

CR 2013/31

International Court  
of Justice

Cour internationale  
de Justice

THE HAGUE

LA HAYE

YEAR 2013

*Public sitting*

*held on Friday 8 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 vendredi 8 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  
                         Cañado Trindade  
                         Yusuf  
                         Greenwood  
                         Xue  
                         Donoghue  
                         Gaja  
                         Sebutinde  
                         Bhandari  
Judge *ad hoc* Dugard  
  
                 Registrar Couvreur

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

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

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*comme conseillers.*

The PRESIDENT: Please be seated. Good morning. The sitting is now open and the Court meets to hear the second round of oral observations of Costa Rica on the Request for the indication of provisional measures filed by Nicaragua.

For reasons duly communicated to me, Judge Skotnikov and Judge *ad hoc* Guillaume are not able to sit today.

I now give the floor to Dr. Kate Parlett to start the presentation of Costa Rica in the second round. You have the floor, Madam.

Ms PARLETT:

#### **FACTS RELEVANT TO THE RISK OF IRREPARABLE PREJUDICE**

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

1. Mr. President, Members of the Court, it is an honour to appear before you on behalf of Costa Rica, and a privilege to have been asked by Costa Rica to address certain of the underlying facts in the present case.

2. There are three issues I want to address: first, the environmental impact study for the road; second, the scope and effectiveness of the remediation works which have been carried out and which are underway; and finally, Costa Rica's plans for resuming construction of the unfinished parts of the road. Mr. Wordsworth will then explain why there is no real or imminent risk of irreparable prejudice such as would justify the ordering of provisional measures; and he will be followed by Mr. Ugalde, who will address the absence of any urgency for Nicaragua's Request. Ambassador Edgar Ugalde Álvarez will close Costa Rica's second round and will read Costa Rica's submissions.

##### **B. Environmental impact study**

3. Turning to the environmental impact study, yesterday counsel for Nicaragua took a new approach to this aspect of Nicaragua's Request. Having asked the Court to order that Costa Rica

provide “the Environmental Impact Assessment Study” for the road<sup>1</sup>, Nicaragua now says that it was actually seeking a study of the impact of the planned *new* works to complete the road.

4. It is perhaps unsurprising that Nicaragua has moved away from its provisional measures request for the Environmental Impact Assessment for the existing road. As Costa Rica explained on Wednesday, the question whether Nicaragua is entitled to receive such an Assessment is a matter for the merits<sup>2</sup>. Nicaragua says that it is entitled to receive one and that Costa Rica breached international law by failing to provide it; and you heard from Professor Pellet yesterday Nicaragua’s argument on that by reference to the Convention on the Law of the Non-Navigational Uses of International Watercourses. Costa Rica says that it was not obliged to provide one because of the emergency circumstances in which the road was constructed — an emergency brought about by Nicaragua’s conduct. A request for an impact assessment for the existing road cannot be regarded as a “measure[] of interim protection”, because it is “designed to obtain an interim judgment in favour of a part of the claim formulated in the Application”<sup>3</sup>. Professor Pellet appeared to accept as much yesterday<sup>4</sup>. An order requiring Costa Rica to produce the Environmental Impact Assessment would prejudge the merits of this case.

5. But Nicaragua’s newly interpreted Request must also fail. And the reason for this is simple: irrespective of whether Nicaragua would be entitled on the merits to receive such a document, Costa Rica has conducted studies on the impact of the road. Pursuant to Costa Rican law, a study of the impact of a project which is already constructed is designated an “Environmental Diagnostic”<sup>5</sup>. This type of study has two main objectives: first, to identify the negative impacts and risks of the activity on the environment; and secondly, to recommend environmental control measures necessary to prevent or to mitigate those negative impacts and risks.

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<sup>1</sup>Letter from Nicaragua to the ICJ, 11 Oct. 2013, Ref. HOL-EMB-196, p. 4.

<sup>2</sup>CR 2013/29, p. 22, para. 2 (Wordsworth); p. 49, para. 22 (Kohen).

<sup>3</sup>*Factory at Chorzów (Germany v. Poland)*, Order of 21 November 1927, P.C.I.J., Series A, No. 12, p. 10.

<sup>4</sup>CR 2013/30, pp. 31-32, para. 7 (Pellet).

<sup>5</sup>Costa Rica, Ministerial Resolution 02752 of 2009, Technical Guide for an Environmental Diagnostic — EDA, 2 Nov. 2009, tab 2 of Costa Rica’s judges’ folders.

6. This is being done in respect of the road. The Environmental Diagnostic is being prepared by a team of experts from the Tropical Science Center, a well-respected Costa Rican organization which was established in 1962. The Center has extensive experience in scientific environmental research in areas subject to tropical conditions, including the preparation of environmental impact assessments.

7. This Environmental Diagnostic will be extensive. It will cover the entire 108 km of the road in the vicinity of the San Juan River, from Boundary Marker 2 to Delta Costa Rica. It will consider the existing physical environment where the road is constructed, including the climate, hydrology, terrestrial and aquatic flora and fauna, and ecology.

8. The Environmental Diagnostic will comply fully with the requirements of Costa Rican law. Those requirements are specified in Ministerial Resolution No. 02752 of 2009, which you will find at tab 2 of your folders<sup>6</sup>. And as Mr. Brenes told you on Tuesday, Costa Rica intends to submit this Environmental Diagnostic with its Counter-Memorial, in six weeks' time. In the *Pulp Mills* case, although applying there a bilateral treaty, you specifically addressed the requirement to conduct an environmental impact study under customary international law, noting that the content of such a study is a matter for domestic law. You said:

“it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment . . .”<sup>7</sup>.

9. The Environmental Diagnostic will be in accordance with Costa Rican law, and it will be provided to the Court, and to Nicaragua, in due time. Costa Rica has nothing to hide. Despite Professor Pellet's flourishes, Costa Rica is not keeping the Court and Nicaragua in suspense. It is following the procedure set by the Court for this case. And there is simply no justification for a provisional measures order requiring Costa Rica to provide this study in advance of the filing of its Counter-Memorial in exactly six weeks' time. And nothing will happen to the Road, or to the river, in the next six weeks which would alter the existing situation.

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<sup>6</sup>Costa Rica, Ministerial Resolution 02752 of 2009, Technical Guide for an Environmental Diagnostic — EDA, 2 Nov. 2009 (extract), tab 2 of Costa Rica's judges' folders.

<sup>7</sup>*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp. 83-84, para. 205.

10. I might add that Nicaragua does now have a substantial number of technical studies and research from Costa Rica, and from its independent expert, concerning the impact of the road, which Costa Rica has submitted to defend against the present Request. Those studies will be supplemented with the full record of evidence in due course.

### **C. Remediation works**

11. The second factual matter I will address is the scope and effectiveness of the remediation works which have been carried out, and which are currently underway on the road.

12. One introductory point is that these works are designed to address the risk of environmental impacts of the road. They are not, of course, directed solely to mitigate the effects on Nicaraguan territory, as Nicaragua implied; in large part, the remediation measures also address potential impacts on Costa Rican territory. Works are also being carried out as part of the normal maintenance of the road. The fact that Costa Rica is carrying out such works is not tantamount to an admission<sup>8</sup> that the road is causing significant transboundary harm to Nicaragua, let alone that it is causing irreparable prejudice to Nicaragua's rights.

13. Nicaragua has challenged two aspects of Costa Rica's remediation works.

14. First, it challenges the geographical extent of these works. You heard yesterday that remediation works on the road have only been carried out on 15 km of the length of the road<sup>9</sup>. Mr. Reichler complained that this was less than one-tenth of the 160 km road<sup>10</sup>. That figure does give an impression that Costa Rica is not taking these remediation works seriously. However, it is simply not correct.

15. [Start slide] You see now on your screens, and at tab 3 of your folders, the entire 160 km of the Border Road. Of that 160 km, only 108 km runs along the San Juan River<sup>11</sup>. That part of the Road is now *highlighted*. Dr. Kondolf says 106 km<sup>12</sup>, but it is around 108. And of that 108 km,

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<sup>8</sup>Cf CR 2013/30, p. 22, para. 4 (Reichler).

<sup>9</sup>CR 2013/30, p. 29, para. 9 (Reichler); and p. 25, para. 13 (Reichler);

<sup>10</sup>*Ibid.*, p. 25, para. 13 (Reichler).

<sup>11</sup>See Allan Astorga G. and Andreas Mende, *Route 1856: Analysis of the Change in Land use Based on Satellite Images Before and After the Construction of the Border Road*, Aug. 2013, Attachment CR-4, p. 4, tab 3 of Costa Rica's judges' folders.

<sup>12</sup>G. Mathias Kondolf, *Comments on Costa Rican Submissions of November 2013*, 6 Nov. 2013, p. 3, third paragraph.

Dr. Kondolf complains only about the first 41 km, from Marker 2 to the Rio San Carlos (you see that now highlighted on your screens). In his 2012 Report, Dr. Kondolf said that this was because it has the steepest topography, and that he didn't have time to look at the rest of the road<sup>13</sup>. Well, he has had another year, and we now have three additional reports from him, and he still has not mentioned the other 67 km of the road. [Start photographs] And as you can see from the photographs now on your screen, it is clear why: there is simply nothing that can be said about the impact of this road over this 67 km<sup>14</sup>. The terrain downstream of Boca San Carlos is much flatter, and here the road follows a pre-existing road for a far greater proportion of its length, passing through areas that have long been inhabited and developed for pasture, crops, forestry and other uses. So we are not talking about 160 km, or even 108 km; we are — at most — talking about 41 km. So Mr. Reichler's 10 per cent is obviously wrong.

16. [Start slide] And the 15 km figure is also wrong; in fact, Costa Rica is carrying out remediation works on a much greater length of the road. On Tuesday we showed you this map identifying seven points where remediation work will be undertaken. Four of those points, now highlighted on your screens, extend beyond the first 15 km of the road. As we explained, the works at these points include stabilization of cut and fill slopes, building ditches, installing permanent culverts and sediment traps, as well as planting of vegetation<sup>15</sup>.

17. [Start slide] While we are looking at maps and photographs, I mention a photograph supplied to Dr. Kondolf by the Nicaraguan Army, which is reproduced as figure 9 to Dr. Kondolf's latest report, submitted to the Court on Wednesday evening<sup>16</sup>. The photograph is dated from 2011, when construction of the road commenced, so it pre-dates any of Costa Rica's substantial remediation works. But that is not the important point. The Nicaraguan Army gave co-ordinates for this photograph. Those co-ordinates are marked on the image now before you and at tab 6 of your folders, together with an inset of the offending photograph. And as you can see, the photograph is taken some way inland on the road, between Marker 2 and Los Chiles, more than

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<sup>13</sup>G. Mathias Kondolf, *Environmental Impacts of Juan Rafael Mora Porras Route 1856, Costa Rica, on the Rio San Juan, Nicaragua*, Dec. 2012, MN, Ann. 1, p. 9, third paragraph.

<sup>14</sup>Photographs reproduced at tab 4 of Costa Rica's judges' folders.

<sup>15</sup>CR 2013/29, p. 20, para. 24 (Brenes).

<sup>16</sup>G. Mathias Kondolf, *Comments on Costa Rican Submissions of November 2013*, 6 Nov. 2013, p. 13, fig. 9.

2.7 km from the San Juan River. This confirms — if such confirmation were needed — that photographs are simply not an adequate substitute for evidence based on scientific data and measurements, as also followed from Mr. Wordsworth’s remarks on Wednesday. [End slide]

18. Coming back to Costa Rica’s works on remediation, the second criticism levelled by Nicaragua yesterday is that these works protect only against surface erosion, and do not do anything to protect cut slopes, fill slopes and stream crossings<sup>17</sup>. Nicaragua’s counsel based this criticism on the opinion of Dr. Kondolf, which was based in turn on his review of photographs taken from the river<sup>18</sup>.

19. [Start slide] You see now on your screens, and at tab 7 of your folders, a more detailed explanation of the remediation measures which Costa Rica has undertaken and which are continuing. These are taken from the explanation of the works in the CONAVI Report<sup>19</sup>. Each of the measures implemented are described in the first column; the next four columns, headed “road surface”, “cut slopes”, “fill slopes” and “stream crossings” indicate whether each measure addresses the risks presented by each of these features; and the final column contains further explanation of the way in which the measures address these risks. Of the 21 measures implemented, eight address road surface erosion; 12 protect cut slopes; 13 protect fill slopes; and six reduce the risks associated with stream crossings. So again, here, Nicaragua has underestimated Costa Rica’s remediation measures. These measures are addressing the environmental risks associated with the road, and they are doing so effectively.

20. In a final attempt to cast doubt on Costa Rica’s remediation efforts, Nicaragua seized upon Professor Thorne’s observation that some of the remediation measures were temporary rather than permanent, and argued that this statement proved the necessity of its requested measures<sup>20</sup>. But Nicaragua quoted only selectively from Professor Thorne’s Report. Professor Thorne said that the remediation works he observed:

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<sup>17</sup>CR 2013/30, p. 24, para. 10 (Reichler).

<sup>18</sup>G. Mathias Kondolf, *Comments on Costa Rican Submissions of November 2013*, 6 Nov. 2013, p. 7; see also G. Mathias Kondolf, *Continued Impacts from Erosion from Rte 1856, Costa Rica, to the Rio San Juan, Nicaragua*, 30 Oct. 2013, Ann. 2 to Letter from Nicaragua to the ICJ, 1 Nov. 2013, Ref. HOL-EMB-223, pp. 9-10.

<sup>19</sup>Consejo Nacional de Vialidad (CONAVI), *Program for the Consolidation and Continued Improvement of Route No 1856*, Ref. DIE-02-13-3107, 25 Oct. 2013, Attachment CR-3.

<sup>20</sup>CR 2013/30, p. 25, paras. 12-13 (Reichler).

“are part of ongoing efforts intended to reduce erosion risks stemming from the way the Road was constructed in 2011 and . . . are not intended to provide a permanent solution to erosion issues. Given that, my experience suggests that with appropriate inspection and, where necessary, maintenance or repair, the mitigation works will significantly reduce local erosion rates for the next year or two, allowing time for the work necessary to design, contract and build permanent works to progress.”<sup>21</sup>

The point is of course not whether the works are complete, or whether the measures put in place are permanent. The point is that temporary measures can still be effective, and Professor Thorne concludes that these are.

#### **D. Resumption of construction of the road**

21. This brings me to my third and final topic, concerning Costa Rica’s plans for completing construction of the road. Yesterday, Nicaragua showed you again the extract from the March presentation of the Ministry of Public Works, with the famous timetable for resumption of construction of the road<sup>22</sup>. As Costa Rica explained on Wednesday, this timetable is out of date<sup>23</sup>. The deadlines it shows for designs, between December last year and August this year, have not been met. If the designs are not in place, construction cannot resume. Nicaragua asked for Costa Rica to be more precise about how long the delays might be, suggesting they might be only two or three months, such that construction might start in January next year<sup>24</sup>. That is unrealistic. [Start slide] You see now on your screens, and at tab 8 of your folders, a new schedule provided by the Costa Rican Ministry of Public Works. This schedule indicates that the tendering process for designs will re-open in December this year, with different deadlines for the different sections. Only the designs for Section 5, which runs from Delta Costa Rica to the mouth of the Sarapiquí, may be finalized in the next six months. Section 5 is that area of the road downstream from Delta Costa Rica, which is of course the long stretch of road which traverses over flatter terrain, and follows pre-existing roads. Nicaragua has no criticism of this part of the road. If the designs are finalized on this proposed timetable, construction would begin on Section 5 — at the very earliest — around July next year.

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<sup>21</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, p. 41, para. 90.

<sup>22</sup>CR 2013/30, p. 29, para. 16 (Reichler).

<sup>23</sup>CR 2013/29, p. 18, para. 18 (Brenes).

<sup>24</sup>CR 2013/30, p. 28, para. 18 (Reichler).

22. Construction in the other four sections — which cover the only part of the road that Dr. Kondolf finds troubling — will not be before late 2014 or early 2015. These works will not begin in days or weeks, or even months. This is a matter to which Mr. Ugalde will return, but it bears mentioning here that, if Nicaragua had genuinely been concerned about the schedule it discovered in January this year, it could have written to Costa Rica, in the ordinary way, and asked about this schedule. Costa Rica would then have had an opportunity to explain that this old timetable was out of date. Instead Nicaragua filed a Request for provisional measures, a request which did not even mention resumption of construction of the road. The first Costa Rica heard about this, the factor which Nicaragua’s counsel described as “most underscor[ing] the urgency and immediacy of Nicaragua’s request” was during the hearing on Tuesday morning this week<sup>25</sup>. Nicaragua’s failure to mention this at any time before this week is surprising, to say the least.

23. Mr. President, Members of the Court, I thank you for your kind attention, and I ask that you give the floor to Mr. Wordsworth.

The PRESIDENT: Thank you very much, Dr. Parlett, and I invite Mr. Wordsworth to take the stand. You have the floor, Sir.

Mr. WORDSWORTH: Thank you.

## **NO IRREPARABLE PREJUDICE (RESPONSE)**

### **A. Introduction**

1. Mr. President, Members of the Court, it has been said that, if you are weak on the law, bang on about the facts, and if you are weak on the facts, bang on about the law, and if you are weak on both, then just bang on the table. My friend Professor McCaffrey sought gamely to avoid the third of these well-worn tracks, and positioned Nicaragua’s case on irreparable prejudice very firmly in the second track, telling you that Costa Rica has been focusing on the wrong target in looking at the facts on irreparable prejudice.

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<sup>25</sup>CR 2013/28, p. 38, para. 7 (Reichler).

2. Now, one might think that a curious proposition to make at a provisional measures hearing where, like it or not, facts are all-important in establishing whether there is a real and imminent risk that prejudice may be caused to the rights in dispute before the Court has given its final decision. And, naturally enough, we say, Costa Rica has focused on the allegations of fact that were made by Nicaragua in its Request of 11 October 2013, as these constitute the basis for making the Request in the first place. As the Court may recall, the allegations are as follows:

- (a) First, at page 1: “Costa Rica’s road works have caused a surge in the San Juan River’s sediment load requiring Nicaragua to take active efforts, including dredging, to maintain the quality and quantity of the river’s waters.”<sup>26</sup>
- (b) And then, at page 3, there is the allegation with respect to “the irreparable damage that is being inflicted on the river and its surrounding environment, including on navigation and the health and wellbeing of the population living along its margins”<sup>27</sup>.

3. Nicaragua’s case, as put yesterday, is that we are wrong to focus on whether there was in fact this alleged surge, or whether there was in fact the alleged harm to the river and its environment, to navigation and so on. Rather, we were told, Costa Rica’s focus should have been on alleged irreparable prejudice to its territorial sovereignty; as to which, however, there is not one word in Nicaragua’s Request.

4. I shall come back to this new emphasis on territorial sovereignty in a moment, but first it may be useful to recall where matters now stand on the underlying facts.

5. As Costa Rica said in opening, this is not a request that appears likely to turn on whether the Court prefers the evidence of expert X or expert Y, and that now looks to be all the more unlikely.

6. As the Court is aware, a fourth report by Dr. Kondolf was lodged by Nicaragua on Wednesday evening and, while it is something of a procedural oddity for a party to be submitting further expert reports after the expert in question has heard what counsel has to say on his or her existing report, Dr. Kondolf’s further report is not unhelpful. What is clear from this report, and likewise from Professor McCaffrey’s remarks yesterday, is that there is now little if anything

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<sup>26</sup>Letter from Nicaragua to the ICJ, 11 Oct. 2013, Ref. HOL-EMB-196, p. 1.

<sup>27</sup>*Ibid.*, p. 3.

between the parties on what Costa Rica sees as the key issues of fact going to risk of imminent and irreparable prejudice. And while Dr. Kondolf raises questions as to certain aspects of Costa Rica's expert reports, what he does not say is that they are wrong on any of the key facts.

- (a) First, in terms of the high suspended sediment concentration in the San Juan River, and the absence of any surge in the sediment concentration due to construction of the road, there is no challenge. Not a word.
- (b) Secondly, there is no challenge to the evidence that the road is only contributing — and this is even on Dr. Kondolf's figures — only contributing 1 to 2 per cent of the total sediment load in the San Juan, and 2 to 3 per cent in the Lower San Juan where it was said that the deposition was taking place. There is no challenge to Professor Thorne's opinion, at paragraph 64 of his report of 4 November, that this "is obviously too small a proportion to have a significant impact on the River"<sup>28</sup> — no challenge to that. Irrelevant, Professor McCaffrey now appears to suggest<sup>29</sup>, and I will come back to that shortly.
- (c) Thirdly, there is no challenge to the evidence that, even on Dr. Kondolf's figures, if all the road-related sediment supplied to the Lower Río San Juan were to be deposited on the bed of the Lower Río San Juan that would result in an average increase in the rate of aggradation of the bed between 3 and 4 mm.

Professor McCaffrey had a minor grumble here, which is derived from Dr. Kondolf's further report, to the effect that it was highly unlikely that the sediment would be spread evenly in the Lower San Juan<sup>30</sup>. Well, it is Nicaragua's Request, and it is for Nicaragua to make good its allegation that there has been significant aggradation such as to require it "to take active efforts, including dredging", as it alleged in its Request. And notably, despite the complaint, still no evidence was put forward as to how and where the sediment would in fact be deposited — even though this is of course Nicaragua's sovereign river, and it is Nicaragua that is saying —or rather, *was* saying — that it had had to carry out dredging.

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<sup>28</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 November 2013, Attachment CR-7, para. 64.

<sup>29</sup>CR 2013/30, p. 18, para. 8 (McCaffrey).

<sup>30</sup>*Ibid.*, p. 17, para. 4 (McCaffrey).

And even if one were to assume in Nicaragua's favour that the sediment is deposited over half the area of the riverbed, it would still only be 8 mm worth (which must bring us up to the dizzying heights of 3 to 4 times the diameter of a grain of sand); or if the sediment were deposited over a quarter of the area of the riverbed, it would still only be 18 mm (less than the height of a ripple of sediment on the riverbed). So this is all a distraction, and the case on significant aggradation — and you remember that was a case on which considerable emphasis was placed in opening — has simply fallen away.

(d) To continue: fourthly, there has been no challenge to Professor Thorne's evidence about the benefits of sediment deltas to the ecosystem, whether these are formed by natural or human means<sup>31</sup>.

(e) And, fifthly, there is now no suggestion of identified risks of irreparable prejudice to the environment, and we heard nothing more of the 46 endangered species in the broader region.

(f) And finally, Nicaragua has not picked up the gauntlet in terms of identifying how any of the mitigation or construction works, set out in the Minister's communication of March 2013, how any of these may adversely impact the environment. So what is still at issue?

### **B. Facts still at issue**

7. So what is still at issue on the facts?

8. A point was made by Professor McCaffrey about the University of Costa Rica having calculated the quantities of sediment coming from the road only by reference to the first 15 km, not the whole 108 km length, and of having avoided seriously eroding sites<sup>32</sup> — that is putting it quite high, I have to say. There are three brief points on this.

9. First, as explained in Professor Thorne's report, and this is a quote from paragraph 33:

“The monitoring results reported here [he is referring to the University of Costa Rica Report] come from the two largest rotational landslides observed along the Road; the three large gullies; the slope which displayed most intense rill (micro-channel) erosion; and a sediment trap that collects sediment eroded from a steep stretch of road bed and cut slope which only experiences sheet erosion (Figures 5 and 6). Hence, it is

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<sup>31</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, para. 77.

<sup>32</sup>CR 2013/30, p. 21, para. 19 (McCaffrey).

reasonable to assume that the recorded rates of land surface lowering represent 'worst case' scenarios for Road-related erosion to date."<sup>33</sup>

I should add that Professor Thorne has himself driven, or flown, along the whole length of the road on various occasions, so these views don't come from nowhere, as it were.

10. Secondly, of course, Dr. Kondolf himself does not focus on the whole 108 km reach of the Road that goes along or near the river, but, as Dr. Parlett has just said, he only focuses on a 41-km stretch. That is no doubt because along the lower sector of the road the terrain is much flatter, and there is much lesser scope for erosion. The University of Costa Rica team focused on where the slopes were at their most prevalent, which is in the first 15 km of that stretch.

11. Thirdly, and I am sure the Court already has this point, this is not in any event an issue that the Court has to dwell on, because ICE and Professor Thorne sought to avoid needless contention by taking Dr. Kondolf's figures on sediment coming from the road when it came to assessing whether increases in sediment in the river could be significant. It is not, as Professor McCaffrey suggested, that Costa Rica does not take serious issue with Dr. Kondolf's estimates<sup>34</sup>. It does. But, for the purposes of the current Request, this is not a major issue, because those estimates have been taken into account in calculating whether the increases are significant, and the outcome is that they are not, as I showed you on Wednesday, and is now unchallenged.

12. There is also still an issue that divides the Parties on the importance of the risk from hurricanes and tropical storms. Professor McCaffrey gave you some statistics on the havoc wreaked by Hurricanes Joan and Mitch, and these were indeed awful and catastrophic events.

13. But, there are two points.

14. First, nothing that Professor McCaffrey said can alter the fact that Hurricanes Joan and Mitch did not traverse the area that the Court is now concerned with. The same applies to Hurricane Stan, which was also referred to yesterday. You can see their tracks now up on the screen (and in tab 10 of your folder) — that is the whole multitude of tracks and then we have Joan, Mitch highlighted and Stan highlighted in 2005 — you can just pick them up, and they are all well to the north.

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<sup>33</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, para. 33.

<sup>34</sup>CR 2013/30, p. 18, para. 11 (McCaffrey).

15. Now, it is not just that these are all to the north of the road; it is also that once again Nicaragua is not giving you the data you would need to determine whether there is the real and imminent risk that it alleges. And while it was very interesting yesterday to hear some information from Wikipedia — no less — of how, although Mitch did not enter Nicaragua, it was accompanied by extensive rainfall there estimated as over 50 inches (that is 1,300 mm), what Nicaragua did not do is to furnish you with evidence of the actual rainfall at the time in the area of the road. Curious; it must have such evidence; it must have its own national meteorological centre. Likewise, you were only given Wikipedia figures — this time it was 20 inches (500 mm) — in relation to Hurricane Stan, and you weren't given figures at all for Hurricane Joan.

16. In an attempt to give you more reliable data, or more useful data I should say, we have included at tab 11 of your folder a letter that we have just received from the National Meteorological Institute of Costa Rica.

17. If one sees there, it goes through each of these hurricanes and then it details the rain at the time in Costa Rica. So there we see, halfway down the letter, Hurricane Joan 10-23 October 1988: Hurricane Joan made contact with the coast of Nicaragua, at Bluefields. For Costa Rica the rain accumulation from 20 to 23 October in the North and North Caribbean region ranged from 20 to 250 mm, the highest numbers on the Caribbean area — that is not our area — and the lower numbers towards the area of Sarapiquí, with intermediate values towards the area of Los Chiles. As I understand it, the road area is between Sarapiquí and Los Chiles.

Then there is Hurricane Mitch, 22 October to 9 November 1998: this hurricane entered Central American territory through the central sector of the coast of Honduras. Similarly, due to its position on the Caribbean, the main effects on Costa Rica were on the Pacific Watershed. The map included below establishes that rain accumulation from 21 October to 1 November, which clearly shows that the rains recorded during those days in the Caribbean Watershed and the North Area, were below 100 mm — and the road is within that area, below 100 mm.

And then, overleaf, we have Hurricane Stan, 1-5 October 2005: the recorded rain accumulation from 2 to 5 October for the North and the North Caribbean Area ranged from 150 mm in the Sarapiquí area to 15 mm on the coast. It is worth noting that the north area of the

country, due to its nature, is very rainy. The average annual rain accumulation can reach 6,000 mm.

18. So, no rainfall in the order of 1,300 or even 500 mm, and notably the area in any event already receives a high rainfall, which puts in context the rainfall figures at the time these hurricanes were passing to the north.

19. The second point is that, if notwithstanding the general pattern that you have seen, a hurricane or associated rains were to hit Costa Rica with the force that Professor McCaffrey alluded to in describing Hurricane Mitch, there would be a national disaster as there was indeed in Nicaragua in 1998, and any additional sediment impacts from the road would be a complete irrelevance. Indeed, hurricanes of themselves may cause landslides even on undisturbed slopes, as is clear from the US Geological Survey report on Hurricane Mitch<sup>35</sup>.

20. And any additional sediment from the road would be dwarfed, not just by the general destruction, but by increased sediment from the whole catchment area draining into the San Juan. Sedimentation from the unfinished road might well increase, but not somehow in isolation, and Nicaragua has offered you no evidence to suggest how one would not still be looking at the road contributing a very small percentage of the river's overall sediment load.

21. And, again stepping back, if this focus on hurricanes could establish the real and imminent risk that Nicaragua is searching for, Nicaragua would no doubt have made its provisional measures request two years ago when it first lodged its Application. Hurricanes are not a new phenomenon; even if they are, fortunately for Costa Rica, a phenomenon that is of materially less concern to it than its northern neighbours.

22. So, when it comes, on this final day, to the facts relevant to risk of irreparable prejudice:

(a) First, Nicaragua does not challenge Costa Rica's measurements of the sediment loads of the river, both before and after the construction of the road.

(b) Secondly, there is no debate as to the absence of any surge in the sediment load caused by the road, or indeed that the additional contribution from the road is very low in the context of this river, some 1-2 per cent generally, or 2-3 per cent in the lower San Juan.

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<sup>35</sup>See Landslides Triggered by Hurricane Mitch in Guatemala—Inventory and Discussion, available at: <http://pubs.usgs.gov/of/2001/ofr-01-0443/>.

- (c) Likewise, there is no challenge to the evidence that — again on Nicaragua’s own figures — the aggradation of the bed would be imperceptible, the thickness of a few grains of sand; although there may, at some stage in the future, be a debate as to whether it is two grains of sand, or some other number that Nicaragua may eventually put into evidence.
- (d) Finally, there is no challenge to the evidence that sediment deltas benefit the ecosystem, while Nicaragua does not suggest that its only concrete evidence as to negative impact on the ecosystem, in respect of the limited — you may recall this, it is almost like a tiny footnote point in Professor Kondolf’s third report — but there is evidence there of sampling carried out by a colleague of what is called periphyton, that is detritus and bacteria and algae in the river, is no suggestion that that gives rise to any risk of irreparable prejudice. And of course it does not.

23. Puzzlingly, when it comes to urgency, Nicaragua still says that you should take no account of its two-year delay in making its Request because “the fact that a patient has been losing blood for some time does not mean that there is no urgency to stop the haemorrhaging, and as soon as possible”<sup>36</sup>. It is as if Nicaragua has forgotten that it has in effect conceded that its patient is not losing any blood, and, so far as concerns sediment content, is in the same shape as it was one year ago, or two years ago, or 30 years ago, when the 1974-1976 measurements on sediment concentrations were taken — to which reference is made, as you may recall — in the reports of ICE and Professor Thorne and I took you to the details on Wednesday.

24. In circumstances, then, where Nicaragua is unable to challenge the expert opinion that a contribution of 1-2 per cent sediment from the road “is obviously too small a proportion to have a significant impact on the River”, where is the risk of irreparable prejudice to be found?

### **C. Nicaragua’s new case on irreparable prejudice to sovereignty and territorial integrity**

25. According to my friend Professor McCaffrey, we have been addressing the wrong question and, instead of focusing on facts, should have been focusing on Nicaragua’s territorial sovereignty. Where, he asked, was Costa Rica’s explanation of how the sediment delivered into the river does not violate Nicaragua’s sovereignty and territorial integrity?<sup>37</sup>

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<sup>36</sup>CR 2013/30, p. 19, para. 13 (McCaffrey).

<sup>37</sup>*Ibid.*, p. 16, para. 2 (McCaffrey).

26. Now, there are three obvious points to make here.

27. First, no sediment is being delivered into the river. Some sediment, from an unfinished road, is being washed into the river in a context where Costa Rica is engaged in mediation works as described by Dr. Parlett. That is not “delivery”, and the analogy to dumper trucks emptying into the river remains quite inapposite.

28. Secondly, the question of whether the erosion of sediment into the river does or does not violate Nicaragua’s sovereignty and territorial integrity is evidently one for the merits. We consider Nicaragua’s case on violation of sovereignty and territorial integrity to be entirely misconceived, but that is for another day. I do recall that a similar point was raised by Hungary in the *Gabčíkovo-Nagymaros* case, but in fact that went nowhere at all.

29. Thirdly, the current focus on Nicaragua’s sovereignty and territorial integrity is an afterthought. As I noted earlier, it does not get a mention in Nicaragua’s Request. And this is not to make a procedural point. Rather, Nicaragua presumably included in its Request those matters it thought went to a real and imminent risk of irreparable prejudice. And, evidently, and quite unsurprisingly, supposed threats to sovereignty and territorial integrity were not foremost in Nicaragua’s mind. The alleged rights, in this respect, do not come close to being at any risk of irreparable prejudice.

30. Let it be supposed, for argument’s sake, that the sediment did indeed impede navigation in the Lower San Juan as was once alleged — that is what was alleged on Tuesday at least — and let us suppose that this prejudiced Nicaragua’s sovereignty and territorial integrity. Evidently, that would not be irreparable. Costa Rica might ultimately be ordered to pay damages for the costs of any necessary dredging operation, but that would be that. Where else could a risk of irreparable prejudice lie? Nicaragua might characterize damage to the environment as prejudicing its sovereignty and territorial integrity. But it has given up on that angle so far as concerns this Request, as follows from its decision not to challenge the evidence that the contribution of sediment from the road is too small to have a significant impact on the river.

31. And, while I am loath to return to the dumper trucks analogy, if one has to see what is happening here by reference to any mechanical equivalent, it is the conveyor belt that comes to mind. [Start slide]

32. Now this is from a 1997 paper of Nicaragua's expert, Dr. Kondolf and it is at tab 13 of your judges' folders — this paper. And there he explains that:

“Rivers transport sediment from eroding uplands to depositional areas near sea level. If the continuity of sediment transport is interrupted by dams or removal of sediment from the channel by gravel mining, the flow may become sediment-starved (hungry water) and prone to erode the channel bed and banks . . .”<sup>38</sup>

and he illustrates the process with the sketch that you now see on your screens<sup>39</sup>. A landslide and erosion in the mountains at the top there, the sediment entering the river and being washed along until it is deposited at the end of the conveyor belt in the river delta.

33. And the point I want to make here is that the washing of sediment into a river is part of a natural process that is commonly regarded as beneficial and that sediment is not a pollutant, although Nicaragua seems to treat it as such, even referring to the *Nuclear Tests* cases in its oral submissions<sup>40</sup>. Rather, it is one of the two essential components to any river: that is, water, and sediment. One merely has to think of the tensions that result from dam projects on international watercourses to identify just how important a component sediment is — one thinks of Egypt's concerns with respect to upstream dams on the Nile and the loss of sediment flows to the Nile Delta, or Vietnam's parallel concerns with respect to upstream dam construction on the Mekong River. Again they are not just about water, they are about sediment also. [End slide]

34. And there are two further points to bear in mind as to Nicaragua's new characterization of sediment reaching the river from the road as a “trespass” or an “assault” on Nicaragua's territory, and thus it says, its rights to sovereignty and territorial integrity<sup>41</sup>.

35. First, where does the trespass begin and end? [Start slide] As a matter of fact, 70 per cent of the sediment in the San Juan comes from the Costa Rican side. As is clear from the measurements recorded by the Costa Rican Institute of Electricity, Costa Rican river basins contribute around 6.2 million tonnes of sediment to the San Juan each year, while Nicaraguan

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<sup>38</sup>G. M. Kondolf, “Hungry water: Effects of dams and gravel mining on river channels” 21 (4) *Environmental Management* 533, tab 13 of Costa Rica's judges' folders, abstract.

<sup>39</sup>*Ibid.*, p. 534.

<sup>40</sup>CR 2013/29, p. 43, para. 19 (Reichler).

<sup>41</sup>CR 2013/28, p. 28, para. 15 (McCaffrey).

basins contribute around 2.8 million tonnes<sup>42</sup>. There is a graphic at tab 12 of your judges' folders, which is taken from the ICE Report<sup>43</sup>, and illustrates the respective contribution of sediment from each State's river basins, and you see there Nicaragua's contributions at the top of the graphic and Costa Rica's is at the bottom. The greater contribution, as I have just said, coming from Costa Rica. And this is all part of the river's natural processes. Now, there can be no case that Costa Rica is assaulting Nicaragua's territorial sovereignty by allowing its rivers to contribute the vast majority of sediment to the San Juan in general terms, so how can an increase that is insignificant and well within the range of natural variability suddenly constitute an assault, or prejudice that is somehow irreparable?

36. Secondly, and related to this, it would be meaningless to characterize receipt of the sediment from the road as some form of "trespass" or "assault" on the basis that suddenly Nicaragua is receiving a surplus of sediment. Sediment input to the river is changeable from year to year due to natural variability in rainfall, run-off, volcanic activity, land sliding and numerous other factors. The range of variability, with a 95 per cent confidence interval, is +/- 20 per cent<sup>44</sup>. In the remaining 5 per cent of cases, the variability will be even greater. So the natural variability is far greater than the additional 1 to 2 per cent that the road leads to on Dr. Kondolf's figures. So by reference to the road, you simply cannot say that the river is receiving any more sediment than it might in any given year, be anticipated to receive.

[End slide.]

37. As a final point, Professor McCaffrey sought to bolster the argument on irreparable prejudice by citing Professor Crawford's argument in the 2011 *Certain Activities* provisional measures hearing, to the effect that the dumping of sediments derived from Nicaragua's dredging of the San Juan onto Isla Portillos was causing irreversible damage to the wetland<sup>45</sup>. Reference

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<sup>42</sup>Costa Rican Institute of Electricity (ICE), SBU Projects and Associated Services, Centre for Basic Engineering Studies, Department of Hydrology, *Report on Hydrology and Sediments for the Costa Rican River Basins draining to the San Juan River*, Aug. 2013, Attachment CR-1, p. 28, table 11; see also p. 14, table 4.

<sup>43</sup>*Ibid.*, Attachment CR-1, fig. 23, p. 32, tab 12 of judges' folders.

<sup>44</sup>Professor Colin Thorne, *Report on the Risk of Irreversible Harm to the Río San Juan relating to the Construction of the Border Road in Costa Rica*, 4 Nov. 2013, Attachment CR-7, para. 71.

<sup>45</sup>CR 2011/1, p. 70, para. 49 (Crawford), cited in CR 2013/30, p. 17, para. 6 (McCaffrey).

was also made to Mr. Ugalde's submissions in that case<sup>46</sup>, and Professor McCaffrey said that the contribution of sediment to the river from the road was "no different" than the dumping of sediment onto land<sup>47</sup>. Of course that is wrong, but anyway the obvious point is that the Court did not conclude that the dumping of sediment on Isla Portillos created a risk of irreparable prejudice such as would justify an order that Nicaragua suspend its dredging programme<sup>48</sup>. The point may have been argued, the Court did not accept it.

38. Mr. President, Members of the Court, that concludes my remarks. I thank you for your kind attention, and ask you to hand the floor to Mr. Ugalde.

The PRESIDENT: Thank you very much, Mr. Wordsworth. I give to floor to Mr. Ugalde, Sergio Ugalde, you have the floor.

Mr. UGALDE:

**NICARAGUA'S REQUEST DOES NOT MEET THE REQUIREMENTS  
OF THE COURT'S STATUTE**

1. Mr. President, distinguished Members of the Court, this morning I will once more address the issue of urgency, and I will show that Nicaragua has not been able to demonstrate that it fulfils the requirements for the indication of provisional measures under Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules.

2. First, I will refer to the supposed "urgency" that Nicaragua claims to exist. Second, I will set out the reasons why Nicaragua's submissions cannot be granted by the Court, and therefore why the request for provisional measures in this case must be rejected.

**A. Nicaragua's Request is not urgent**

3. I begin with urgency. Yesterday, Mr. Reichler attempted to give some content to Nicaragua's claim of urgency. He said that urgency deals with matters in the future, not past

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<sup>46</sup>CR 2013/30, p. 18, para. 9 (McCaffrey).

<sup>47</sup>*Ibid.*, p. 17, para. 7 (McCaffrey).

<sup>48</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. 26, para. 82.

events<sup>49</sup>. But there must be a fact that will produce in the future another fact giving rise to a risk of irreparable prejudice. Something must have happened to give rise to the belief that an imminent event will, in the future, irreparably prejudice a right *pendente lite* before the Court renders its final decision. If the river is under no threat of being irreversibly harmed, as Professor McCaffrey appeared to concede, so far as concerns this hearing<sup>50</sup>, then Nicaragua has dispensed with the very object of its Request!

4. Urgency of the kind required by the case law of this Court entails a real and imminent risk of irreparable prejudice. What did Nicaragua show you to demonstrate that there was a real risk? Nothing. Yesterday, Mr. Reichler's presentation on urgency was understandably "brief"<sup>51</sup>. Nicaragua has not provided any convincing response to the points Costa Rica made on Wednesday.

5. As Rosenne explains, the law relating to provisional measures concerns urgency in two respects: as a matter of procedure and as a matter of substance<sup>52</sup>. As a matter of procedure, Nicaragua announced that it might seek the indication of provisional measures 22 months ago. It has requested them, in different forms, without success. It filed this Request only last month, in response to Costa Rica's own request for provisional measures<sup>53</sup>. Nicaragua has admitted as much. This, according to Nicaragua, constitutes urgency.

6. As a matter of substance, Nicaragua certainly has not made out its case on urgency. It submitted *no* evidence of urgency with its Request. It did not even explain in its Request *why* it was urgent. Yesterday Mr. Reichler said that urgency was established because roadworks were about to recommence, even though he had already observed on Tuesday that the tendering process for the designs has been delayed<sup>54</sup>. He was wrong to suggest the works will recommence "before the end of the year"<sup>55</sup>. Dr. Parlett has shown you this morning that the works will not recommence any time in 2013, nor in the first half of 2014. But this is anyway a non-issue. It is not the

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<sup>49</sup>CR 2013/30, p. 27, para. 17 (Reichler).

<sup>50</sup>*Ibid.*, p. 17, para. 4 (McCaffrey).

<sup>51</sup>*Ibid.*, p. 26, para. 16 (Reichler).

<sup>52</sup>Shabtai Rosenne, *Provisional Measures in International Law Adjudication* (Oxford: Oxford University Press, 2005), p. 136.

<sup>53</sup>CR 2013/28, p. 12, para. 4 (Argüello).

<sup>54</sup>*Ibid.*, p. 39, para. 10 (Reichler).

<sup>55</sup>CR 2013/30, p. 27, para. 17 (Reichler).

commencement of works that establishes urgency. If that had been a real case of urgency, Nicaragua would have made its request 23 months ago. And even leaving this to one side, how does the commencement of further works — aimed precisely at building a permanent road that addresses among other things all the sedimentation issues that Nicaragua has been focusing on — establish urgency?

7. Anticipating the weakness of their position on urgency, counsel for Nicaragua presented an alternative argument: even if the works will not be recommenced immediately<sup>56</sup>, the Court should proceed on the basis of a legal fiction according to which the indication of provisional measures is urgent *now*, to avoid Nicaragua having to return to the Court *later*<sup>57</sup>. Urgency — according to Nicaragua — is a matter of convenience.

8. Urgency is not demonstrated by roadworks that *may* commence late in 2014, according to the most optimistic estimates, and not allowing for any delays. Can it really be said that there is an urgent situation that requires action now, to stop an event that *might* take place in many months' time? Could Costa Rica, for example, request provisional measures to prevent the construction of a Nicaraguan canal — which would certainly cause irreparable prejudice to Costa Rica's rights on the San Juan and Colorado rivers — even though Nicaragua says the construction of the canal will begin only in a year's time?

9. Professor McCaffrey said that the question of whether Nicaragua's rights are being irreparably prejudiced, deals not with the quantity of sediment deposited from the road relative to all the sediment carried by the river, but with the *absolute* quantity<sup>58</sup>. If that is the case, should Costa Rica ask the Court to stop Nicaragua from completing the multi-million-dollar bridge on the San Juan we were told of yesterday<sup>59</sup>, on the basis that some sediment from it is intruding into the Colorado River, and Nicaragua has not transmitted a transboundary environmental impact assessment to Costa Rica? Would that be reasonable? Nicaragua did not transmit transboundary EIAs for the dredging of the San Juan, for the construction of a military airport in

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<sup>56</sup>CR 2013/30, p. 27, para. 18 (Reichler).

<sup>57</sup>*Ibid.*, p. 34, para. 12 (Pellet).

<sup>58</sup>*Ibid.*, p. 18, para. 8 (McCaffrey).

<sup>59</sup>*Ibid.*, p. 14, para. 23 (Argüello).

San Juan del Norte, or for the bridge on the San Juan — all projects that it was or is carrying out in close proximity to Costa Rican territory. On the basis of Nicaragua's current claims, that amounts to several overt breaches of its international obligations towards Costa Rica. But of course that would be a matter for the merits, and Costa Rica's road is no different.

10. Although Nicaragua has not carried out a transboundary EIA in relation to the dredging activities on the San Juan, the project is ongoing, as Nicaragua accepts. When Costa Rica requested the Court to stop the dredging activities due to the lack of a transboundary EIA<sup>60</sup>, the Court declined to do so. Three years later, we have not yet received a transboundary EIA for this ongoing project.

11. Nicaragua also has to show how the event it is complaining about creates a real and imminent risk of irreparably prejudicing its rights, before the Court renders a decision. Nicaragua has said and has presented nothing — nothing at all — to explain how having a public tendering process for the designs of the road, and a period for the conclusion of contracts for construction once the designs have been finalized, can be a sign that its rights are about to be irreparably prejudiced. In the *Pulp Mills* case, the Court declined to indicate provisional measures for an alleged risk of environmental harm merely because the mills were under construction<sup>61</sup>. Equally here, public tenders cannot cause any harm to the San Juan River. We now know that Nicaragua is not concerned about the destruction of the San Juan, because it will not happen. But Nicaragua must show you how its sovereign rights would be prejudiced by the construction of the road. A number of questions follow from this.

12. Is it the case that Nicaragua cannot exercise its sovereign rights in any stretch of the river? It appears that that is not the case. Nicaragua accepts that its army and MARENA functionaries ply the river constantly<sup>62</sup>. They continue to impose unlawful limitations on the enjoyment of Costa Rica's right of free navigation. There is no sign that if the road works were recommenced, then Nicaragua would no longer be in a position to exercise its sovereign rights.

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<sup>60</sup>See CR 2011/3, pp. 24-27, paras. 9-24 (Crawford).

<sup>61</sup>*Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 78.

<sup>62</sup>Letter to the Registrar of the Court from H.E. Carlos Argüello Gómez, Agent of the Republic of Nicaragua, 31 Oct. 2013, Ref. HOL-EMB-220, Ann. 1, Technical Waterway Patrol on the San Juan River on 27 Oct. 2013, Ministry of Environment and Natural Resources (MARENA), San Juan River Territorial Delegation.

Nicaragua has not said a word on the point. It could not prove that its navigation rights are impaired because there is no such actual or potential risk.

13. Is it the case, then, that the river is changing its course and thereby prejudicing Nicaragua's territorial integrity? That is not happening either, as Costa Rica showed you on Wednesday.

14. All we hear is that the road works are about to recommence, that a disaster is upon us. These assertions alone, however strenuously they are pleaded, are not grounds for a request for provisional measures, certainly not one that satisfies the requirements laid down by Article 41 of the Statute of the Court. Nicaragua's putative "evidence", submitted after its Request was filed — indeed, only "discovered" after Nicaragua filed its Request — is not sufficient to support these assertions and leads to the same conclusion.

15. This takes me to Nicaragua's argument that the question of the recommencing of the road works has not yet been properly dealt with by the Court. This argument goes nowhere. First, a request for the indication of provisional measures *proprio motu* does, after all, engage the Court's attention on the question of provisional measures. The issues were presented to the Court back when Nicaragua made the request. The Court observed that they required no action on its part<sup>63</sup>. What has changed?

16. The request for modification of provisional measures had the same fate. Although the Court suggested that Nicaragua should have used a different procedural mechanism, the fact remains that it saw no merit in modifying the provisional measures it indicated on 8 March 2011 on the basis of the facts Nicaragua presented to it. They were largely the same facts presented with its *proprio motu* request, save that they also included the recommencement of works, as I explained on Wednesday.

17. Nicaragua's Agent yesterday presented an incomplete quote from your Order of 16 July 2013. I will read in full what the Court concluded about Nicaragua's Application for the modification of provisional measures on the facts:

"The Court will now examine the request of Nicaragua. As regards its first argument, concerning the construction of a road . . . the Court recalls that, in the

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<sup>63</sup>See letter from the ICJ to Costa Rica, 11 March 2013, Ref. 142641.

Application instituting proceedings which it filed in the Registry on 21 December 2011, Nicaragua indicated that ‘[t]he most immediate threat to the [San Juan] river and its environment is posed by Costa Rica’s construction of a road running parallel and in extremely close proximity to the southern bank of the river, and extending for a distance of at least 120 kilometres’. When it filed its Memorial in the *Nicaragua v. Costa Rica* case, on 19 December 2012, Nicaragua also asked the Court to ‘examine *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures’, basing its argument once again on the construction of the road. *However, the Court was of the view that this was not the case . . .*”<sup>64</sup>

18. Since the Court made that observation on 16 July of this year, well after Costa Rica’s Ministry of Transportation announcement back in March of this year, what has changed? Nothing. This time around, Nicaragua’s Agent stated yesterday that after your Order of 16 July, it was “considering” bringing a proper request for provisional measures. He stated:

“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. After this announcement Nicaragua was considering the appropriate moment in which to file its formal request for provisional measures.

This was the situation when Costa Rica filed last September a request for new provisional measures . . .”<sup>65</sup>

19. In order to try to substantiate its claim of urgency, Nicaragua has had to claw back to an announcement made in March of this year that Nicaragua brought to the Court’s attention on Tuesday. And Nicaragua is well aware that the Court, largely on the same facts, had already considered Nicaragua’s complaints about road construction — and that it had rejected the reasons given by Nicaragua.

20. Mr. Reichler suggested yesterday that the fact that Costa Rica’s Minister of Communication had stated that the road is viewed as a matter of priority constitutes grounds enough for the indication of provisional measures on the basis of urgency<sup>66</sup>.

21. Of course Costa Rica views the road as a matter of priority. It wants to complete it, and it will do so in accordance with the highest environmental and engineering standards. Although most of the road, as shown by Dr. Parlett today, is already in a good condition, part of the road

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<sup>64</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Requests for the Modification of the Order of 8 March 2011 Indicating Provisional Measures*, Order of 16 July 2013, para. 26; emphasis added.

<sup>65</sup>CR 2013/30, p. 9, paras. 6-7 (Argüello).

<sup>66</sup>*Ibid.*, p. 27, paras. 18-19 (Reichler).

needs more work. It does not follow — and Nicaragua did not show during these hearings how it could follow — that undertaking secondary works to improve a road, constructed with urgency in a state of emergency created by Nicaragua, gives rise to a real and imminent risk of irreparable prejudice to Nicaragua's rights.

22. Mr. President, the fact of the matter is that urgency has not been established in this case.

**B. The provisional measures requested by Nicaragua are not justified**

23. I will now turn your attention to the measures requested. On Wednesday, Professor Kohen detailed the reasons why not one of the provisional measures requested by Nicaragua is justified<sup>67</sup>. Nicaragua said nothing yesterday that cast any doubt on those reasons. The measures are still not justified.

24. Nicaragua's *first* request is for the Environmental Impact Assessment for the road. But even if it were correct that Costa Rica had breached an obligation to provide an EIA to Nicaragua (*quod non*), that would be a question for the merits. And Costa Rica has already indicated that its Counter-Memorial, to be submitted next month, will include an Environmental Diagnostic<sup>68</sup>. Nicaragua did not explain yesterday how this could result in irreparable prejudice to the rights of Nicaragua in dispute. There is patently nothing irreparable in Nicaragua having to wait until the appropriate time to receive Costa Rica's case on the merits, certainly not when it is a matter of six weeks, regardless of whether this obligation exists, which as I said, is a question to be decided at the merits stage.

25. Therefore, the first measure requested comes down to no more than an attempt to force you to decide a question that should be left to be decided on the merits.

26. The *second* measure requested by Nicaragua — that Costa Rica immediately undertake a number of emergency measures based on conclusions by Dr. Kondolf — must also fail. The mitigation measures Costa Rica has carried out preceded any request by Nicaragua, and go beyond what Nicaragua requests, as Professor Kohen demonstrated on Wednesday. Costa Rica notes that

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<sup>67</sup>CR 2013/29, pp. 49-52, paras. 19-29 (Kohen).

<sup>68</sup>*Ibid.*, p. 22, para. 5 (Wordsworth).

Nicaragua has *still not*, after two rounds of oral pleadings, produced any evidence that the road poses a risk of irreparable prejudice to Nicaragua.

27. Costa Rica has presented you with evidence that any sediment from the road that enters the San Juan River is of negligible or imperceptible impact. This evidence is based not on general speculation about road building drawn from experience in the United States or elsewhere, but on actual data taken from the river itself. It is *Nicaragua* that must present evidence proving irreparable prejudice. It has not done so. Only Costa Rica has presented evidence on the impact, or lack of it, of sediment from the road from the appropriate baseline: as a portion of the existing sediment load of the river.

28. It follows that there is no justification for subordinating Costa Rica's existing programme of remediation on its own territory to the will of Nicaragua.

29. The same is true of the *third* measure that Nicaragua seeks, for Costa Rica not to renew construction activities on the road while the Court is seised of the case. Since Nicaragua has failed to establish that the road causes it any irreparable prejudice in its current state, *a fortiori* the eventual resumption of construction of the road in accordance with appropriate designs and construction practices will also not cause Nicaragua any irreparable prejudice. On the contrary, even if it were true that the road created a significant risk of sedimentation, its completion in accordance with such designs and practices could only improve the road, and be of benefit to all.

30. More fundamentally, the subject of this Request is also an internal matter for Costa Rica. We have previously explained why Costa Rica declared a state of emergency and commenced construction of a road as a priority. It is still a priority. Not only is Nicaragua's Request unjustified by any irreparable prejudice to Nicaragua, it would also intrude on Costa Rica's right to make sovereign decisions about a matter of grave importance for security, health and wellbeing of its inhabitants. It would, in fact, gravely prejudice Costa Rica's rights to make those sovereign decisions.

31. It is clear from the inclusion of this measure in the Request that its intent is not limited to ensuring that the road causes no irreparable prejudice to Nicaragua. The Request is in absolute terms. Its effect would be to disable Costa Rica from constructing a road along its border for a considerable period of time — regardless of whether there are any consequences at all for

Nicaragua, and before Costa Rica can put its case on the merits. The explanation is simple. Despite its protestations yesterday, Nicaragua does not want the road built and will do whatever it can to stop it.

32. And so, Mr. President, none of the three measures requested by Nicaragua is justified. They appear to be variously motivated: to decide a question for the merits prematurely, to delay and obstruct Costa Rica's existing attempts to take remediation measures and improve the road, and to delay or prevent Costa Rica from completing construction of the road at all. Not least, they are a response to the well-grounded request that Costa Rica brought a few weeks ago. What does not appear to motivate them is any genuine urgency or any demonstrated irreparable prejudice.

33. Just as the Court declined to order measures to similar effect when requested to do so *proprio motu* and declined to modify its 2011 provisional measures Order to similar effect, so the Court should reject this further unmeritorious request.

34. Mr. President, distinguished Members of the Court, I thank you, Mr. President. In order to close the second round of Costa Rica's oral arguments, I ask that you call on Ambassador Edgar Ugalde, who will deliver Costa Rica's closing remarks and its submissions.

The PRESIDENT: Thank you, Sir. I give the floor to the Agent of the Government of Costa Rica, Ambassador Ugalde Álvarez. You have the floor, Sir.

Mr. UGALDE ÁLVAREZ:

1. Mr. President, distinguished Members of the Court, Nicaragua appeared before you this week to pursue its Request for provisional measures. By Nicaragua's own admission, these hearings have been an expensive, inconvenient and time-consuming way to dispense with its Request<sup>69</sup>.

2. Since Nicaragua once again came to the Court yesterday with the allegation that Costa Rica "has been spending at least five times more on military weapons than Nicaragua for the past two decades"<sup>70</sup>, I feel obliged to correct any misconception this may create. According to the Stockholm International Peace Research Institute, Costa Rica has no military expenditure as it does

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<sup>69</sup>CR 2013/28, p. 12, para. 4; *ibid.*, p. 20, para. 38 (Argüello).

<sup>70</sup>CR 2013/30, p. 12, para. 18 (Argüello).

not have an army. On the other hand, Nicaragua's military expenditure has increased by *44 per cent since 2010*, the year that Nicaragua invaded Costa Rica in the northern sector of Isla Portillos, a fact that raises serious concerns.

3. Mr. President, as we conclude these hearings, there is no doubt that the road works carried out by Costa Rica in its territory pose no real and imminent risk of irreparable prejudice to Nicaragua rights.

4. Despite 23 months passing since Nicaragua filed its Application instituting proceedings, Nicaragua has not submitted any relevant evidence showing that sediment coming from Costa Rica territory as a result of road works causes harm to the San Juan River. Nicaragua is sovereign over the waters of the river, yet it has not carried out studies which demonstrate that there has been an increase in sediment in the San Juan River, which demonstrate that the road is causing harm to Nicaraguan territory. Costa Rica — the Respondent — has filed evidence on this issue, and that evidence shows that the contribution of sediment is imperceptible — so low as to have no impact, let alone to cause significant harm. Costa Rica's evidence has not been seriously challenged by Nicaragua this week.

5. Nicaragua has failed to demonstrate that there is any urgency to its Request. It filed its Request at the eleventh hour, just before the hearings on Costa Rica's request for new provisional measures in the *Certain Activities* case were scheduled to commence. It did not file its Request because of any real or imminent risk, but because it thought this would be "a good opportunity to . . . take advantage" of the fact that hearings for a different request were about to open<sup>71</sup>. This is not the way a State with a *bona fide* request for provisional measures either reasons or behaves.

6. It is apparent that the real purpose behind Nicaragua's Request is to stop Costa Rica from putting in place basic infrastructure, entirely within Costa Rican territory. Nicaragua has already obstructed Costa Rica by different ways from exercising its right of free navigation on the San Juan River, a right that has been the subject of a judgment of this Court. Now Nicaragua is trying to obstruct Costa Rica from exercising its sovereign right to defend itself and to reliably provide

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<sup>71</sup>CR 2013/30, p. 9, para. 7 (Argüello).

essential services for the local population. If ordered, the provisional measures sought by Nicaragua would cause irreparable harm to Costa Rican rights.

7. Mr. President, Costa Rica will continue to endeavour to co-operate with Nicaragua to address its concerns about the road works. Nicaragua will receive Costa Rica's Environment Diagnostic study annexed to its Counter-Memorial. All future construction works on the road will be carried out in accordance with the highest environmental and engineering standards. Costa Rica will also continue to carry out remediation works on the road, to address any risk of impact in Costa Rica, as well as to the San Juan River.

8. Mr. President, distinguished Members of the Court, I will proceed to read Costa Rica's submissions:

#### **FINAL SUBMISSION**

9. In accordance with Article 60 of the Rules of Court and having regard to the Request for the indication of provisional measures of the Republic of Nicaragua and its oral pleadings, the Republic of Costa Rica submits that,

— for the reasons explained during these hearings and any other reasons the Court might deem appropriate, the Republic of Costa Rica asks the Court to dismiss the Request for provisional measures filed by the Republic of Nicaragua.

10. Mr. President, distinguished Members of the Court, to conclude our participation in these oral hearings, I wish to extend, on behalf of the Republic of Costa Rica, our appreciation to you, Mr. President, and each of the distinguished Members of the Court, for your kind attention to our presentations. May I also offer our thanks to the Court's Registrar, his staff, and to the interpreters and translators.

11. Finally, I would also like to thank publicly Costa Rica's counsel and all the members of our delegation. Thank you, Mr. President.

The PRESIDENT: Thank you very much, Ambassador Ugalde. The Court takes note of the submissions you have read on behalf of your Government.

This brings an end to the present series of sittings. It remains for me to thank the representatives of both Parties for the assistance they have given to the Court by their oral

observations in the course of these four hearings. In accordance with practice I ask the Agents to remain at the Court's disposal.

The Court will render its Order on the Request for the indication of provisional measures filed by Nicaragua as soon as possible. The date on which this Order will be delivered at a public sitting in this hall will be duly communicated to the Agents of the Parties.

Having no other business before it today, the Court now rises.

*The Court rose at 11.30 a.m.*

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