

YEAR 2013

*Public sitting*

*held on Thursday 7 November 2013, at 10 a.m., at the Peace Palace,*

*President Tomka presiding,*

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

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VERBATIM RECORD

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ANNÉE 2013

*Audience publique*

*tenue le jeudi 7 novembre 2013, à 10 heures, au Palais de la Paix,*

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

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

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COMPTE RENDU

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*Present:*      President Tomka  
                 Vice-President Sepúlveda-Amor  
                 Judges Owada  
                 Abraham  
                 Keith  
                 Bennouna  
                 Skotnikov  
                 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  
Abraham  
Keith  
Bennouna  
Skotnikov  
Caçado Trindade  
Yusuf  
Greenwood  
Mmes Xue  
Donoghue  
M. Gaja  
Mme Sebutinde  
M. Bhandari, juges  
MM. Guillaume  
Dugard, juges *ad hoc*  
  
M. Couvreur, greffier

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The PRESIDENT: Veuillez vous asseoir. Good morning. The hearing is open. We meet this morning for the second round of oral observations of Nicaragua on its Request for the indication of provision measures. I call upon His Excellency Dr. Carlos Argüello Gómez, Agent of the Republic of Nicaragua. Excellency, you have the floor.

Mr. ARGÜELLO GOMEZ:

1. Mr. President, distinguished Members of the Court, good morning. In my first presentation I gave a list of the steps Nicaragua had taken prior to deciding to make a formal request for provisional measures on the basis of Article 41 of the Statute and Article 73 of the Rules of Court.

2. In fact the measures requested by Nicaragua were that Costa Rica simply comply with its international obligations and produce a transboundary environmental impact assessment for the road work and not proceed with any other works that had transboundary impacts without complying with its international obligations. The request was not extraordinary, it did not involve any damage to Costa Rica's interests or ask that it abandon the exercise of any plausible right it might have.

3. The explanation given in my first presentation is that Nicaragua attempted several different ways for preserving its rights, and that when these failed it decided to make a formal request to the Court. Costa Rican counsel have said that Nicaragua has requested the same thing five times from the Court and has been rejected as many times.

4. This was not due to lack of merit of the Nicaraguan request but because the Court considered that it was not the appropriate procedural method for considering the request. To avoid repeating the details of these attempts one by one which are explained in my first presentation<sup>1</sup>, we can summarize and say that these attempts basically called on the Court to use its statutory powers, including its especial faculty to decide *proprio motu* on provisional measures to order the provisional measures Nicaragua was requesting. It was not until 11 March of this year, after several of these requests had been made, that the Registrar finally informed Nicaragua that the

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<sup>1</sup>CR 2013/28, pp. 19-20, paras. 35-41 (Argüello).

Court did not consider that the circumstances of the case, as they presented themselves to it at the time, were such as to require the exercise of the powers invoked by Nicaragua<sup>2</sup>.

5. Shortly after this communication was sent by the Registrar, Costa Rica filed a new request for the modification of the measures ordered by the Court on 8 March 2011<sup>3</sup>. Nicaragua saw this as another opportunity to present its case to the Court without having recourse to public hearings<sup>4</sup>. The Court, nonetheless considered in its Order of last 16 July that,

“even if the situation invoked in the *Nicaragua v. Costa Rica* case were to justify the indication of provisional measures, the appropriate method of securing that is not the modification of the [Order of 8 March 2011] made in the *Costa Rica v. Nicaragua* case”<sup>5</sup>.

6. In the meantime, Costa Rica had announced that the road work would be continued towards the end of this year and that this would in any event happen before the general elections that were to take place in February 2014<sup>6</sup>. After this announcement Nicaragua was considering the appropriate moment in which to file its formal request for provisional measures.

7. This was the situation when Costa Rica filed last September a request for new provisional measures. In view of the fact that this Costa Rican request implied that there were to be public hearings, Nicaragua considered that it was a good opportunity to present its own case and take advantage of the fact that the Court would in any case be in session and that the Nicaraguan legal team would also be in The Hague, thus reducing the expense of these proceedings and the time involved for the Court.

8. What I stated in my first speech that it was only when it became clear that these hearings requested by Costa Rica would go through, Nicaragua decided to also file its own petition, does not mean that one was the cause of the other. Counsel for Costa Rica attempted to make my words to mean that the only reason for the Nicaraguan request was that Costa Rica had filed a request and

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<sup>2</sup>Note from the Registrar dated 11 March 2013, ref. 141600.

<sup>3</sup>Costa Rica’s Request for the modification of the Court’s Order of 8 March 2011 on Provisional Measures in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 23 May 2013.

<sup>4</sup>Written Observations by Nicaragua and Request by Nicaragua for the modification of the Order in light of the joinder of the proceedings in the two cases, 14 June 2013.

<sup>5</sup>Order of 16 July 2013 on the Request for the modification of the Order of 8 March 2011 indicating provisional measures, para. 28.

<sup>6</sup>CR 2013/28, p. 39, para. 9 (Reichler).

Nicaragua wanted to add on its own request<sup>7</sup>. This is not what I said or meant. One thing is the decision to choose an appropriate moment to take some action and the other the decision that taking that action is needed. Nicaragua had decided that it had to present its request preferably before Costa Rica reinitiated the road work, and when Costa Rica filed its request this seemed a good opportunity for doing so. The request would have been made one way or the other by Nicaragua at around this time.

9. The characterization by Costa Rican counsel of Nicaragua's Request for provisional measures as abusive is frankly itself an abuse. It is quite surprising. Nicaragua has been a party to nearly ten cases before the Court in the last 30 years and has only requested provisional measures in one of those other cases. Nicaragua has been very careful not to abuse the Court's time with these requests that, due to their urgent nature, disrupt the Court's agenda and also because of the cost of these public hearings for the parties.

10. Costa Rica, on the other hand, has been abusing the right to request provisional measures right from the start of these joined cases<sup>8</sup>. First, it used an incident that involved the dispute over 250 hectares of swamp land without inhabitants or constructions to turn it into the main focus of the foreign policy of a country that should have many other important matters to be attending and has been using it for continually imposing on the attention of the Court on this very minor issue. The term "swamp" was used by the Secretary General of the Organization of American States (OAS) to characterize the area when he visited it at the beginning of the dispute. The expression reflected his surprise at the existence of a dispute over an area that, he said, "this is a swamp; in the most common language it is called a swamp . . ."<sup>9</sup>.

11. Not satisfied with the attention given by the Court to this issue, Costa Rica again attempted to obtain further provisional measures by means of a request for a modification of the

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<sup>7</sup>CR 2013/29, p. 43, para. 4 (Kohen).

<sup>8</sup>Costa Rica's Request for the indication of provisional measures, 18 Nov. 2010.

<sup>9</sup>See Ann. 26 (The Truth that Costa Rica Hides about the Rio San Juan) to the Counter-Memorial of the Republic of Nicaragua in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 6 August 2012. Jose Miguel Insulza, Secretary General of the OAS in the Special Session of the General Assembly, 11 Sept. 2010.

measures that had been ordered on 8 March 2011<sup>10</sup>. This, fortunately, did not imply public hearings but it was time-consuming and involved expensive consultations. The great urgency for this request was that there is a group of young environmentalists that regularly visit the site — which in over the two years this has been going on has never occasioned harm to the area or violence of any nature.

12. And, finally, a third request for new provisional measures was filed by Costa Rica on the grounds that Nicaraguan personnel had entered the territory in dispute and were performing operations that contravened the Order of the Court<sup>11</sup>. But without going further on this subject, the fact is that when the President of Nicaragua was informed of the situation he immediately ordered a stop to whatever was happening. After that, there was no legal reason to continue with that request and to have held those hearings.

13. If we are referring to an abuse of the right of request of provisional measures it is certainly on the Costa Rican side. Three requests in a single case involving a small plot of uninhabited swampland is certainly an abuse of a mechanism that should not be used for any and all claims.

14. Compared to the interests in play in the 250 hectares of swampland, Costa Rica has pulled down forests and levelled hillsides and mountains right next to the San Juan River for a length of over 100 km causing ecological damage of all type to the area; not only the silting and poisoning of the waters of the river but also causing changes to the natural environment of the area. And when Nicaragua tries to find procedures to preserve its rights that would not involve invoking public hearings, Costa Rica accuses Nicaragua of abusing the procedure. To borrow a phrase from Costa Rican counsel, the characterizations are “surrealist”.

15. Costa Rican counsel have said that the “main purpose of the border road was to facilitate Costa Rica’s protection of its border” and they go on to say that the claim of navigation by Nicaragua in the Colorado River “had a very real and plausible concern that the situation would

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<sup>10</sup>Costa Rica’s Request for the modification of the Court’s Order of 8 March 2011 on Provisional Measures in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 23 May 2013

<sup>11</sup>Costa Rica’s Request for the indication of new provisional measures, 24 Sept. 2013.

further escalate into an armed conflict”. And that “This concern was exacerbated by Costa Rica’s lack of military capacity to repel an armed invasion.”<sup>12</sup>

16. This assertion deserves some comments. The President of Nicaragua stated that he would seek navigation rights through the Colorado so long as there was no possible outlet to the Caribbean Sea through the San Juan River proper, since most of the waters now flow out through the Colorado, making it the only year-round navigable outlet. Costa Rican counsel quoted a statement from a news report which is in tab 3 of the judges’ folders presented by Costa Rica yesterday. The headline of that news report reads “Nicaragua will request before the ICJ navigation through the Rio Colorado”. Since when can an announcement that a question will be brought to the Court be construed as a military threat that could prompt Costa Rica to construct an environmentally destructive road on the basis of this spurious national emergency? Is seising the Court an aggression?

17. The other supposed threat made by Nicaragua and which is picked up by several of Costa Rica’s counsel is that President Ortega said that Nicaragua might claim the return of the Province of Guanacaste<sup>13</sup>. This also deserves some comments. In the first place, President Ortega said in his speech that “we [w]ould consider taking the case [of the Guanacaste] to the International Court of Justice”<sup>14</sup>. Again, when is an announcement that taking a question to the Court to be considered a military threat? In any event, President Ortega’s statement was made more than two years *after* Costa Rica declared a national emergency and decided to build the road. So it is disingenuous to cite it as a justification for Costa Rica’s decision.

18. One other point that I will not pass over is the statement by Costa Rican counsel, that the road was a defense for a country like Costa Rica that does not have an army or that it “lacked military capacity” to defend itself. Costa Rica does not lose an opportunity of making this statement in spite of the fact that for many years it does not correspond to the reality. Costa Rica has been spending at least five times more on military weapons than Nicaragua for the past two decades. We have recalled this on several occasions here before the Court and given the data that

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<sup>12</sup>CR 2013/29, p. 12, para. 4 (Brenes).

<sup>13</sup>*Ibid.*, p. 45, para. 7 (Kohen).

<sup>14</sup>Tab 10 of the judges’ folders for Costa Rica’s presentation, 6 Nov. 2013.

is readily available in the most elementary search in Google or in any of the international publications on military expenditure. Since Costa Rica insists it is not a military budget, it is usually referred to as a paramilitary budget. In 2010 this budget for Costa Rica was of US\$215 million, five times more than the budget allocated by Nicaragua for its own armed forces the same year which amounted to US\$38 million.

19. This Costa Rican mantra of being a country without an army is coupled to the other mantra that Costa Rica is an example of ecological care and protection. In Nicaragua's Application to this case<sup>15</sup>, it is pointed out that the World Resources Institute lists Costa Rica as the country with the highest use of pesticide per hectare in the world. It uses 51 kg of pesticide per hectare while Colombia, which is in the second place, uses 16 kg per hectare. As we say in Spanish, "create fama y echate a dormer" build up a reputation and then go to sleep, in this case go do the opposite of what your established reputation indicates.

20. Costa Rican counsel pointed out that its national courts had upheld the validity of the declaration of the state of emergency for the construction of the road without the need of any environmental impact assessment study. They pointed out that similar legislation existed in Nicaragua<sup>16</sup>. That is true in Nicaragua and in many other countries in cases of national emergencies. But Costa Rican counsel seems to forget that they are not pleading before a national Court and that no domestic national decree is going to waive its international duty. As the Permanent Court of International Justice stated, "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."<sup>17</sup> The transboundary environmental impact assessment cannot be dismissed by Costa Rican domestic legislation.

21. Costa Rican counsel commented that if Nicaragua was so pressed to stop the roadwork, why did it request one year for the preparation of its Memorial<sup>18</sup>. In relation to that question, I

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<sup>15</sup>Application by Nicaragua instituting proceedings in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 22 Dec. 2011, para. 38.

<sup>16</sup>CR 2013/29, p. 15, para. 10 (Brenes).

<sup>17</sup>*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

<sup>18</sup>CR 2013/29, p. 39, para. 16 (Ugalde).

would recall that during the meeting of the Agents with the President for setting up the timetable for the pleadings in this case, the question of the request that Nicaragua had made for an environmental impact assessment was an issue during the meeting and it at the very least confirms the interest and worry Nicaragua had on this point. As to the amount of time requested for the presentation of the Memorial, that is a question that depends on many factors. In the instant case, as Agent, I took into consideration among many other things, that Nicaragua in the coming months after that meeting would be preparing a Counter-Memorial in the *Certain Activities* case, it would be having public hearings in the *Nicaragua v. Colombia* case, and several other considerations. In any case, the existence of Article 41 of the Statute is precisely to take care of the interim status of cases where rights might be prejudiced *pendente litis*.

22. Costa Rican counsel has stated that the object of the Nicaraguan request for provisional measures is simply to delay any decision on the request made by Costa Rica<sup>19</sup>. This statement is a bit difficult to reconcile with the fact that Nicaragua did not decide to postpone the present hearings until this week, but had attempted to have the hearings at the same time as the Costa Rican request was being heard. This can hardly be portrayed as an attempt to delay those proceedings. And, may I ask, delay in what form? A week, two weeks?

23. Costa Rica also states that the whole object of Nicaragua is to stop it from having its own road<sup>20</sup>. This is a baseless and gratuitous accusation. Nicaragua would have no problems if the Costa Rican road had been constructed properly. On the contrary, it would have been of benefit for both countries. There is a bridge upstream over the San Juan River under construction which is well underway. At the inauguration of the works of this bridge, the Japanese Ambassador, as representative of the country helping Nicaragua with this project, pointed out that this bridge could be a point of union for both Nicaragua and Costa Rica. And, in fact, if this road had been properly constructed and really led somewhere, it would have been a continuation of the land route from the Nicaraguan side into the Costa Rican, to the benefit of both countries.

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<sup>19</sup>CR 2013/29, p. 53, para. 34 (Kohen).

<sup>20</sup>*Ibid.*, p. 51, para. 27 (Kohen).

24. Costa Rica states that if the renewal of the construction of the road is delayed, this would cause great harm to Costa Rica<sup>21</sup>. If this were true, the Costa Rican authorities who have stopped construction and have delayed the furnishing of funds for the renewal works would have tried to avoid this damage to Costa Rican vital interests. Mr. Reichler pointed out why this construction was stopped and funding delayed, and no considerations of national security and interests played a part in these decisions<sup>22</sup>.

25. Furthermore, it might be recalled that during the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Costa Rica attempted to justify its request to navigate the river armed on the basis of the alleged need for “supply and staff relief purposes”. This was not correct then and much less is it correct now since “roadways, whose construction began prior to 1998, now connect to all the Costa Rican border and police post, and facilitate supply and staff relief operations”<sup>23</sup>. There was no urgent need to connect these already connected communities with an ecological disastrous road.

Mr. President, Members of the Court, thank you for your kind attention.

The order and general subject of the speakers is as follows:

- Professor Stephen McCaffrey will address the unconvincing Costa Rican evidence on the Absence of Prejudice;
- Mr. Paul Reichler will address Costa Rica’s inadequate remediation and the urgent need for provisional measures; and
- Professor Alain Pellet will address *la menace de la reprise de la construction de la Route 1856*.

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

The PRESIDENT: Thank you very much, Ambassador. I call now on Professor Stephen McCaffrey. You have the floor, Sir.

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<sup>21</sup>CR 2013/29, p. 51, para. 28 (Kohen).

<sup>22</sup>CR 2013/28, p. 40, para. 12 (Reichler).

<sup>23</sup>See Rejoinder of the Republic of Nicaragua, “*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*”, Vol. I, 15 July 2008, para. 1.2.43, p. 280, para. 5.98.

Mr. McCaffrey: Thank you, Mr. President.

**THE UNCONVINCING COSTA RICAN EVIDENCE ON  
THE ABSENCE OF PREJUDICE**

Mr. President, distinguished Members of the Court, good morning. My task this morning is to show why Costa Rica's presentations yesterday concerning irreparable prejudice were wide of the mark, and failed to rebut Nicaragua's case for provisional measures.

1. First and foremost, Mr. President, counsel for Costa Rica were addressing the wrong question. The test this Court has laid down and repeated in every one of its provisional measures orders requires an imminent threat of irreparable prejudice to the *rights* of a party. Rather than showing this, Costa Rica focused on *facts*, apparently in an effort to distract the Court's attention from the clear ongoing and threatened future prejudice to Nicaragua's rights. Thus counsel for Costa Rica tried to minimize the prejudice by encouraging the Court to direct its attention to such things as grains of sand in the Lower San Juan.

2. Mr. President, Members of the Court, where was Costa Rica's explanation of how the sediment delivered into the river, Nicaragua's territory, does not violate Nicaraguan sovereignty and territorial integrity? My friend Mr. Wordsworth ignored this entirely. And Professor Kohen was rather dismissive of Nicaragua's argument on this point, simply stating that "la souveraineté et l'intégrité territoriales du Nicaragua ne sont nullement en cause ici"<sup>24</sup>. Professor Kohen said that, if anything, what was involved could be a violation of the obligation not to cause significant transboundary harm<sup>25</sup>. It is hard to tell whether Costa Rica simply does not understand the concept of the inviolability of a State's sovereign territory — which seems highly unlikely — or that it decided not to try to refute Nicaragua's arguments on irreparable prejudice to sovereignty and territorial integrity because it realized it could not.

3. Thus, Nicaragua's submission on this point effectively stands unchallenged: Costa Rica, by constructing Route 1856 in such a way as to cause an average of some 100,000 m<sup>3</sup> of sediment to be deposited in the San Juan each year, has caused, and threatens to continue to cause,

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<sup>24</sup>CR 2013/29, p. 47, para. 15 (Kohen).

<sup>25</sup>*Ibid.*

irreparable prejudice to the rights of Nicaragua that are the subject of the dispute before the Court. Most fundamentally, those rights, which, again, are threatened with irreparable prejudice, are Nicaragua's rights to sovereignty and territorial integrity, to be free from transboundary harm, and to receive a transboundary environmental impact assessment before any further work is done on the road.

4. Even in their focus on the factual effects of the road project, Mr. President, the best Costa Rica's counsel could do was to fasten onto the analysis of Professor Thorne, who began by reducing the sediment delivered into the river from the road project by 90 per cent. He then spread the remaining 10 per cent evenly — itself something highly unlikely to occur — evenly, over the bed of the Lower San Juan *only*, to come up with a thickness of sediment deposition in the Lower San Juan of the equivalent of one or two grains of sand. Interesting. But, Mr. President, entirely irrelevant.

5. What *is* relevant, Mr. President, Members of the Court, is the threatened continued prejudice to Nicaragua's rights, as just mentioned, and the fact that the prejudice will soon be compounded by the resumption of work on the road by Costa Rica.

6. And this prejudice is irreparable. Costa Rican counsel, Professor Crawford, as much as concurred with this in the hearings on Costa Rica's request for provisional measures in the *Certain Activities* case, their original request. He said:

“[Nicaragua] likewise must stop immediately the dumping of sediments on Costa Rican territory. No doubt Nicaragua has the right to dredge the San Juan, provided it complies with condition 6 of the Cleveland Award. What it has no right to do is to dump the resulting sediments on Costa Rican territory without Costa Rica's consent. Its doing so causes damage to the territory which, in a wetland, is effectively irreversible. It should be stopped, by your order, now.”<sup>26</sup>

7. The conclusion can be no different in this case, Mr. President, merely because the sediment is going into the river, rather than onto land. As I discussed Tuesday, we have moved past the time when rivers can be viewed as a convenient means of waste disposal. I trust that if he were here, Professor Crawford would not disagree.

8. Costa Rica also trumpets Professor Thorne's statement that “[t]he sediment derived from erosion related to the Road as estimated by Dr. Kondolf, makes up 1 or 2% of the total sediment

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<sup>26</sup>CR 2011/1, p. 70, para. 49 (Crawford).

load carried by the Río San Juan which is obviously too small a proportion to have a significant impact on the River”<sup>27</sup>. But, Mr. President, it is not the *relative* quantity that is relevant, but the *absolute* quantity. And the quantity must only be sufficient so as not to be *de minimis* to constitute a violation of territorial sovereignty and integrity, and of the obligation not to cause transboundary harm. One hundred thousand cubic metres per year is hardly *de minimis*. It is a considerable amount of sediment.

9. In fact, Mr. President, Costa Rican counsel, Mr. Ugalde, again in the hearings on Costa Rica’s original provisional measures request in the *Certain Activities* case, complained of a far lower quantity of sediment deposition:

“The inspections [by Costa Rica] made clear that Nicaragua had been depositing a great deal of dredged sediment on Costa Rica’s territory. The amount of sediment deposited equalled about 1,680 cubic metres, or 240 truck loads.”<sup>28</sup>

10. Mr. President, there, Costa Rica thought 240 truck loads was “a great deal of . . . sediment”. Here, the quantity deposited on Nicaragua’s territory, every year, is sixty times that much.

11. My admittedly rather homespun attempt to give the Court some basic appreciation of the quantity of sediment that is delivered into the river from the road project—the “5,000 dump trucks” analogy—was dismissed by Mr. Wordsworth on the ground that there was no “dumping,” or as he called it, “tipping”<sup>29</sup>. Even if this rather semantic response were accepted as correct, *quod non*, Costa Rica did not take serious issue with the volume figure of 100,000 m<sup>3</sup> as an average annual quantity of sediment delivered into the river by the road project in unexceptional meteorological circumstances (Dr. Thorne quibbled but said it did not matter as it was an insignificant quantity). This is a tremendous amount of sediment—enough to cover thoroughly Costa Rica’s entire road, in fact, according to the road surface area figures given by Costa Rica in Annex 4 filed last Friday<sup>30</sup>.

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<sup>27</sup>CR 2013/29, p. 26 (Wordsworth).

<sup>28</sup>CR 2011/1, p. 29, para. 21 (Ugalde).

<sup>29</sup>CR 2013/29, p. 29, para. 22 (Wordsworth).

<sup>30</sup>Nicaragua’s Request for the Indication of Provisional Measures, Republic of Costa Rica Annexes, Ann. 4, p. 27, Conclusion 1.

12. And, Mr. President, the best Costa Rica could do to control the damage to its case, caused by the rogue culvert in the river, was to insinuate that Nicaragua “dragged” it there<sup>31</sup>. Obviously, they believe this hurt them seriously or they would not have made such an unlikely charge. In any event, Nicaragua certainly did not “drag” the culvert into the river from the location where it was originally installed or anywhere else. Only normal rain, and improper installation, were enough to accomplish this.

13. Mr. President, Members of the Court, the fact that the violations of Nicaragua’s rights have been ongoing should not be seen as negating a future threat to Nicaragua’s rights, for two reasons: first, doing something wrong over a period of time, in the face of protests, does not make it right. To put it more graphically and prosaically, the fact that a patient has been losing blood for some time does not mean there is no urgency to stop the haemorrhaging, and as soon as possible. And second, the impending resumption of work on the road, and the corresponding threat of increased sedimentation that will come with it, makes it even more urgent that measures be ordered to protect Nicaragua’s rights of sovereignty, territorial integrity, and freedom from transboundary harm.

14. Mr. President, Members of the Court, Costa Rica’s counsel yesterday belittled the threat of storms, showing a NOAA figure that tracked hurricanes<sup>32</sup>. Although many of the tracks would actually appear from the figure at tab 22 to have crossed Nicaragua, here again, Costa Rica misses the point — and perhaps engages in some wishful thinking. Counsel for Costa Rica, my friend Mr. Wordsworth, stated: “this is not a region where there are hurricanes or tropical storms”<sup>33</sup>.

15. Mr. President, within the past 25 years, the region has been hit by two hurricanes: Joan in 1988 and Mitch in 1998. The following are excerpts from typical entries available on the Internet concerning these hurricanes to illustrate their severity:

“Hurricane Joan was a powerful hurricane that caused death and destruction in over a dozen countries in the Caribbean and Central America. Moving on a due west course for nearly two weeks in October 1988, Hurricane Joan caused widespread flooding and over 200 deaths after moving into Central America. Widespread

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<sup>31</sup>CR 2013/29, p. 22, para. 3 (Wordsworth).

<sup>32</sup>National Oceanic and Atmospheric Administration, Historical Hurricane Tracks, Costa Rica judges’ folder, 6 Nov. 2013, tab 22.

<sup>33</sup>CR 2013/29, p. 30, para. 30.

suffering and economic crises were exacerbated by Joan, primarily across Nicaragua, as heavy rains and high winds impacted those near the hurricane's path."<sup>34</sup>

And for Hurricane Mitch:

“Due to its slow motion from October 29 to November 3, Hurricane Mitch dropped historic amounts of rainfall in Honduras, Guatemala, and Nicaragua, with unofficial reports of up to 75 inches (1,900 mm). Deaths due to catastrophic flooding made it the second deadliest Atlantic hurricane in history . . . Though Mitch never entered Nicaragua, its large circulation caused extensive rainfall, with estimates of over 50 inches (1,300 mm). In some places, as much as 25 inches (640 mm) of rain fell on coastal areas . . . Two million people in Nicaragua were directly affected by the hurricane.”<sup>35</sup>

16. But, Mr. President, it is not only hurricanes that can cause landslides on unstable slopes such as those we showed yesterday. It is the large amounts of rain accompanying them, and other storms, that are a cause of concern. The large system associated with Hurricane Stan in 2005 brought “torrential rainstorms [that] dropped upwards of 20 inches (500 mm) of rain, causing severe flash floods, mud slides, and crop damage . . . over portions of Mexico and Central America, including . . . Nicaragua, . . . and Costa Rica”<sup>36</sup>. Finally, a Ramsar Advisory Mission Report states that the San Juan River region receives 2,500 to 6,000 mm of rain annually, one of the highest rates of precipitation in the Western Hemisphere<sup>37</sup>. A veritable “perfect storm”, Mr. President, of conditions for landslides.

17. So much then, Mr. President, for Mr. Wordsworth's notion that “this is not a region where there are hurricanes or tropical storms”<sup>38</sup>. As Dr. Kondolf observes, in relation to events that can trigger mass wasting, or landslides:

“to a geomorphologist these triggering events are not so rare. The Río San Juan experienced intense rainfalls from two hurricanes that passed nearby in recent decades, Juana [or Joan] in 1988 and Mitch in 1998. The hurricane or tropical storm need not be a ‘direct hit’ on the basin to produce intense rains. With the undercutting of slopes in the road cuts and unstable fill placed along the outside of the road, the stage is set for extensive landsliding when, inevitably, intense rains occur.”<sup>39</sup>

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<sup>34</sup>[http://en.wikipedia.org/wiki/Hurricane\\_Joan%E2%80%93Miriam](http://en.wikipedia.org/wiki/Hurricane_Joan%E2%80%93Miriam).

<sup>35</sup>[http://en.wikipedia.org/wiki/Hurricane\\_Mitch#Nicaragua](http://en.wikipedia.org/wiki/Hurricane_Mitch#Nicaragua).

<sup>36</sup>[http://en.wikipedia.org/wiki/Hurricane\\_Stan](http://en.wikipedia.org/wiki/Hurricane_Stan).

<sup>37</sup>RAMSAR Advisory Mission Report No. 69, Ann. 147, p. 111, to the Memorial of Costa Rica in the *Certain Activities* case.

<sup>38</sup>CR 2013/29, p. 30, para. 30.

<sup>39</sup>Comments on Costa Rican Submissions of November 2013, G. Mathias Kondolf, Ph.D., 6 Nov., 2013, p. 5.

18. To sum up on this point, Mr. President, it is the intense rain, not necessarily the storm itself, that triggers these massive movements of earth and thus, in this case, similarly massive deliveries of sediment into the San Juan.

19. Mr. President, just one final point. It is striking that the report from the University of Costa Rica trumpeted so loudly by Costa Rican counsel, “Report on Systematic Field Monitoring of Erosion and Sediment Yield along Rte 1856” (Oreamuno and Villalobos 2013), that this report covers only 15 km of the river, a stretch that is upstream from the most severely eroding area. In Dr. Kondolf’s words:

“[I]t is notable that the sites chosen were all within the first 15 km of the river-adjacent Rte 1856 . . . Thus, the area monitored was extremely limited in comparison to the 106-km extent of Rte 1856 along the south bank of the Río San Juan (Figure 1). The ‘study area’ did not extend downstream into the reach with the worst-eroding sites along Rte 1856, the 26-km from Río Infiernito to the Río San Carlos confluence . . . Thus Oreamuno and Villalobos avoided some of the more seriously eroding sites. By limiting themselves to sites upstream of Río Infiernito, the authors excluded the severely eroding sites downstream, including sites . . . which involve massive road fills that are rapidly failing.”<sup>40</sup>

Thus, Mr. President, the fact that the sites chosen for the University of Costa Rica study were not representative and were from a short stretch of the river upstream of the area where the most serious erosion is occurring calls into question the usefulness of the study.

20. Mr. President, Members of the Court, this concludes my brief presentation. Thank you once again for your kind attention. Mr. President, I would ask that you now call my friend and colleague, Mr. Paul Reichler, to the podium.

The PRESIDENT: Thank you, Professor McCaffrey, and I give the floor to Mr. Reichler.  
You have the floor, Sir.

Mr. REICHLER:

**COSTA RICA’S INADEQUATE REMEDIATION AND THE URGENT NEED  
FOR PROVISIONAL MEASURES**

1. Mr. President, Members of the Court, good morning.

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<sup>40</sup>Comments on Costa Rican Submissions of November 2013, G. Mathias Kondolf, Ph.D., 6 Nov., 2013, p. 3.

2. I will respond to two of Costa Rica's arguments: first, on the adequacy of the measures Costa Rica has taken to remediate the problems resulting from the first phase of construction of Route 1856; and second, on the urgency of the provisional measures Nicaragua has requested.

3. Mr. President, Costa Rica applauds itself for the remediation it claims to have done, "on its own initiative", to fix the problems with the road<sup>41</sup>. The second provisional measure requested by Nicaragua is directed at remediation of these problems. [graphic] Here is the chart displayed by Professor Kohen yesterday<sup>42</sup>. As a convenience it is also in today's judges' folder at tab 20. Mr. Kohen said — I am sorry, *Professor Kohen*, he is my friend and I apologize — Professor Kohen said that the left column lists the remediation measures requested by Nicaragua and the right column lists the measures Costa Rica claims it has already taken or is taking.

4. There is one thing the Parties can agree on: this is a *lot* of remediation. What does this tell us about the road? If Costa Rica acknowledges that all this remediation is necessary, this is a gigantic admission against interest, as defined in the Court's jurisprudence<sup>43</sup>, that what Nicaragua has been saying about the road is true: the first phase of construction was a disaster. If it wasn't, why is all this remediation required? And this is consistent with how the road was described, not just by Nicaragua, but by Costa Rica's own National Federation of Architects and Engineers. I quote directly from their report: "The route was constructed without a single plan to indicate the path that was to be opened, or what its characteristics should have been. This situation causes increased costs, environmental problems and a rapid deterioration of the project."<sup>44</sup> The University of Costa Rica's National Laboratory of Materials and Structural Models was just as critical: "In its current condition the Border Trail has a high risk of collapsing during the rainy season as a result of nonexistent drainage structures and instability of a large number of cuts and fills . . ."<sup>45</sup>

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<sup>41</sup>CR 2013/29, p. 11, para. 2.

<sup>42</sup>Costa Rica's judges' folder of 6 Nov. 2013, tab 31.

<sup>43</sup>*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment, I.C.J. Reports 2005, p. 42, para. 78; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 41, para. 64.

<sup>44</sup>Federated Association of Engineers and Architects of Costa Rica, "Report on Inspection of the Border Road, Northern Area Parallel to the San Juan River CFIA Report", MN, Ann. 4, p. 25.

<sup>45</sup>National Laboratory of Materials and Structural Models of the University of Costa Rica, "Report INF-PITRA-014-12: Report from Inspection of Route 1856 — Juan Rafael Mora Porras Border Road," May 2012, MN, Ann. 3, p. 51.

5. Costa Rica did not deny any of this yesterday. They did not defend the manner in which the road was constructed. They did not dispute that the road was badly designed and poorly constructed, with reckless disregard for the environment, and that no thought at all was given to transboundary harm, including to the San Juan River.

6. In recognition of these deficiencies, Mr. Brenes told the Court that “Costa Rica has been carrying out, on its own initiative and in an effective manner, the measures Nicaragua now asks the Court to order Costa Rica to perform”<sup>46</sup>. Here is another big admission against interest: that Costa Rica agrees that the measures Nicaragua has asked the Court to order are necessary and should be carried out. Why else would Costa Rica claim to be doing this? Professor Kohen goes even farther, saying that the remedial measures Costa Rica has undertaken go *beyond* what Nicaragua has requested, and are sufficient to fix the problems created by the road<sup>47</sup>. But he is incorrect, in both respects.

7. First, contrary to the claims of Mr. Brenes and Professor Kohen, Costa Rica has *not* carried out the remediation measures requested by Nicaragua. The specific steps necessary to carry out these measures were spelled out by Dr. Kondolf in his report of 12 October<sup>48</sup>, and were included at tabs 15 through 18 of the judges’ folder for 5 November and pointed out by Professor Pellet on that date<sup>49</sup>. Professor Kohen’s chart shows only the general requests made by Nicaragua, not the steps necessary to implement them. By comparing what Costa Rica claims to have done with the specific steps indicated as necessary by Dr. Kondolf, the Court can see that Costa Rica has fallen far short of what is required.

8. Second, Costa Rica’s remediation efforts have been inadequate by any measure. In that regard, the Court may wish to consider Dr. Kondolf’s report of 6 November, at tab 21 of today’s folder. This includes his evaluation of the remedial measures Costa Rica has taken, based on his inspection of the area last month and the reports supplied by Costa Rica this week:

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<sup>46</sup>CR 2013/29, p. 11, para. 2 (Brenes).

<sup>47</sup>*Ibid.*, p. 50, para. 26 (Kohen).

<sup>48</sup>Prof. Mathias Kondolf, “Confirmation of Urgent Measures to Mitigate Erosion and Sediment Delivery from Route 1856, Costa Rica, into the Río San Juan, Nicaragua”, 12 Oct. 2013.

<sup>49</sup>CR 2013/28, pp. 57-60, paras. 24-37.

“There are multiple sites with massive, unstable cutslopes and fillslopes, which already evince landsliding and gullying, and which pose an imminent risk of massive failure, especially in the next intense rains.

Erosion is actively occurring along multiple parts of the road, and *erosion and drainage control works have been limited in extent and scope, and have been ineffective in addressing the serious erosion and slope stability problems.*”<sup>50</sup>

9. The evidence of Costa Rica’s remediation efforts consists primarily of a report by CONAVI, dated 25 October 2013, which is at Annex 3 of their submissions for this hearing. The report is entitled “Program for the Consolidation and Continued Improvement of Route No. 1856”. It describes Costa Rica efforts, between February and April 2013, to remediate 15 km of the road<sup>51</sup>. *15 kilometres!* That is less than one-tenth of the road’s length. What about remediation of the rest of Route 1856? Costa Rica offers no evidence that any was done. If all the works claimed by Professor Kohen were performed on these 15 km, it would be an eight-lane super-highway by now. But it would still be a road to nowhere; a short one, but still leading nowhere. The rest of Costa Rica’s remediation consists of planting new trees, as reported by its Deputy Minister for the Environment<sup>52</sup>.

10. Another major problem with Costa Rica’s remediation efforts cited by Dr. Kondolf is that they appear only

“to protect the road surface, but do little or nothing to protect fillslopes and the river downstream. Moreover, not stated in the [CONAVI] report is the larger fact that all these erosion control projects were undertaken on parts of the road that, while eroding, were not the most serious problems. [They] are attempts to treat surface erosion only, and do not address the fundamental vulnerability to landsliding that will occur during intense rains.”<sup>53</sup>

11. Mr. President, Dr. Kondolf is not the only expert who is underwhelmed by the remediation efforts Costa Rica has undertaken “on its own initiative”. Here is what their own expert, Dr. Thorne, has to say about them [graphic]: “My opinion is that the measures taken by Costa Rica have reduced and will continue to reduce the risk that significant erosion might occur during heavy rainstorms, *compared to conditions immediately following construction of the*

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<sup>50</sup>Prof. Mathias Kondolf, “Comments on Costa Rican Submissions of November 2013”, 6 Nov. 2013, p. 15; emphasis added.

<sup>51</sup>Consejo Nacional de Vialidad (CONAVI), *Program for the Consolidation and Continued Improvement of Route No. 1856*, Ref. DIE-02-13-3107, 25 Oct. 2013, pp. 1 & 3.

<sup>52</sup>Report from Ana Lorena Guevara Fernández, Vice-Minister of the Environment, Costa Rica, to Enrique Castillo Barrantes, Minister for Foreign Affairs, Costa Rica, Reference DVM-293-2013, 8 Oct. 2013, CR-5.

<sup>53</sup>Prof. Mathias Kondolf, “Comments on Costa Rican Submissions of November 2013”, 6 Nov. 2013, p. 7.

road.”<sup>54</sup> Could he have set the bar any lower? This is a classic example of what the British call damning with faint praise! In the words of the great poet Alexander Pope:

“Damn with faint praise, assent with civil leer,  
And without sneering, teach the rest to sneer.”<sup>55</sup>

12. To distance himself even further from Costa Rica’s inadequate remediation efforts, Dr. Thorne also said this [graphic]:

“It is my understanding that the measures I observed in May 2013 are part of ongoing efforts intended to reduce erosion risks stemming from the way the Road was constructed in 2011 and that *they are not intended to provide a permanent solution to erosion issues.*”<sup>56</sup>

13. Mr. President, this is precisely why Nicaragua persists in asking the Court to indicate the second set of provisional measures it has requested. The Parties are agreed on the need for major remediation measures, including the measures requested by Nicaragua. The measures listed by Professor Kohen that Costa Rica claims to have undertaken are quite obviously inadequate, even in the opinion of their own expert. There is also no proof to support Professor Kohen’s claims that even these measures have been implemented, beyond the paltry 15 km that CONAVI reports having attended to.

14. Mr. President, Nicaragua should not be required to continue enduring transboundary harm from Costa Rica’s badly constructed road and inadequate attempts to fix it, pending the final judgment in this case. Nor should Nicaragua be left at the mercy of what Costa Rica “on its own initiative” considers appropriate remediation. Nicaragua would accept an undertaking from Costa Rica to implement the remedial measures recommended as urgent by Dr. Kondolf, accompanied by an implementation plan, which Costa Rica would submit to the Court. The Court has accepted such assurances in the past. In the *Pulp Mills* case, for example, you took note of Uruguay’s assurance that it would not present the Court with a *fait accompli* and denied Argentina’s request for provisional measures in part on that basis<sup>57</sup>. Similarly, in your Order of

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<sup>54</sup>Prof. Colin Thorne, “Report on the Risk of Irreversible Harm to the Rio San Juan Relating to the Construction of the Border Road in Costa Rica”, 4 Nov. 2013, para. 89; emphasis added.

<sup>55</sup>Epistle to Dr. Arbuthnot, Prologue to the Satires, Line 201.

<sup>56</sup>Prof. Colin Thorne, “Report on the Risk of Irreversible Harm to the Rio San Juan Relating to the Construction of the Border Road in Costa Rica”, 4 Nov. 2013, para. 90; emphasis added.

<sup>57</sup>*Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 134, paras. 83-84.

28 May 2009 in the *Hissène Habré* case, you took note of “the assurances given by Senegal [and found] that, the risk of irreparable prejudice to the rights claimed by Belgium [was] not apparent on the date of [that] Order”<sup>58</sup>.

15. Should Costa Rica offer an analogous undertaking tomorrow, Nicaragua, of course, would accept it in good faith. But failing that, Nicaragua must proceed with its request that the Court indicate the measures deemed necessary by Dr. Kondolf. It is significant that, while Dr. Thorne disagrees with Dr. Kondolf about the extent of harm caused to Nicaragua, he takes no exception, in his report of 4 November, to any of the remediation measures Dr. Kondolf has recommended and Nicaragua has requested.

16. I turn now to the question of urgency. And I will be brief. Costa Rica did not say much yesterday that requires a response. Most important, they admitted that resumption of new construction activity is imminent. [graphic] Both Mr. Ugalde and Mr. Brenes cited the same chart I did in Nicaragua’s first round, from the PowerPoint presentation of the Minister of Public Works and Transportation in March 2013. Mr. Ugalde did not deny that new construction would begin, as shown in this schedule, before the end of the year. He merely said it was not a new fact, because Nicaragua would have known about it since last March<sup>59</sup>. Nicaragua may have known, but that is entirely beside the point. Mr. Brenes acknowledged that “funds [for construction of the road] were depleted by December 2011”<sup>60</sup>. Since then, new road construction had not been occurring, and it was not imminent in March 2013. It *is* imminent in November 2013. That is what is new, and that is why Nicaragua’s request for provisional measures is urgent at this time.

17. Mr. Ugalde seems to think that a new fact or a new event must have already occurred *before* an urgent situation requiring provisional measures may be said to exist. He said: “Every other provisional measures request has been *preceded* by the occurrence of some event, or some new fact.”<sup>61</sup> But that is not what the Court’s jurisprudence teaches. Provisional measures are not backward looking. They are not issued to remedy past actions, or harms already consummated.

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<sup>58</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. 155, para. 72.

<sup>59</sup>CR 2013/29, p. 39, para. 14 (Ugalde).

<sup>60</sup>*Ibid.*, p. 17, para. 17 (Brenes).

<sup>61</sup>*Ibid.*, p. 35, para. 5 (Ugalde); emphasis added.

They are prospective in nature, looking forward to future actions or events that might cause irreparable harm to the rights of a party before a final judgment is issued. What makes them urgent is the imminence of the future action. That standard is satisfied here, because according to Costa Rica's own schedule, new construction activities will begin before the end of this year, and will be completed by the end of next year, before the Court is likely to have issued its judgment.

18. Mr. Brenes suggested that the schedule published by the Minister of Public Works — which has not been modified, withdrawn or superseded — is somehow “outdated”, and that new construction activities will be delayed because Costa Rica is still engaged in contracting for the design work<sup>62</sup>. Conspicuously, Mr. Brenes did not say how long the process will be delayed, or when new construction will begin, although he did say “this is a project which is certainly being proceeded with as a matter of priority”<sup>63</sup>. Is January less imminent than December? Must Nicaragua return to the Court and renew its request for provisional measures next month, when the start-up date is closer, and the situation is, by his definition, more “urgent”?

19. The evidence shows that Costa Rica is moving full speed ahead to resume new construction activities at the earliest possible date. Just last week, on 28 October, the Minister of Communications reiterated that construction of Route 1856 will continue to be a priority piece of work until its completion by the current government — whose term of office ends next June — and that the works will continue forward, through that date, even though this does not please Nicaragua<sup>64</sup>.

20. Mr. President, it is undeniable that the resumption of new construction activities is imminent. Costa Rica's senior officials have confirmed it. If it is not staring us directly in the face, it is right around the corner. Whether it starts up later this month, next month, or early in the New Year, it is going to happen very soon. *Unless* the Court indicates the provisional measures Nicaragua has requested. That is why they are urgently needed now. Mr. President, I invite you to call upon my friend and colleague, Professor Pellet, who will address in greater detail Nicaragua's urgent need for the first and third of the requested provisional measures.

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<sup>62</sup>CR 2013/29, p. 18, para. 18.

<sup>63</sup>*Ibid.*, p. 18, para. 19.

<sup>64</sup>“Country Expects to Demonstrate that Trail Construction Did Not Damage the San Juan River” *Monumental*, 28 Oct. 2013, NPM, Ann. 14.

21. I thank you, Mr. President, and distinguished Members of the Court, once again for your kind and courteous attention.

The PRESIDENT: Thank you very much, Mr. Reichler. J'invite maintenant Monsieur le professeur Alain Pellet à prendre la parole.

M. PELLET : Merci, Monsieur le président.

#### **LA MENACE DE LA REPRISE DE LA CONSTRUCTION DE LA ROUTE 1856**

1. Monsieur le président, Mesdames et Messieurs de la Cour, les raisons qui justifient l'indication par la Cour de la deuxième mesure conservatoire demandée par le Nicaragua, dont vous ont entretenu mes collègues Steve McCaffrey et Paul Reichler, expliquent aussi largement pourquoi vous devriez également adopter les deux autres mesures, objets de notre demande : le fiasco de la première tranche de travaux ne doit pas se reproduire — ce qui implique que les travaux effectués dorénavant (que ce soit sur le fleuve lui-même ou sur ses affluents) le soient conformément aux règles de l'art et *après* une étude d'impact sérieuse (sérieuse et communiquée à l'Etat voisin). Mais il y a évidemment une grande différence : contrairement à la première, cette seconde tranche de travaux, envisagée, n'a, par hypothèse, pas encore été menée — c'est une lapalissade. Il est donc encore temps d'éviter l'irréparable. En d'autres termes, la deuxième mesure que nous demandons vise à atténuer les effets néfastes de la construction de la route et à en empêcher l'aggravation ; les première et troisième mesures ont pour objectif de prévenir qu'ils se produisent dans le cadre des travaux à intervenir.

2. Mais je veux être très clair, Monsieur le président : en dépit des envolées souverainistes et lyriques de mon contradicteur et ami, Marcelo Kohen, à la fin de sa plaidoirie d'hier<sup>65</sup>, il n'entre nullement dans les intentions du Nicaragua d'empêcher *le Costa Rica* de construire toutes les routes qu'il veut sur son territoire, même si elles ne doivent mener nulle part ! Et même si elles suivent la berge du fleuve San Juan : le Costa Rica y est chez lui ; la cause est entendue. Notre agent l'a redit on ne peut plus clairement dans sa présentation de toute à l'heure. En revanche, la Partie nicaraguayenne entend, fermement, faire respecter *sa* souveraineté sur le fleuve et l'intégrité

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<sup>65</sup> CR 2013/29, p. 52-53, par. 30-31 (Kohen).

de celui-ci — c'est le but à la fois de sa requête et de la présente instance. Cela veut dire en particulier que ni les travaux de construction de la route, ni les suites de cette construction — c'est-à-dire la route elle-même — ne doivent causer de dommage au fleuve nicaraguayen du San Juan : les déchets ne doivent pas y être évacués ; les remblais et les matériaux dont la route est faite ne doivent pas s'y écrouler ; les ponceaux et les autres éléments d'infrastructure de la route ne doivent pas y choir et empêcher son écoulement naturel ; etc. Tout cela s'est produit s'agissant des portions déjà construites ; il faut empêcher que cela continue à se produire — c'est l'objet de la deuxième mesure conservatoire ; et il faut empêcher que cela se reproduise à la suite de nouveaux travaux — et c'est pour cela, Mesdames et Messieurs de la Cour, que le Nicaragua vous demande d'ordonner que — sauf les mesures de mitigation, bien sûr — rien ne soit fait, dorénavant, sans une étude d'impact sur l'environnement probante et soumise à l'appréciation du Nicaragua et de la Cour elle-même ; tel est l'objet des première et troisième mesures conservatoires demandées par la lettre de notre agent du 11 octobre dernier<sup>66</sup>.

3. Et j'ai bien dit, Monsieur le président, «l'objet» au singulier car ces deux mesures sont inextricablement liées : la construction de la route ne doit pas être reprise tant que le Nicaragua n'aura pas reçu — et été en mesure de discuter utilement — une étude d'impact sur l'environnement, établie et communiquée en conformité avec l'obligation internationale lui incombant «de procéder à une évaluation de l'impact sur l'environnement lorsque l'activité industrielle projetée risque d'avoir un impact préjudiciable important dans un cadre transfrontière, et en particulier sur une ressource partagée»<sup>67</sup>.

4. Je me suis permis, Monsieur le président, de citer à nouveau<sup>68</sup> ce passage de l'arrêt de la Cour de 2010 dans l'affaire des *Usines de pâte à papier* car j'ai noté la véhémence avec laquelle le professeur Kohen — ou «Monsieur Kohen», les professeurs sont des messieurs et des dames — récuse cette règle et, en tout cas, son applicabilité en l'espèce : «Le Costa Rica conteste que dans les circonstances particulières de l'espèce cette obligation s'impose à lui.»<sup>69</sup> C'est une fin de

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<sup>66</sup> Lettre en date du 11 octobre 2013 adressée au greffier de la Cour par l'agent du Nicaragua (réf. HOL-EMB-196).

<sup>67</sup> *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, C.I.J. Recueil 2010 (I), p. 83, par. 204.

<sup>68</sup> Voir CR 2013/28, p. 55, par. 16 (Pellet).

<sup>69</sup> CR 2013/29, p. 48, par. 17 (Kohen) ; voir aussi p. 45, par. 8 (Kohen).

non-recevoir on ne peut plus claire ! Et elle appelle deux séries de remarques, que je crois importantes.

5. En premier lieu, mon contradicteur a tenté de justifier ce refus catégorique en invoquant l'article 19 de la convention sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation du 21 mai 1997 (qui figure à l'onglet n° 23 du dossier des juges). Cette disposition mérite qu'on s'y arrête un instant. Aux termes de son paragraphe premier :

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

Bien que l'ambassadeur Argüello ait montré que la thèse de l'agression était pitoyable, admettons, pour les besoins de la discussion, que l'on adhère à la fable de l'extrême urgence en ce qui concerne la construction précipitée et «à la va comme je te pousse» des premiers tronçons de la route. Il reste que :

1) il faut aussi lire les paragraphes 2 et 3 de l'article 19 :

«2. En pareil cas, une déclaration formelle proclamant l'urgence des mesures accompagnée des données et informations pertinentes est communiquée sans délai aux autres Etats du cours d'eau visés à l'article 12.»

Il faut croire que l'urgence était extrêmissime, Monsieur le président : le Nicaragua n'a pas reçu cette communication, pourtant obligatoire quelles que soient les circonstances, comme l'est aussi la notification «des données techniques et informations disponibles» prévue à l'article 12, «afin de mettre les [autres Etats du cours d'eau] à même d'évaluer les effets éventuels des mesures projetées». Puis, paragraphe 3 de l'article 19 :

«3. L'Etat qui projette les mesures engage promptement, à la demande de l'un quelconque des Etats visés au paragraphe 2, des consultations et des négociations avec lui, de la manière indiquée à l'article 17, paragraphes 1 et 2.»

Comme l'a rappelé l'ambassadeur Argüello, le Costa Rica n'a donné aucune suite aux protestations et aux demandes d'éclaircissement du Nicaragua<sup>70</sup>. (Et que le Costa Rica ne

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<sup>70</sup> Voir les échanges de notes du 29 novembre 2011 (note diplomatique du ministre des affaires étrangères du Nicaragua au ministre des affaires étrangères et du culte du Costa Rica (réf. MRE/DVM/AJST/500/11/11) (MN, annexe 14, vol. II, p. 395) et note diplomatique du ministre des affaires étrangères et du culte du Costa Rica au ministre des affaires étrangères du Nicaragua (réf. M-AM-601-11) (MN, annexe 15, vol. II, p. 399)), et des 10 et 20 décembre 2011 (note diplomatique du ministre des affaires étrangères du Nicaragua au ministre des affaires étrangères et du culte du Costa Rica, 10 décembre 2011 (réf. MRE/DVS/VJW/0685/12/11) (MN, annexe 16, vol. II, p. 403-404) et note diplomatique du ministre des affaires étrangères et du culte du Costa Rica au ministre des affaires étrangères du Nicaragua, 20 décembre 2011 (réf. DVM-AM-286-11) (MN, annexe 17, vol. II, p. 407-408)).

vienne pas nous dire maintenant que la convention n'est pas en vigueur entre les deux Etats : *c'est lui* qui invoque cette disposition !) Et,

2) en admettant même que des raisons pressantes aient obligé le Costa Rica à entreprendre la construction de la route 1856 sans étude d'impact préalable — *quod non*, bien sûr ! — ce prétexte n'a plus aucune espèce de vraisemblance plus de trois ans après la prétendue «invasion» nicaraguayenne et plus d'un an après l'achèvement de la première tranche des travaux.

6. Tout ce temps aurait dû — et devait — être mis à profit pour respecter ce qui constitue non seulement une obligation internationale, mais aussi un devoir évident à la fois de bon sens et de bon voisinage : on ne se lance pas dans des travaux de ce genre et de cette ampleur sans études approfondies et sans en discuter avec un Etat voisin dont tout donne à penser que le territoire sera affecté, d'une manière ou d'une autre, par les travaux en question. Ceci me conduit à ma seconde série de remarques.

7. Le Costa Rica est conscient du problème et a cru trouver la parade : en demandant la communication d'une EIE en tant que mesure conservatoire, nous chercherions à obtenir prématurément «un jugement provisionnel adjugeant une partie des conclusions de [notre] requête», pour reprendre la formule de la CPJI dans l'ordonnance du 21 novembre 1927 sur les mesures conservatoires dans l'affaire de l'*Usine de Chorzów*<sup>71</sup>. Le professeur Kohen a mal lu et notre requête et ma présentation de lundi matin. Nulle part, dans la première, nous ne concluons à la communication d'une EIE ; notre conclusion (*submission*) 2 iv) est plus soigneusement rédigée : ce que nous y demandons à votre haute juridiction c'est

«to adjudge and declare that Costa Rica must . . . not . . . continue or undertake any future development in the area without an appropriate transboundary Environmental Impact Assessment and that this assessment must be presented in a timely fashion to Nicaragua for its analysis and reaction».

Comme j'avais fait de mon mieux pour l'expliquer avant-hier<sup>72</sup> — mais je n'ai peut-être pas été clair, ou le conseil du Costa Rica n'y a pas prêté attention... —, l'EIE est, ici comme dans toutes les

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<sup>71</sup> *Usine de Chorzów, ordonnance du 21 novembre 1927, C.P.J.I. série A n° 12*, p. 10 — cité dans CR 2013/29, p. 49, par. 22 (Kohen).

<sup>72</sup> CR 2013/28, p. 54-56, par. 14-18 (Pellet).

demandes que nous avons présentées, un préalable, un «prerequisite»<sup>73</sup>, indispensable à toute décision et à toute action — et nous en avons toujours fait une mesure *conservatoire*<sup>74</sup>, dont nous demandions (et demandons toujours) qu'elle soit satisfaite à titre liminaire.

8. Il serait indécent qu'après tous ses atermoiements, le Costa Rica s'appuie aujourd'hui sur l'extrême urgence (si ce n'est, peut-être, électorale) qu'il y aurait à reprendre les travaux de construction de la route (je ne parle pas de ceux qui sont indispensables pour atténuer les dommages causés par la première tranche). Il est naturel que toute reprise de ces travaux soit subordonnée à une étude d'impact sérieuse, dont rien ne justifierait qu'elle ne nous soit pas communiquée pour étude et observation avant toute mise en œuvre.

9. Monsieur le président, il est vrai que, de son côté, la troisième des mesures conservatoires que nous prions la Cour d'indiquer recouvre partiellement la conclusion 2 iv) de notre mémoire que je viens de citer. Mais il s'agit d'une *suspension* et non d'une mesure définitive qui, ici encore, est conservatoire par essence. De deux choses l'une en effet :

- ou bien, suite à votre ordonnance, le Costa Rica élabore enfin l'EIE dont il est redevable et la communique au Nicaragua et, dans ce cas-là, les Parties seront appelées à se concerter sur les suites à donner au projet costa-ricien de façon à préserver leurs droits respectifs (celui du Costa Rica de construire une route sur son territoire ; celui du Nicaragua que son territoire — fluvial — ne soit pas affecté par cette construction) ;
- ou bien, le Costa Rica s'arc-boute dans son refus de réaliser cette indispensable étude d'impact, et votre ordonnance indiquant sa nécessité — et sa conséquence : l'impossibilité de reprendre les travaux de construction — s'appliquera jusqu'à votre arrêt qui décidera sur nos conclusions.

10. Ceci met en lumière, me semble-t-il, la grande différence qu'il y a entre les deux demandes. La troisième demande nicaraguayenne de mesure conservatoire n'a vocation à durer qu'aussi longtemps qu'elle sera nécessaire pour préserver les droits du Nicaragua dans l'attente de l'arrêt (c'est d'ailleurs aussi un moyen de protéger le Costa Rica lui-même contre les conséquences

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<sup>73</sup> CR 2013/28, p. 54-55, par. 16 — voir mémoire du Costa Rica dans l'affaire relative à *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, p. 208, par. 5.22.

<sup>74</sup> Voir la requête introductive d'instance dans l'affaire relative à la *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, p. 33, par. 55 ; la lettre du Nicaragua à la Cour accompagnant le mémoire du Nicaragua, 19 décembre 2012 (réf. 02-19-12-2012) et la lettre en date du 11 octobre 2013 adressée au greffier de la Cour par l'agent du Nicaragua (réf. HOL-EMB-196).

de sa trop grande précipitation...). Elle prendra fin soit si les conditions fixées par la Cour dans l'ordonnance qu'elle adoptera sont remplies, soit avec l'arrêt lui-même<sup>75</sup>. La conclusion 2 iv) du mémoire nicaraguayen a, pour sa part, un objet plus définitif et continu : si la mesure conservatoire indiquée par la Cour ne produit pas ses effets, la reprise des travaux de construction de la route restera subordonnée sans limitation de durée à l'EIE tant attendue.

11. Du reste, il est souvent arrivé dans le passé que la Cour ordonne, à titre conservatoire, la suspension d'activités, ou de certains comportements, dont la condamnation ou l'arrêt définitifs était l'objet même des demandes contenues dans la requête ou des conclusions des écritures de la Partie défenderesse. Il en a été ainsi, par exemple, dans les affaires de l'*Anglo-Iranian*<sup>76</sup>, des *Essais nucléaires*<sup>77</sup>, du *Nicaragua* (je parle du «big case» et de l'ordonnance du 10 mai 1984<sup>78</sup>), des *Activités armées*<sup>79</sup> ou plus récemment, dans *Géorgie c. Russie*<sup>80</sup>. Dans tous ces cas, les mesures suspensives ont pris fin lorsque la Cour soit s'est déclarée incompétente<sup>81</sup> soit a adopté son arrêt au fond<sup>82</sup>.

12. Monsieur le président, le prononcé des mesures 1 et 3 que le Nicaragua demande à la Cour d'indiquer est-il urgent ? Oui ; mon cher collègue Paul Reichler vient de le rappeler. Il y a urgence car le Costa Rica a indiqué — et n'a pas infirmé lors de l'audience d'hier — qu'il entendait reprendre les travaux de construction de la route 1856 ; «that construction of the

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<sup>75</sup> *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011*, p. 410, par. 86. Voir aussi *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 649, par. 177.

<sup>76</sup> Requête introductive d'instance du Royaume-Uni, 26 mai 1951, p. 18-19 et *Anglo-Iranian Oil Co. (Royaume-Uni c. Iran), mesures conservatoires, ordonnance du 5 juillet 1951, C.I.J. Recueil 1951*, p. 90 et p. 93-94.

<sup>77</sup> *Essais nucléaires (Australie c. France), mesures conservatoires, ordonnance du 22 juin 1973, C.I.J. Recueil 1973*, p. 100, p. 101, par. 9, p. 104, par. 25-26 et p. 106.

<sup>78</sup> *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 10 mai 1984, C.I.J. Recueil 1984*, p. 170-171, par. 1, p. 171-172, par. 2 et p. 186-187, par. 41.

<sup>79</sup> *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), mesures conservatoires, ordonnance du 1<sup>er</sup> juillet 2000, C.I.J. Recueil 2000*, p. 113-114, par. 7 et p. 115-166, par. 7, p. 127-128, par. 40-43 et p. 129, par. 47.

<sup>80</sup> *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008*, p. 359-360, par. 23, p. 365-367, par. 48 et p. 398, par. 149 A).

<sup>81</sup> *Anglo-Iranian Oil Co. (Royaume-Uni c. Iran), exception préliminaire, arrêt, C.I.J. Recueil 1952*, p. 114 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011*, p. 410, par. 86.

<sup>82</sup> *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 272, par. 61. Voir aussi *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 649, par. 177.

Borderline Trail will continue to [be] a priority piece of work until termination by the current government»<sup>83</sup> — dont, je le rappelle, le mandat expire en mai 2014. Au demeurant, comme je l'ai indiqué mardi<sup>84</sup>, l'incertitude sur la date exacte de reprise des travaux ne saurait être un motif pour refuser l'indication des mesures demandées. Et je pense que vous conviendrez assez volontiers, Mesdames et Messieurs de la Cour, qu'il serait absurde que nous devions revenir devant vous le jour où la menace sera précisément datée — en admettant d'ailleurs que nous en soyons avertis car le Costa Rica pratique, avec semble-t-il une certaine délectation, l'art du suspense et du secret en la matière. Mais ceci renforce aussi la nécessité de ces mesures : la transparence est l'une des conditions de la validité de la réalisation de ces grands projets de construction ayant des effets transfrontières. Il existe une réelle urgence à désamorcer les conséquences néfastes de l'effet de surprise que le Costa Rica veut nous réserver...

13. Les mesures 1 et 3 demandées par le Nicaragua sont-elles de nature à préserver («conserver») les droits que cet Etat a entendu faire valoir en saisissant la Cour du présent différend ? Oui aussi, bien sûr ! Que demandons-nous essentiellement ? Que les droits souverains dont dispose le Nicaragua sur le fleuve San Juan de Nicaragua ne soient pas affectés ; que le Costa Rica n'utilise pas son propre territoire pour mener des activités y portant atteinte. La réalisation d'une étude d'impact de l'environnement sérieuse, de nature à apaiser toute inquiétude à cet égard, réalisée selon les règles de l'art et sur laquelle le Nicaragua serait consulté comme il est de droit, *avant* la reprise des travaux, est évidemment de nature à éviter un fait accompli qui remettrait en cause l'objet même de la requête.

14. Monsieur le président, ce que je viens de dire, qui concerne plus spécialement les première et troisième mesures conservatoires demandées par le Nicaragua ; ce qu'ont dit Steve McCaffrey et Paul Reichler, qui portait plutôt sur la très concrète deuxième mesure, conduisent le Nicaragua à confirmer ses trois demandes. A moins de surprise de dernière minute — mais nous sommes moins adroits dans cet art que nos amis de l'autre côté de la barre... — c'est ce que l'agent du Nicaragua va maintenant confirmer en lisant nos conclusions si vous voulez bien

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<sup>83</sup> Déclaration du ministre de la communication du Costa Rica, M. Carlos Roverssi, 28 octobre 2013 (annexe 14 à la lettre en date du 31 octobre 2013 adressée à la Cour par le Nicaragua (réf. HOL-EMB-220)).

<sup>84</sup> CR 2013/28, p. 64-65, par. 49 (Pellet).

lui donner la parole, Monsieur le président. Je vous suis très reconnaissant, Mesdames et Messieurs de la Cour, d'avoir bien voulu écouter une nouvelle fois la mienne.

Le PRESIDENT : Merci beaucoup, Monsieur le conseil. I now give the floor to the Agent of Nicaragua, His Excellency Ambassador Argüello Gómez. You have the floor, Sir.

Mr. ARGÜELLO GÓMEZ: Mr. President, Members of the Court, I will read the Final Submissions of Nicaragua.

### FINAL SUBMISSIONS

In accordance with Article 60 of the Rules of the Court and having regard to the request for the *Indication of Provisional Measures* filed by the Republic of Nicaragua and its oral pleadings, Nicaragua respectfully requests the Court, as a matter of urgency to prevent further prejudice to Nicaragua's rights and damage to the River, and to avoid aggravation of the dispute, to order the following provisional measures:

- (1) that Costa Rica immediately and unconditionally provide Nicaragua with the Environmental Impact Assessment Study and all technical reports and assessments on the measures necessary to mitigate significant environmental harm to the Río San Juan;
- (2) that Costa Rica immediately take the following emergency measures:
  - (a) Reduce the rate and frequency of road fill failure slumps and landslides where the road crosses the steeper hill slopes, especially in locations where failed or eroded soil materials have been or could potentially be delivered to the Río San Juan;
  - (b) Eliminate or significantly reduce the risk of future erosion and sediment delivery at all stream crossings along Route 1856;
  - (c) Immediately reduce road surface erosion and sediment delivery by improving dispersion of concentrated road runoff and increasing the number and frequency of road drainage structures; and
  - (d) Control surface erosion and resultant sediment delivery from bare soil areas that were exposed during clearing, grubbing and construction activities in the last several years.

(3) that Costa Rica not renew any construction activities on the road while the Court is seized of the present case.

These are the Submissions of Nicaragua. Mr. President, a signed copy of the written text of our Final Submissions has been communicated to the Court. To conclude our participation in this stage of the oral proceedings, I wish to express, on behalf of the Republic of Nicaragua and of our delegation, our deepest appreciation to you, Mr. President, and to each of the distinguished Members of the Court, for the attention you have kindly given to our presentations. May I also offer thanks, Mr. President, to the Court's Registrar and his staff and to the team of interpreters? Our congratulations, also, to the delegation of Costa Rica. Finally, I must personally publicly thank the Nicaraguan team that has given the best of its endeavours. Thank you, Mr. President, Members of the Court.

The PRESIDENT: Thank you very much, Excellency. The Court takes note of the Submissions you have read on behalf of the Government of the Republic of Nicaragua. This brings to an end the second round of oral argument of Nicaragua. The Court will meet tomorrow, at 10 a.m., to hear the second round of oral observations of Costa Rica. The Court now rises.

*The Court rose at 11.25 a.m.*

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