

CR 2013/26

International Court
of Justice

Cour internationale
de Justice

THE HAGUE

LA HAYE

YEAR 2013

Public sitting

held on Wednesday 16 October 2013, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2013

Audience publique

tenue le mercredi 16 octobre 2013, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

Registrar Couvreur

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

M. Couvreur, greffier

The Government of Costa Rica is represented by:

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

as Agent;

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

as Co-Agent;

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

as Co-Agent, Counsel and Advocate;

Mr. James Crawford, A.C., S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, Barrister,

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

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

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

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

as Counsel and Advocates;

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

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

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

as Advisers.

The Government of Nicaragua is represented by:

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

as Agent and Counsel;

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

Le Gouvernement du Costa Rica est représenté par :

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

comme agent ;

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

comme coagent ;

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

comme coagent, conseil et avocat ;

M. James Crawford, A.C., S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de l'Institut de droit international, avocat,

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

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

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

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

comme conseils et avocats ;

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

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

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

comme conseillers.

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

comme agent et conseil ;

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

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

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

as Counsel and Advocates;

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

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

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

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

as Counsel;

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

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

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

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

as Assistant Counsel.

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

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

comme conseils et avocats ;

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

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

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

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

comme conseils ;

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

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

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

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

comme conseils adjoints.

The PRESIDENT: Please be seated. The hearing is open. We meet this morning for the second round of the oral observations of Costa Rica on its Request for the indication of provisional measures. I now call upon Professor James Crawford. You have the floor, Sir.

Mr. CRAWFORD:

NINE ESTABLISHED PROPOSITIONS

A. Introduction

1. Thank you, Mr. President. Mr. President, Members of the Court, in this speech, I will address the core facts established by the evidence on which the Court has to make its decision on Costa Rica's request. There are *nine* of them. I will not deal with the host of peripheral issues raised by Nicaragua yesterday, because you need to focus only on the essentials. Not dealing with these peripheral issues is not, of course, to be taken as an admission of any of the allegations made.

2. Before dealing with these nine core propositions, I would make three preliminary and more general points.

3. The first preliminary point concerns the suggestion made by Professor Pellet that Costa Rica's request is in some way "abusive"¹ (that was his word). The Court will have remarked how rapidly President Ortega responded to Costa Rica's protest of 16 September 2013: the very next day². It is unusual in our experience for a Nicaraguan Head of State to give such prompt and personal attention to a Costa Rican protest. But, according to Nicaragua, he did so unaided—Mr. Reichler testified that his legal team was otherwise engaged³. While Mr. Reichler is in testifying mode, perhaps he will tell you when he first saw the letters. In any event, a rapid succession of orders and instructions was apparently given and just as rapidly complied with. The one thing that Nicaragua omitted to do, notwithstanding our reminder of 3 October 2013⁴ and its protest about overflight of 1 October 2013, was to *tell* anyone about this prompt and meticulous correspondence. At the time of our Request, and until the very end of last week, the only

¹CR 2013/25, p. 50, para. 20 (Pellet).

²Letter from the Secretary of National Public Policies to the Executive President of the National Port Authority, Reference SPPN-E-13-711, 17 Sep. 2013, Ann. 1 to Letter from Nicaragua to ICJ, 11 Oct. 2013, Ref. HOL-EMB-197.

³CR 2013/25, p. 25, para. 30 (Reichler).

⁴Diplomatic Note sent by Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 3 Oct. 2013, Ref. DM-AM-568-13, Attachment PM-23.

information we had about Nicaragua's position involved allegations about rainfall and aquatic plants. Moreover, the information we provided in our letter of 16 September included not just satellite images, but precise co-ordinates⁵. That information turned out to be correct. Professor Pellet's suggestion that the action Costa Rica promptly took — when it had received no adequate explanation — was “abusive”; that suggestion is quite extraordinary.

4. My second preliminary point is a related one. Nicaragua says that it had ordered Mr. Pastora and the National Port Authority to cease construction and cleaning works and to withdraw any personnel and equipment from the disputed territory on 22 September, before the Request was made on 24 September. As I have said, these facts were only brought to the attention of the Court and Costa Rica last Friday⁶. There were many opportunities to do so before that.

(a) They were not brought to Costa Rica's attention following the intense media coverage of the dispute, in both countries.

(b) They were not brought to Costa Rica's attention on 22 September, the day Commander Ortega was said to have given his order⁷.

(c) They were not brought to Costa Rica's attention on 24 September, when the Request for new provisional measures was made, or when the Foreign Minister wrote to Nicaragua saying that its explanation of 18 September was implausible and reiterating Costa Rica's request for information and assurances⁸. There was no response to that letter of 24 September at any time.

(d) They were not brought to the Court's attention, or to Costa Rica's attention, on 30 September, when you notified the Parties that you would hold oral hearings this week.

⁵Diplomatic Note sent by Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 16 Sep. 2013, Ref. DM-AM-536-13, Attachment PM-1.

⁶Letter from Nicaragua to ICJ, 11 Oct. 2013, Ref. HOL-EMB-197.

⁷Letter from the Executive President of the National Port Authority to the Government Delegate for the Dredging Works of the San Juan de Nicaragua, Ref. PE-VSM-0592-09-2013, 22 Sep. 2013, Ann. 8 to Letter from Nicaragua to ICJ, 11 Oct. 2013, Ref. HOL-EMB-197; and Letter from the Executive President of the National Port Authority to the Technical Manager of the National Port Authority, Ref. PE-VSM-0591-09-2013, 22 Sep. 2013, Ann. 7 to Letter from Nicaragua to ICJ, 11 Oct. 2013, Ref. HOL-EMB-197.

⁸Diplomatic Note sent by Gioconda Ubeda Rivera, Acting Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 24 Sep. 2013, Ref. DM-D VM-550-2013, Attachment PM-20.

(e) They were not brought to Costa Rica's attention on 1 October 2013, when the Nicaraguan Foreign Minister wrote protesting about overflight⁹.

(f) They were not brought to Costa Rica's attention on 3 October 2013, when Costa Rica responded to the protest against overflight, and referred to the Nicaraguan activities in the disputed territory¹⁰.

5. Yesterday counsel for Nicaragua gave you two explanations for this delay, neither of them very plausible. First, he said that "Nicaragua decided that it should deliver its answer to [the Court], rather than to Costa Rica"¹¹. Well, fair enough, but a letter addressed to the Court should take no more time than a letter to Costa Rica, and certainly it does not justify a delay of 26 days. Secondly, he said that it took some time to "assemble its legal team, analyse the facts, and prepare its submission to the Court", including translations¹². He says it "hurried" to do so¹³. As counsel to a number of States, I would say that no governmental client of mine would consider 26 days to be "hurried"; nor would it consider 26 days to translate nine pages of correspondence to be reasonable. Besides which, the point is not that Nicaragua did not substantiate its new position — its third narrative — until Friday evening; the point is that it did not tell anyone — not anyone — that that was its position.

6. Even when Nicaragua's breach was finally revealed to the Court — finally, on Friday — the Agent still stood by the Foreign Minister's Note of 18 September, expressly referring to it, formally reiterating it, and not disclaiming any part of it¹⁴. Nicaragua's counsel continued to stand by it yesterday¹⁵.

7. My third preliminary point — most important of all — concerns the evidence before you on this Request, apart from the correspondence filed on Friday. With that exception, all the

⁹Diplomatic Note sent by Orlando Gomez, Vice-Minister of Foreign Affairs, Nicaragua, to Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, 1 Oct. 2013, Ref. MRE/DM/DGAJST-VMOG/293/10/13, Attachment PM-22.

¹⁰Diplomatic Note sent by Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 3 Oct. 2013, Ref. DM-AM-568-13, Attachment PM-23.

¹¹CR 2013/25, p. 25, para. 30 (Reichler).

¹²CR 2013/25, p. 25, para. 30 (Reichler).

¹³CR 2013/25, p. 25, para. 30 (Reichler).

¹⁴Letter from Nicaragua to the ICJ, 10 Oct. 2013, Reference HOL-EMB-193, p. 2.

¹⁵See, e.g., CR 2013/25, p. 21, para. 16 (Reichler); CR 2013/25, p. 27, para. 36 (Reichler); CR 2013/25, p. 27, para. 37 (Reichler); and CR 2013/25, p. 48, para. 17 (Pellet).

evidence before you has been filed by Costa Rica. Nicaragua had weeks' notice of this hearing, it has produced nothing. There is no evidence from Nicaragua as to the present state of the eastern *caño*, but Nicaragua must — does — know that. People from the National Port Authority dug the *caño*. The officers and men at the nearby military encampment observed the work — as the Nicaraguan Agent effectively conceded yesterday¹⁶. Yet no evidence is produced. Nicaragua produces no evidence to challenge our expert evidence as to the risk of irreparable prejudice presented by the eastern *caño*; indeed, it effectively accepts our evidence in that regard. I will come back to that in a moment.

B. The Present State of Affairs

8. Mr. President, Members of the Court, I turn now to the Request, and I am going to outline nine basic propositions that are either undisputed or cannot reasonably be disputed, in light of the evidentiary record, commenting as I go on some particular points made by Nicaragua.

Proposition 1: Nicaragua constructed the *caños*

9. It is uncontested that a senior member of the Nicaraguan Government, assisted by a Government department, constructed the two artificial *caños* in the disputed territory¹⁷. The Nicaraguan Government department carrying out the works in the disputed territory is the “government agency responsible for river transportation and ports”, according to Nicaragua¹⁸. The explanation given by Nicaragua’s counsel that “while [Mr. Pastora] was performing these cleaning works in the area [he] took it upon himself to extend his activities into the disputed territory”¹⁹ is simply not credible. These new *caños* are clearly the result of careful planning, something which is

¹⁶CR 2013/25, p. 16, para. 35 (Argüello).

¹⁷CR 2013/25, p. 11, para. 17 (Argüello); CR 2013/25, p. 21, para. 15 (Reichler); CR 2013/25, p. 22, para. 17 (Reichler); CR 2013/25, p. 24, para. 24 (Reichler); and CR 2013/25, p. 46, para. 12 (Pellet). See also Letter from the Technical Manager of the National Port Authority to the Executive President of the National Port Authority, Ref. GT-LAQG-0886-09-2013, 20 Sep. 2013, Ann. 3 to Letter from Nicaragua to ICJ, 11 Oct. 2013, Ref. HOL-EMB-197 (“cleaning works began in August in order to guarantee the natural flow of the San Juan River into the river mouth Delta. These works include the use of a suction dredger.”).

¹⁸CMN, para. 4.28. See also CMN, para. 2.51 (EPN is “the State institution charged with administering the Nation’s ports, improving the country’s navigation systems, and optimizing ship traffic capacity”); Declaration of Technical Manager of the National Port Company (EPN), Lester Antonio Quintero Gómez, 16 Dec. 2010, MCR Ann. 164, para. 1 (the EPN “is the state agency charged with the development of port authorities in Nicaragua’s marine, river, and lake regions, as well as all required port facilities required [*sic*] for the transportation of both people and goods”).

¹⁹CR 2013/25, p. 24, para. 24 (Reichler).

evident from their straight design, particularly the eastern one²⁰, and they have been constructed precisely at the point where they can benefit the most from the change in gradient of the course of the San Juan River. They are, from a river diversion point of view, a big technical improvement on the 2010 *caño*. It is not as if Mr. Pastora simply lost his way or strayed into the disputed territory by accident and decided to dig a hole by himself.

10. It is also now uncontested that the Nicaraguan Army was aware this work was going on²¹. How could they not be? Whether it was known by a “young lieutenant”, or by the Commander of the Army, is irrelevant. The work which was done by Nicaragua was known by Nicaragua to be underway.

11. To summarize, to say that Nicaragua “did not send” is absurd. Of course Nicaragua “sent”. We do not know whether President Ortega sent. Perhaps we will never know. But people were sent, and by Nicaragua.

Proposition 2: Those constructing the *caños* had ostensible authority to do so

12. Mr. Pastora and the National Port Authority were organs of the Nicaraguan State. They had ostensible and as far as appears actual authority — at least until 22 September 2013 — to carry out the works in the disputed territory. Following the Court’s Order of 8 March 2011, they were never prohibited from doing so by any Nicaraguan instruction in evidence.

13. The only evidence on the record is the specific authorization for Mr. Pastora and the National Port Authority to carry out the project for the “Improvement of Navigation on the San Juan de Nicaragua River”²². We heard nothing about *ultra vires* action on the previous Request. The only Nicaraguan instruction to the National Port Authority and to Delegate Pastora not to enter the disputed territory post-dates the construction of the two new *caños*, and Mr. Reichler could not show otherwise. The director responsible for the project at the Nicaraguan Ministry of the Environment and Natural Resources testified to you in December 2010 that the Ministry is able to

²⁰See University of Costa Rica Centre for Research in Sustainable Development, Department of Civil Engineering, “Technical assessment of the artificial canals on Isla Portillos”, Oct. 2013, Attachment PM-19 (in judges’ folders, day 1, tab 19).

²¹CR 2013/25, p. 16, para. 35 (Argüello).

²²MARENA Administrative Resolution No. 038-2008, 22 Dec. 2008, CMN, Ann. 33, p. 79; amended by MARENA Administrative Resolution No. 038-2008-A1, 30 Oct. 2009, CMN, Ann. 34.

amend or withdraw this kind of authorization at any time²³. Nineteen months have passed since your March 2011 Order requiring Nicaragua not to send its personnel to the disputed territory. Where is the withdrawal of that authorization? Nicaragua has not produced it.

Proposition 3: Nicaragua breached the 2011 Order by constructing the caños

14. This is not now in dispute. Professor Pellet said “*peut-être*”²⁴: what a concession coming from him! Mr. Reichler described it as “cleaning”²⁵ but the word “dredging” passed his lips²⁶. There is nothing *peut-être* about it. This was the Nicaraguan State in full-scale action, with the Army standing vigilantly close by.

15. Mr. President, Members of the Court, I turn to the question of risk of irreparable harm. This is the question of the significant risks that result from Nicaragua’s works on the eastern *caño* — significant risks of diversion of the Rio San Juan, and of adverse environmental and other impacts, including in the upstream sector. Mr. Wordsworth made the point in opening. Nicaragua’s answer was “we have stopped”, as Professor McCaffrey’s brief presentation essentially emphasized.

16. Here there are four relevant agreed or indisputable propositions and I will deal with them in turn.

Proposition 4: The risk of irreparable prejudice is even more serious than first thought

17. Mr. President, Members of the Court, matters are more serious than we realized. Overnight, we received more satellite imagery. These are at tab 2 of your folders; they show the position on 5 October. You see the image now on the screen. I accept there is no dredger on that date. “Look Mum, no dredger!” But what the Court needs to focus on is how the works on the beach have progressed from 18 September. You see now the newly excavated trench, marked at the top of the screen. We estimate the distance between the end of the trench on 5 October and the waterline at seven metres. A good half day’s work for a platoon with shovels. Nearby, the military

²³Affidavit of Hilda Espinoza Urbina, National Director of the Department of Environmental Quality at the Ministry of the Environment and Natural Resources of Nicaragua (MARENA), 20 Dec. 2010, MCR, Ann. 165, para. 9 (f).

²⁴CR 2013/25, p. 51, para. 22 (Pellet).

²⁵CR 2013/25, p. 29, para. 42 (Reichler).

²⁶CR 2013/25, p. 21, para. 15 and p. 30, para 51 (Reichler).

camp. At the bottom of the screen, there is a new opening on the *caño* that can just be seen, and I will return to this in a moment.

18. Now you can see the photograph of 18 September, showing the trench at the end of the *caño*, at the top of the image²⁷. If we return to the image of 5 October, you see the work on the trench is now much more advanced; indeed, it is virtually complete. I will come back later to the extraordinary failure on Nicaragua's part to give the Court any fair assessment of the current position. It knew that works were further advanced than Costa Rica or the Court had been told, it said nothing. Now, I am sure my friends opposite of counsel were not aware of this; they gave you what they had been given: nine late letters, in this case. For now, however, I am focusing on significant risk.

19. Professor Thorne said this at paragraph 4.7 of his report (screen on):

“In the case of the eastern *caño*, the trench already dug part way across the beach could be extended to achieve this with very little difficulty. Once the trench is completed, increasing wet season runoff from the catchment of the Rio San Juan will raise the elevation of the water surface in the River compared to that in the sea, . . . with sufficient force to scour its bed and enlarge the ditch through the beach. Connecting the River to the Caribbean Sea via the eastern *caño* would provide a short cut to the sea for water flowing along the Rio San Juan. Through time, this short cut would convey progressively more of the flow, which would reduce the discharge in the San Juan River downstream of the *caño*, causing it to deposit silt, with a significant risk that it would close entirely at times of low runoff during the next and subsequent dry seasons.”²⁸

20. But the position, as we have just learnt, is that the trench across the beach has *already* been extended. It is virtually complete. You can see the breadth of it, again on 5 October, on your screens. In the four days between the photograph of 18 September, and President Ortega's order to cease all work, the personnel working in the disputed territory must have worked very hard indeed.

21. There is something else remarkable about this new image from 5 October. You can see at the upstream end of the *caño* on the San Juan River, at the bottom of the picture, that a new entrance to the *caño* has been created; it is circled on the screen. It joins the *caño* a short way along. So, there are two routes for water from the river to enter the *caño*. If you were to remove

²⁷Close up of Attachment PM-14.

²⁸Prof. Colin Thorne, *Report on the Impact of the Construction of Two New Caños on Isla Portillos*, 10 Oct. 2013, Attachment PM-33, p. 6, para. 4.7 (judges' folder, day 1, tab 20).

the small triangular island created by these two channels, there would be a large opening; quite large enough to divert the river, if the only evidence that you have is to be believed.

22. Mr. President, Members of the Court, we have shown these new images to Professor Thorne. His view is that the increasing wet season runoff from the catchment is likely *now* — that is, over the coming weeks — to raise the elevation of the water surface in the river compared to that in the sea, creating the gradient necessary to drive the flow through the *caño* with sufficient force to scour its bed and enlarge the ditch through the beach. The “if the work is completed” argument, that formed the mainstay of Professor McCaffrey’s pleading, has a hole in it the size of the hole in the beach.

23. Before I move on, I would like to mention an issue of transparency. Mr. Reichler yesterday asked why the clear images of 14 September were not provided to Nicaragua with our first protest letter of 16 September²⁹. The reason is that we obtain satellite imagery from a Costa Rican company, which gets it from international satellite operators. It takes around ten days between the time the image is ordered by the company and the time it is delivered to the Government. The 14 September image was received in late September. The 5 October image was received last night. But as I have said, the 16 September letter included accurate co-ordinates, and it should have been the work of a moment, with modern military technology in communications, to confirm them. Quicker, I think, than it takes to ring the Nicaraguan weather forecasting service.

Proposition 5: Costa Rica’s expert evidence is unchallenged

24. The evidence of Costa Rica’s two expert reports — from the University of Costa Rica and from Professor Thorne — is unchallenged by any expert or other evidence, and there has been a notable failure on Nicaragua’s part to explain why it has not put in any expert evidence. To a large extent, Nicaragua adopted our two reports, at the same time saying — incorrectly — that Mr. Wordsworth left out crucial passages in those reports³⁰. The passages in question made it clear that the experts were addressing the situation:

²⁹CR 2013/25, p. 22, para. 19 (Reichler).

³⁰CR 2013/25, p. 38, para. 6 (McCaffrey).

- (a) “[o]nce the dredger completes its work and these obstructions are removed” (page 14 of the University of Costa Rica report that Mr. Wordsworth took you to)³¹; or that
- (b) once the trench is completed (which is paragraph 4.7 of Professor Thorne’s report that Mr. Wordsworth also took you to)³².

25. The simple point is that the experts could only address in their reports the situation as it appeared from the information available to them as at mid-September 2013. Until last night, the latest information Costa Rica had dated from 18 September. Nicaragua has not submitted any updated evidence on the situation *after* 18 September. Now we can see the situation as at 5 October, now that we can do that Professor Thorne has been able to give a more up-to-date picture of the real and imminent risk. How matters stand as of 16 October, Nicaragua knows; we do not, you do not. This is Professor Pellet’s “abusive” request³³.

Proposition 6: The expert evidence is not “unsupported assertion without scientific basis”

26. I quote Professor McCaffrey’s words. It is rather bizarre, in the light of the fact that Nicaragua does not challenge the two reports and does not produce any reports of its own, that Professor McCaffrey could say that “Costa Rica’s predictions of future harm are nothing more than unsupported assertions without scientific basis”³⁴. Costa Rica’s two expert reports cannot conceivably be described as unscientific—there is no evidentiary basis for that contention. Nicaragua has a river scientist, Dr. Kondolf. Where is he, you might ask? Would he testify that there is no risk of the eastern *caño*, as it now stands, breaking through to the nearby sea?

27. And if the point is that Costa Rica is not able to make firm predictions of future harm, then the point is a bad one. As we made clear, we are not asking you to make final determinations of fact at this stage, it is not part of your function at provisional measures³⁵. What matters is whether there is a real and imminent risk—risk, nothing more.

³¹University of Costa Rica Centre for Research in Sustainable Development, Department of Civil Engineering, “Technical assessment of the artificial canals on Isla Portillos”, Oct. 2013, Attachment PM-19 (in judges’ folder, day 1, tab 19).

³²Professor Colin Thorne, *Report on the Impact of the Construction of Two New Caños on Isla Portillos*, 10 Oct. 2013, Attachment PM-33, p. 6 (in judges’ folder, day 1, tab 20).

³³CR 2013/25, p. 50, para. 20 (Pellet).

³⁴CR 2013/25, p. 37, para. 11 (McCaffrey).

³⁵CR 2013/24, p. 25, para. 3 (Wordsworth).

28. So we were genuinely perplexed when Professor McCaffrey criticized Professor Thorne's evidence, saying "he cannot come to any conclusion about the effect of the 2013 *caños* despite the fact that this is his field of expertise"³⁶. This is hopelessly misconceived. The Court is not concerned with conclusions about impact; it needs to know about risk. As Professor McCaffrey said, Professor Thorne is not able to "*determine* the potential environmental impacts". Of course he cannot. The question is one of risk, not determination of consequences, if the risk is realized. And Professor Thorne does not even have access to this site. I suppose Dr. Kondolf does, or could have, but he is not here. And if I may recall what Professor Thorne said in full on impacts to the ecosystem, and not just the snippet Professor McCaffrey took you to [screen on]:

"It is difficult to predict precise impacts on the ecosystem on the basis of the limited available information. [That is the bit that Professor McCaffrey read; but the passage continues:] However, there is certainly a real risk that diverting some portion of the flow in the Rio San Juan into the 2013 *caños* would have multiple impacts on the River, biota that inhabits the River as well as the ecological services it supplies."³⁷

29. Real risk — quite. Professor McCaffrey said that it was not enough to show the possibility of risk, and he took you to a sentence from the provisional measures Order in the *Aegean Sea* case³⁸. Again, it is worth noting what that passage says in full. The Court said:

"Whereas, on the other hand, the possibility of such a prejudice to rights in issue before the Court does not, *by itself*, suffice to justify recourse to its exceptional power under Article 41 of the Statute to indicate interim measures of protection; whereas, under the express terms of that Article, this power is conferred on the Court only if it considers that circumstances so require in order to preserve the respective rights of either party; and whereas this condition, as already noted, presupposes that the circumstances of the case disclose the risk of an irreparable prejudice to rights in issue in the proceedings."³⁹

30. The risk — *that* is the relevant test; not certain conclusions on impact.

31. And it follows that the criticism that the University of Costa Rica was unable to make a precise determination of tractive force is equally misplaced⁴⁰. These are engineers, not magicians.

³⁶CR 2013/25, p. 38, para. 11 (McCaffrey).

³⁷Professor Colin Thorne, *Report on the Impact of the Construction of Two New Caños on Isla Portillos*, 10 Oct. 2013, Attachment PM-33, p. 7, para. 4.11 (in judges' folder, day 1, tab 20).

³⁸CR 2013/25, p. 37, para. 10 (McCaffrey).

³⁹*Aegean Sea Continental Shelf (Greece v. Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 11, para. 32; emphasis added.

⁴⁰CR 2013/25, p. 38, para. 12 (McCaffrey).

They can make an approximation, as Mr. Wordsworth explained, based on the gradient and width of the *caños*. Unlike Nicaragua, they have no access to the site to take measurements of the respective depth of the river and the *caño*. And Nicaragua has not told us those crucial facts. Nicaragua sits on the side-lines as if it knows nothing — *caño?* what *caño?* — and it snipes at one or other aspect of our evidence.

32. I should add that the Court always takes into account, in assessing the facts — an assessment here purely provisional — the relative opportunity each party has to establish the facts.

Proposition 7: Nicaragua has failed to inform the Court of material facts

33. You have heard much about the fact that the *caños* have not been completed. But at the same time Nicaragua let an out-of-date picture of the situation rest before you without correction. And, moreover, you heard not one word about the intention behind construction of the *caños*. You have only got to look at the 5 October overhead to see what the intention was, *res ipsa loquitur*. No evidence; no challenge to the independent expert view of Professor Thorne that the intention was to divert a portion of discharge from the San Juan into a new course⁴¹; no explanation other than the absurd explanation of Mr. Pastora about aquatic plants. The construction of at least the eastern *caño* was an attempt to create a new course for waters of the river to the Caribbean Sea. That conclusion is inescapable. While we are speaking about cleaning, it is about time that Nicaragua came clean on that point. Forget that attribution for now, forget the case that Mr. Pastora was off on a frolic of his own. We ask Nicaragua, formally, to tell us in the second round — to tell you — what was the intention behind the construction of the eastern *caño*, regardless of who did it. What was the eponymous constructor trying to do?

Proposition 8: The *caño* continues to exist

34. Counsel for Nicaragua on Tuesday repeatedly emphasized that the work had stopped, as if that were enough. It is not enough. The *caño* has not disappeared just because the dredger has gone. The works on the eastern *caño* have not been deconstructed. They are more advanced than we realized when opening on Monday. The works, if not now complete, are as good as complete,

⁴¹Professor Colin Thorne, *Report on the Impact of the Construction of Two New Caños on Isla Portillos*, 10 Oct. 2013, Attachment PM-33, p. 5, para. 4.4 (in judges' folder, day 1, tab 20).

given that the waters of the river will rise, in the weeks ahead, *in the weeks ahead*, and find their way to the sea. Remediation is not a luxury. It is not an option. This makes the third provisional measure sought by Costa Rica, in one variant or another, absolutely crucial. We will leave it in the Court's hand to determine the variant. But it is absolutely crucial. You cannot think that the Rio San Juan can be diverted through that channel without irreparable consequences in terms of this dispute. Professor Kohen will return to this.

Proposition 9: Nicaragua's northern military encampment is on the disputed territory

35. Yesterday, Nicaragua admitted that the camp near the eastern *caño* is a military camp — “a Nicaraguan military detachment encampment”⁴², confirming Costa Rica's suspicion and confirming that Nicaragua had not merely violated two and a half of its three assurances given to you on the first provisional measures hearing, but all three of them⁴³.

36. Nicaragua says the camp is not on the disputed territory⁴⁴. But you defined the disputed territory as Isla Portillos, between “the right bank of the disputed *caño*, the right bank of the San Juan River . . . and the Harbor Head Lagoon”⁴⁵. The camp is on the territory between the right bank of the river and the Harbor Head Lagoon. It is on the disputed territory as you defined it. You said “the title to sovereignty claimed by Costa Rica over *the entirety* of Isla Portillos is plausible”⁴⁶ — the entirety. You made no exception for the strip of beach between the small lagoon at the northern end of the eastern *caño* and the Caribbean Sea. The camp is on the disputed territory.

37. Nicaragua presented you with a map yesterday which showed an extended sandbar along the Caribbean coast, a “barrier beach”, Mr. Reichler called it⁴⁷. He said it was clearly depicted by

⁴²CR 2013/25, p. 29, para. 44 (Reichler).

⁴³CR 2013/24, p. 36, para. 7 (Crawford).

⁴⁴CR 2013/25, p.30, para. 48 (Reichler).

⁴⁵*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 19, para. 55.

⁴⁶*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 201 (I)1*, p. 19, para. 58; emphasis added.

⁴⁷CR 2013/25, p. 29, para. 45 (Reichler).

Costa Rica as Nicaraguan. He said “Nicaragua’s right to station troops — or anyone else — in that location [on the barrier beach] is therefore indisputable.”⁴⁸

38. You can see now on your screens, and at tab 4 of your folders, the 1988 map that Nicaragua relies on, superimposed on the satellite image of 14 September of this year. The sand bank — or “barrier beach” — is now completely out to sea. The Nicaraguan camp is clearly on Isla Portillos, the territory depicted on the map as Costa Rican.

39. In the image now on your screen, and at tab 5 of your folders, you see co-ordinates for the sandbar and the Nicaraguan military camp. The sandbar co-ordinates are marked in yellow towards the top of the image. The co-ordinates of the Nicaraguan military camp are marked in red. It is not a naval base, it is not a submarine base, it is a military camp; it is not on a submerged sandbar, it is on the disputed territory.

C. Conclusions

40. Mr. President, Members of the Court, from these nine propositions, incontestable as we say they are, two conclusions follow. The first conclusion is that Nicaragua’s assurances should not be accepted by the Court, having regard to the risks presented and the relative burdens of compliance in the circumstances of Nicaragua’s breach of your earlier Order — indeed Nicaragua’s breaches. But we can focus on the eastern *caño* as the relevant breach.

41. The second conclusion is that Costa Rica is entitled to restoration of the status quo as it was before the breach, having regard to the risks involved. I deal with the first point.

(1) Nicaragua’s assurances should not be accepted by the Court

42. On Monday I gave you six reasons why the Court should not accept these assurances in lieu of an Order. Mr. Reichler should not have persuaded you that those reasons are not valid.

43. *One*: Nicaragua has still not admitted the facts, the facts as they are now. There has been some development, admittedly, a fourth narrative, as it were, but that provides no comfort. Nicaragua now finally accepts that its personnel were constructing and dredging the *caños*⁴⁹. It

⁴⁸CR 2013/25, p. 30, para. 47 (Reichler).

⁴⁹CR 2013/25, p. 11, para. 17 (Argüello); CR 2013/25, p. 21, para. 15, p. 22, para. 17 and p. 24, para. 24 (Reichler); and CR 2013/25, p. 46, para. 12 (Pellet).

finally accepts that its personnel have entered the disputed territory in breach of your Order and carried out activities there. It finally accepts that its army, camped in close and convenient proximity to the lagoon at the end of the eastern *caño*, must have known of it⁵⁰. It accepts that it is responsible for the acts of Mr. Pastora, its Government Delegate, and it is responsible for the acts of its government department, the National Port Authority⁵¹. These reluctant concessions can hardly be considered timely: they finally came yesterday, 36 days after we wrote to protest, 36 days after we provided the co-ordinates of the new *caños*⁵². But Nicaragua has still not admitted that its Mr. Pastora, his dredgers and the National Port Authority personnel were authorized to go there in the first place. For the reasons I have explained, they had ostensible authority to do so, and there is nothing in the evidentiary record to suggest otherwise.

44. And if you needed any more proof that Nicaragua has not been forthcoming — and a State in breach of one of your Orders should provide proof if it can — you now have it: the image of 5 October confirms that Nicaragua carried out substantial work between 18 September and 5 October. The trench across the beach is now fully complete. Nicaragua has uttered not one word about it. Not one word.

45. *Two*: Our second reason; Nicaragua has done this before, and it has promised not to do it again, and it has done it again. It said it did not intend to send personnel to the region⁵³; it told you its only operation was to be the replanting of trees⁵⁴; and here it is: cleaning, clearing, cleansing dredging, constructing *caños*, cutting down trees.

46. *Three*: Nicaragua has violated its assurances before. Mr. Reichler said that the suggestion that Nicaragua had breached its assurances was contradicted by the evidence. But he also confirmed that Nicaragua *has* breached the assurances it gave to the Court in 2011. On 18 January 2011 Nicaragua told the Court that “none of its armed forces were . . . stationed on Isla

⁵⁰CR 2013/25, p. 17, para. 35 (Argüello).

⁵¹CR 2013/25, p. 29, para. 42 (Reichler);

⁵²Diplomatic Note sent by Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 16 Sep. 2013, Ref. DM-AM-536-13, Attachment PM-1.

⁵³*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 24, para. 75.

⁵⁴Reply of the Republic of Nicaragua to the question put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the *case concerning Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 18 Jan. 2011, Ref. 18012011-01, p. 6.

Portillos”⁵⁵. On 19 January, as our photographic evidence showed, the Nicaraguan army camp was still there⁵⁶. Nicaragua now says — it “was closed down permanently a few days later” and “has never been reoccupied”⁵⁷. Whether it remained a day, a week or a year is immaterial. Nicaragua told you it was not there and it was, by its own admission; and now there is a military camp, in another place on Isla Portillos.

47. During yesterday’s session, Nicaragua presented itself as an “example of compliance with the Judgments of the Court”⁵⁸, telling us that the construction of the new *caños* was a simple blunder, one that, at most, slightly tarnished an otherwise perfect record. In fact, since the provisional measures were ordered, Nicaragua has shown a perfect record in breaching all of them. In my first speech, I referred to the Sandinista youths that the Nicaraguan press claims have so far visited the disputed area, some of them continuing work on the 2010 *caño*⁵⁹. Nicaragua’s counsel reproved me for giving no evidence for this statement and asserted that no such evidence exists⁶⁰. I apologize to the Court for omitting the footnote. But the evidence does exist. Costa Rica’s Note to Nicaragua of 16 September not only protested the construction of new *caños*, but it pointed out that the Nicaraguan media reported on 9 September that some 10,000 youths had already visited the area⁶¹. The relevant article is at tab 6 of your folders.

48. *Four*: if the Court declines to order provisional measures, its authority will have been, and will be seen to have been, flouted. I stand by that. Nicaragua admitted that it has breached the 2011 Order. It has told you it admits everything, yet it provides no evidence — not a single piece of evidence — about the present state of the *caño*, its depth, its carrying capacity, its length. It

⁵⁵*Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 23, para. 71.*

⁵⁶MCR, Ann. 223; MCR, para. 3.53; Comments by Costa Rica on the Reply of Nicaragua to the questions put by Judges Simma, Bennouna and Greenwood at the end of the hearing on provisional measures requested by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 20 Jan. 2011, Ref. ECRPB 017-11.

⁵⁷CR 2013/25, p. 28, para. 41 (Reichler).

⁵⁸CR 2013/25, p. 17, para. 38 (Argüello).

⁵⁹CR 2013/25, p. 28, para. 40 (Reichler). See also CR 2013/25, p. 13, para. 22 (Argüello).

⁶⁰CR 2013/25, p. 28, para. 40 (Reichler).

⁶¹Diplomatic Note sent by Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister of Foreign Affairs, Nicaragua, 16 Sep. 2013, Ref. DM-AM-536-13, Attachment PM-1.

does not tell you that it has performed substantial work on the trench on the beach since 18 September. Its protestations of good faith and transparency cannot be taken seriously.

49. *Five*: provisional measures are urgent. We now know them to be more urgent that we knew them to be even yesterday, due to the significant extension of the trench across the beach since 18 September. This is more than enough to conclude that there is a risk of irreparable harm. If remediation works are not carried out with urgency, if the trench and the *caño* is not backfilled, there is a likelihood of irreparable harm — not merely a risk; the eastern *caño* carries the present risk, in weeks — not months, not years — of diverting the San Juan to the Caribbean Sea. Nicaragua has presented no evidence to the contrary.

50. *Sixth*: I told you on Monday that if Nicaragua is to be taken at its word, the provisional measures will have little impact on it. If Nicaragua is to be judged by its deeds, by what it has done, the provisional measures will have a significant impact on Costa Rica. I think that you have the point, and I will not dwell on it.

(2) Costa Rica is entitled to the restoration of the status quo

51. I turn to the second conclusion. On this I can be mercifully brief. If Nicaragua has breached your provisional measures Order, and if there is on a reasonable judgment, a risk of harm to the status quo, Costa Rica is entitled to the restoration of the status quo. That is the point of provisional measures. Mr. Reichler kindly said that I usually get points of law correct⁶². This, Mr. President, Members of the Court, is one of them.

Thank you Mr. President, Members of the Court. I ask you to call on Professor Kohen.

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

⁶²CR 2013/25, p. 26, para. 34 (Reichler).

M. KOHEN :

**LES OBSERVATIONS ORALES DU NICARAGUA RENFORCENT LE BESOIN D'INDIQUER
LES MESURES CONSERVATOIRES DEMANDÉES**

1. Monsieur le président, Mesdames et Messieurs les juges, nous avons assisté hier à l'effort considérable accompli par le Nicaragua pour essayer de montrer que, malgré le fait qu'il a construit deux nouveaux «caños» dans le territoire litigieux, il n'y aurait aucun besoin pour la Cour d'indiquer de nouvelles mesures conservatoires. Pourtant, après les observations orales du défendeur, il devient plus indispensable encore d'ordonner les mesures conservatoires demandées par le Costa Rica.

2. Mon exposé sera divisé en trois parties :

- je réfuterai tout d'abord les prétentions de la Partie adverse qui visent à assimiler les nouvelles mesures demandées avec celles ordonnées par votre Cour il y a deux ans et demi, ou à faire croire que ces nouvelles mesures consistent à plaider une nouvelle fois la demande en modification de mesures conservatoires du 23 mai 2013.
- Ensuite, je montrerai, à la lumière de votre jurisprudence, qui a été citée par la Partie nicaraguayenne, que les prétendues assurances du Nicaragua, sur lesquelles nos contradicteurs ont tant insisté, ne sont absolument pas suffisantes dans le contexte actuel.
- Enfin, j'exposerai les raisons pour lesquelles, après avoir entendu nos contradicteurs, le *periculum in mora* apparaît de manière plus aiguë, rendant l'indication des mesures demandées encore plus nécessaire.

3. Le Nicaragua est resté remarquablement silencieux sur un bon nombre d'arguments du Costa Rica qui militent en faveur de l'indication de nouvelles mesures conservatoires et qui distinguent celles-ci de celles ordonnées par votre Cour le 8 mars 2011. Je me bornerai donc à réfuter les arguments avancés par la Partie adverse hier, les considérations de lundi gardant toute leur valeur.

A. De nouvelles mesures conservatoires pour de nouveaux agissements nicaraguayens

4. Hier, mon collègue Alain Pellet a commencé son exposé par l'affirmation bizarre selon laquelle votre Cour ne peut se prononcer sur les demandes du Costa Rica. Bien sûr que si ! James Crawford vient amplement de vous démontrer que l'analyse des conseils nicaraguayens quant aux prétendues absences d'un risque de préjudice irréparable et d'urgence n'est pas fondée. Le conseil nicaraguayen est par ailleurs revenu sur son interprétation de la sentence *Cleveland* selon laquelle tout ce que le Costa Rica peut demander serait une indemnisation⁶³. Argument qu'il avait déjà vainement développé devant vous lors de la première demande en indication de mesures conservatoires⁶⁴. Je passe donc à l'examen fait par le Nicaragua des mesures conservatoires demandées.

5. En bref, le Nicaragua soutient que ces mesures seraient soit une réaffirmation des mesures conservatoires de 2011, soit une deuxième demande de modification de celles-ci, ou même les deux choses à la fois⁶⁵. Ni l'une ni l'autre, Monsieur le président !

6. Nous avons expliqué que ces mesures, provoquées par la récente action nicaraguayenne *pendente lite*, sont nouvelles, donc distinctes, et qu'elles viennent ainsi *s'ajouter* à celles ordonnées par votre Cour en 2011. Voilà un point que nos amis de l'autre côté de la barre semblent ne pas comprendre. Pourtant, les choses sont claires, Mesdames et Messieurs les juges. Votre Règlement distingue trois hypothèses : révocation des mesures ordonnées, modification des mesures ordonnées et indication de nouvelles mesures⁶⁶. Nous ne demandons nullement de révoquer ou rapporter vos mesures de 2011, nous demandons à ce que soient ordonnées des mesures conservatoires spécifiques face à la nouvelle construction par le Nicaragua de deux «caños» en territoire litigieux. Les nouvelles mesures conservatoires viennent donc s'ajouter à celles que vous avez ordonnées. En disant cela, je réponds dès lors d'un seul coup à toutes les fausses accusations entendues hier matin, et selon lesquelles le Costa Rica chercherait à avoir le contrôle illimité du territoire litigieux

⁶³ CR 2013/25, p. 45, par. 10 (Pellet).

⁶⁴ CR 2011/2, p. 32, par. 20 (Pellet).

⁶⁵ CR 2013/25, p. 39, par. 15 (McCaffrey), p. 51, sous-titre 3 (Pellet), p. 12, par. 20 (Argüello).

⁶⁶ Règlement de la Cour, art. 73, 75 et 76.

pendant la décision sur le fond⁶⁷. Je reviendrai sur la question du lien entre les premières et les nouvelles mesures conservatoires, en particulier lors de l'examen de la troisième mesure demandée par le Costa Rica. Examinons donc brièvement les quatre mesures demandées à la lumière des griefs de la Partie adverse. Je commence par la première, que vous verrez à l'écran. [Projection n° 1.]

7. Le Nicaragua soutient que cette mesure reprend simplement la première mesure ordonnée le 8 mars 2011⁶⁸. Nous avons déjà expliqué la différence entre l'envoi ou le maintien d'agents sur le territoire litigieux et la *réalisation de travaux* sur le territoire litigieux⁶⁹. S'il n'y avait pas eu de travaux sur ce territoire, on pourrait en effet supposer qu'il ne pourrait y en avoir sans envoyer des agents. Mais le fait incontestable est qu'il y a eu des travaux. Et qu'il n'est pas certain que ces travaux aient cessé. En effet, tout ce que le Nicaragua a prouvé c'est que le président Ortega a ordonné d'arrêter les travaux, mais le défendeur n'a apporté la moindre preuve de leur cessation effective. Par ailleurs, si l'on croit l'agent du Nicaragua, il s'avère difficile même pour les membres de l'armée nicaraguayenne de questionner les agissements de M. Eden Pastora⁷⁰. Confronté à des travaux qui modifient la configuration physique du territoire litigieux, la première mesure demandée se distingue alors clairement de celle que vous avez ordonnée en premier lieu en 2011. Par ailleurs, et même si l'on veut rapprocher ces deux mesures, comme l'a fait le Nicaragua, les circonstances décrites dans le cas d'espèce «exigent une indication plus spécifique de mesures»⁷¹ «s'ajoutant à celles qui ont été indiquées par l[la précédente] ordonnance de la Cour»⁷², pour reprendre la terminologie que votre Cour a employée dans une affaire que le conseil du Nicaragua a bien malencontreusement comparée avec celle-ci⁷³. [Fin de la projection n° 1.]

⁶⁷ CR 2013/25, p. 12, par. 21, p. 15, par. 27 (Argüello), p. 32, par. 59 (Reichler).

⁶⁸ CR 2013/25, p. 52, par. 25 (Pellet).

⁶⁹ CR 2013/24, p. 56-57, par. 28-29 (Kohen).

⁷⁰ CR 2013/25, p. 16, par. 35 (Argüello).

⁷¹ *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 13 septembre 1993, C.I.J. Recueil 1993, p. 347, par. 46.*

⁷² *Ibid.*, p. 349, par. 59.

⁷³ CR 2013/25, p. 52-53, par. 25-26 (Pellet).

8. Monsieur le président, Mesdames et Messieurs les juges, dans la photo satellite que nous avons reçue hier soir [projection n° 2], datée du 5 octobre, on constate que les travaux de canalisation se sont poursuivis sur la plage et se trouvent tout près de la mer des Caraïbes, même, donc, après le dépôt de notre demande en indication de mesures conservatoires, contrairement à ce que le Nicaragua vous a dit hier. Cela justifie ainsi déjà amplement l'indication de cette nouvelle mesure. [Fin de la projection n° 2.]

9. La deuxième nouvelle mesure demandée par le Costa Rica est aussi considérée par le Nicaragua comme une reprise de la première ordonnée en 2011. Les commentaires que j'ai faits précédemment s'y appliquent également. Cependant, cette mesure a également donné lieu à une fausse interprétation par la Partie défenderesse hier. Vous voyez son texte à l'écran. [Projection n° 3.]

10. Le Nicaragua prétend que cette mesure équivaut à demander encore une fois à la Cour de modifier la première mesure conservatoire pour inclure tous les citoyens nicaraguayens qui se trouvent en territoire litigieux⁷⁴. Indépendamment de l'interprétation que l'on fasse de votre première mesure conservatoire à cet égard, le Costa Rica ne vient pas plaider une nouvelle fois ce qu'il a demandé le 23 mai 2013 et que vous avez décidé le 16 juillet 2013. Le Nicaragua base son interprétation sur le dernier membre de phrase «ou par toute personne relevant de sa juridiction ou venant de son territoire». Le texte est clair, Monsieur le président. Il se réfère aux *installations et matériels* introduits par le Nicaragua «ou par toute personne relevant de sa juridiction ou venant de son territoire». Il n'y a donc pas de nouvelle demande de modification de la première mesure conservatoire, comme le prétend la Partie adverse.

11. Nous avons expliqué les raisons de cette deuxième nouvelle demande, liée aux travaux qui ont conduit à la construction de nouveaux canaux en territoire litigieux. Encore une fois, le Nicaragua n'a pas fourni la preuve d'un retrait quelconque des installations et matériels, il a simplement prouvé que le président Ortega a ordonné le retrait du matériel. Plus grave encore, le Nicaragua est venu expliquer hier que la plage de Isla Portillos ne fait pas partie du territoire litigieux et que ces installations ont le droit d'y rester⁷⁵, ce qui présuppose bien évidemment que

⁷⁴ CR 2013/25, p. 12 et 14, par. 20 et 25 (Argüello), p. 32, par. 58 (Reichler).

⁷⁵ CR 2013/25, p. 17, par. 40 (Argüello), p. 29, par. 44 (Reichler).

l'équipement aussi. En sus des raisons déjà invoquées lundi, cette nouvelle interprétation du défendeur justifie déjà amplement l'indication de la deuxième nouvelle mesure conservatoire [fin de la projection n° 3].

12. La troisième mesure conservatoire a aussi écopé d'une mauvaise interprétation par la Partie nicaraguayenne⁷⁶. Vous avez le texte à l'écran [projection n° 4].

13. J'ai déjà expliqué pourquoi cette mesure ne supplante ni ne modifie la deuxième mesure conservatoire que vous avez ordonnée en 2011. Il s'agit d'une mesure spécifique qui concerne exclusivement les deux «caños» récemment construits par le Nicaragua et qui vise uniquement à remédier à ce que le Nicaragua a fait, avant que l'action des eaux ne s'ajoute à l'action humaine. Monsieur le président, le Costa Rica a été en contact permanent avec le secrétariat de la convention de Ramsar depuis le début de ce malheureux différend. Non seulement le Gouvernement costa-ricain ne souhaite pas se passer de cette collaboration, mais il souhaite au contraire s'appuyer sur cette efficace assistance pour les travaux nécessaires de restauration dans la zone humide qui a subi la construction des deux canaux. La troisième mesure demandée doit s'appliquer, comme toutes les autres, dans le cadre du respect des mesures que vous avez indiquées en 2011 et qui gardent toute leur valeur. Le Costa Rica ne manquera pas de respecter votre deuxième mesure conservatoire, tant vis-à-vis du secrétariat de la convention de Ramsar, que de votre Cour elle-même et du Nicaragua.

14. M^e Reichler a estimé que mon explication sur les travaux de restauration nécessaires étaient des «big plans for the disputed area, which would have a very great impact on Nicaragua if the requested provisional measures were indicated»⁷⁷. Il n'a pas expliqué, et c'est une interrogation que je me pose, par ailleurs, quels seraient les véritables effets majeurs sur le Nicaragua si le Costa Rica entreprenait des travaux pour remédier à ce que le Nicaragua a fait lui-même en construisant deux canaux alors qu'il n'aurait pas dû, de son propre aveu, le faire.

15. Il a aussi été question du besoin d'utiliser le fleuve San Juan pour atteindre la zone des deux nouveaux canaux⁷⁸. Il s'agit pratiquement — je le répète — de la seule manière d'y accéder,

⁷⁶ CR 2013/25, p. 12-13, par. 21 et p. 15, par. 27 (Argüello), p. 32-33, par. 59 (Reichler), p. 40, par. 18 (McCaffrey), p. 53, par. 27 (Pellet).

⁷⁷ CR 2013 /25, p. 33, par. 60 (Reichler).

⁷⁸ CR 2013/25, p. 40, par. 18 (McCaffrey).

compte tenu de la nature du terrain, qui rend difficile, voire impossible, d'arriver par voie terrestre ou même par hélicoptère. J'ai dit qu'il ne s'agit pas de se prononcer sur une question qui relève du fond, mais bien de permettre d'accéder à la région par voie aquatique, en vue d'effectuer ces travaux, sans préjuger des positions des Parties *pendente lite*. Et je me demande, par ailleurs, quel serait le problème que poserait au Nicaragua la présence de ces navires sur le San Juan ? [Fin de la projection n° 4.] [Projection n° 5.]

16. La quatrième mesure demandée n'appelle pas beaucoup de commentaires. Elle contient, comme il est de rigueur, une obligation pour les Parties d'informer la Cour sur l'exécution des mesures ordonnées. Et compte tenu de l'urgence, le Costa Rica prie respectueusement la Cour de fixer un délai bref d'une semaine pour fournir cette information [fin de la projection n° 5].

B. Les «assurances» nicaraguayennes à la lumière de la jurisprudence de la Cour

17. J'en viens maintenant à un point dont tous les orateurs d'hier ont fait grand cas, ce qui s'accommode bien à une, disons, certaine stratégie procédurale soigneusement choisie. Cette stratégie qu'on pourrait appeler «la stratégie des assurances», la voilà : le président Ortega a ordonné la cessation des travaux et le retrait du matériel. Le Nicaragua s'engage à ne pas poursuivre des travaux et à respecter les mesures conservatoires. Donc, les mesures demandées par le Costa Rica sont inutiles, superflues, sans intérêt pratique, «moot»⁷⁹.

18. Mon bon collègue et ami Pellet a fondé cette prétention en comparant les «assurances» nicaraguayennes de dernière minute à ce que votre Cour a fait dans le cadre d'autres demandes de mesures conservatoires. Le conseil du Nicaragua a malheureusement oublié certains éléments des affaires qu'il a mentionnées et qui méritent d'être évoqués ici.

19. Il a commencé d'une manière qui me semble tout à fait pertinente pour arriver à la conclusion contraire à sa démonstration. Il a commencé par notre affaire et par la première demande costa-ricienne de mesures conservatoires. Mon estimé collègue a rappelé que, dans la mesure où le Nicaragua avait en 2011 informé la Cour que les travaux dans la zone du «caño» avaient pris fin, celle-ci en avait pris note et avait estimé que certaines mesures demandées par le

⁷⁹ CR 2013/25, p. 21, par. 13 (Argüello), p. 26, par. 32 (Reichler), p. 34, par. 1 (McCaffrey), p. 42, par. 1 4) et p. 56, par. 33 (Pellet).

Costa Rica n'étaient donc pas nécessaires⁸⁰. Eh bien, que s'est-il passé Monsieur le président ? Nous le savons bien maintenant et ceci n'est même pas controversé. Les travaux nicaraguayens ont malheureusement repris, certes un peu plus loin, mais dans la zone litigieuse. Ce petit «détail», le fait que malgré les assurances de nouveaux travaux ont été entrepris par le Nicaragua fait, me semble-t-il, Mesdames et Messieurs les juges, toute la différence. Et rend «moot», pour utiliser l'anglais comme le fait mon collègue français, les «assurances» nicaraguayennes.

20. Le conseil nicaraguayen a également cité à l'appui de son argumentation les demandes de mesures conservatoires dans les affaires *Certaines procédures pénales engagées en France*⁸¹, *Usines de pâte à papier*⁸², et *Obligation de poursuivre et d'extrader*⁸³. Des différences entre ces affaires et la nôtre sont à relever, Monsieur le président. Dans ces trois affaires, il s'agissait de la première fois que l'une des parties demandait des mesures conservatoires. Ici, vous avez déjà ordonné des mesures conservatoires que l'une des Parties n'a pas respectées et dont les nouveaux agissements motivent une nouvelle demande de mesures conservatoires.

21. Pour sa part, dans l'affaire *Hissène Habré*, c'était la Belgique elle-même qui avait indiqué à la Cour :

«qu'une déclaration solennelle prononcée devant la Cour par l'agent du Sénégal au nom de son gouvernement pourrait suffire à la Belgique pour considérer que sa demande en indication de mesures conservatoires n'aurait plus d'objet, si ladite déclaration était claire et sans condition, et qu'elle garantissait que toutes les mesures nécessaires seraient prises par le Sénégal pour que M. Habré ne quitte pas le territoire sénégalais tant que la Cour n'aurait pas rendu sa décision définitive ; et que la Belgique a précisé souhaiter que, si une telle déclaration était faite, la Cour la reprenne dans le dispositif de l'ordonnance qu'elle serait amenée à rendre»⁸⁴.

22. Comme vous le savez, Monsieur le président, le Costa Rica a proposé vendredi dernier au Nicaragua de constater un accord au respect des mesures conservatoires demandées et que la

⁸⁰ CR 2013/25, p. 49, par. 18 (Pellet).

⁸¹ *Certaines procédures pénales engagées en France (République du Congo c. France), mesures conservatoires, ordonnance du 17 juin 2003, C.I.J. Recueil 2003, p. 109-110, par. 33-35.*

⁸² *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006, p. 134, par. 83-84.*

⁸³ *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009, p. 155, par. 2.*

⁸⁴ *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009, p. 146, par. 33.*

Cour le reprenne dans une ordonnance, ce qui aurait d'ailleurs évité cette procédure orale, mais le Nicaragua a refusé cette proposition.

23. Pour sa part, l'affaire relative à *Certaines procédures pénales* concernait des prétendues menaces aux immunités d'un chef d'Etat, et la France a tout simplement expliqué devant votre Cour qu'il n'y avait aucun risque dans son système juridique de ne pas reconnaître l'immunité du président congolais. Je cite le conseil et agent de la France : «Ce n'est pas une promesse, c'est un constat d'ordre juridique»⁸⁵. Une situation, vous en conviendrez Mesdames et Messieurs les juges, bien distincte de celle d'un Etat qui a accompli des actes de dégradation physique d'un territoire soumis à une mesure conservatoire et qui vient maintenant vous dire et nous dire, qu'il ne le fera plus.

24. Les conseils nicaraguayens ont cité à plusieurs reprises votre ordonnance dans l'affaire du *Plateau continental de la mer Egée*. Ils n'ont pourtant pas remarqué un passage qui semble très pertinent pour notre affaire. Votre Cour, en examinant les raisons pour ne pas indiquer des mesures conservatoires dans l'affaire gréco-turque, signalait «que l'on ne s'est pas plaint de ce que ce genre d'exploration sismique risquait de causer un quelconque dommage physique au lit de la mer, à son sous-sol, ou à leurs ressources naturelles»⁸⁶. Eh bien, Monsieur le président, dans notre cas on s'est plaint et le dommage physique est avéré. Il suffit de regarder l'une quelconque des photographies qui illustrent cette demande en indication de mesures conservatoires.

25. Voilà donc la jurisprudence que le Nicaragua a citée et qui, de toute évidence, ne conforte pas sa position. Elle conforte plutôt les besoins d'indiquer des nouvelles mesures conservatoires.

26. Pour toutes les raisons que nous vous avons indiquées, y compris le fait que des simples assurances nicaraguayennes ne peuvent pas empêcher le risque de préjudice irréparable créé par la construction et l'existence de deux nouveaux «caños», les «assurances» nicaraguayennes ne sont pas recevables comme motif pour écarter la présente demande en indication de mesures conservatoires.

⁸⁵ *Certaines procédures pénales engagées en France, mesures conservatoires, ordonnance du 17 juin 2003, C.I.J. Recueil 2003, p. 110, par. 33.*

⁸⁶ *Plateau continental de la mer Egée (Grèce c. Turquie), mesures conservatoires, ordonnance du 11 septembre 1976, C.I.J. Recueil 1976, p. 10, par. 30.*

C. Les observations orales nicaraguayennes rendent plus impérieuse l'indication de nouvelles mesures conservatoires

27. Monsieur le président, Mesdames et Messieurs les juges, les exposés oraux d'hier n'ont non seulement pas écarté le besoin d'indiquer de nouvelles mesures conservatoires, ils ont, je dirais même, malheureusement, ajouté de nouveaux éléments qui rendent plus pressante encore l'indication par votre Cour de ces mesures. Hier, nous avons appris que le commandant Edén Pastora, ne savait pas où se trouvait le territoire litigieux. Cela fait deux ans et demi que vous avez indiqué des mesures et le responsable nicaraguayen qui dirige les travaux sur le fleuve San Juan ne savait pas où se trouvait le territoire litigieux ! Hier, Monsieur le président, nous avons aussi appris que la partie nord de Isla Portillos jouxtant la mer serait nicaraguayenne. Mon collègue James Crawford vous a déjà expliqué la situation de la bande de sable qui, de toute évidence, n'est pas la plage de Isla Portillos. Hier, M^e Reichler vous a confirmé qu'il y a des installations militaires nicaraguayennes sur cette plage et qu'il n'y a aucune raison de les retirer parce qu'il s'agit du territoire nicaraguayen⁸⁷.

28. Le Nicaragua n'a par ailleurs donné aucune information concrète sur son prétendu retrait du territoire litigieux où il a construit les deux nouveaux canaux, mais nous savons maintenant que le Nicaragua se croit en droit de rester sur la plage de Isla Portillos et y reste. Laissons pour le fond la discussion sur la souveraineté. Nous discutons maintenant des mesures conservatoires. Incontestablement, la plage fait partie du territoire litigieux objet de vos mesures conservatoires. La prétention du Nicaragua, formulée hier même devant vous, aggrave le risque de poursuite des travaux pour relier les nouveaux canaux à la mer des Caraïbes, pose de sérieux risques qui vont bien au-delà de questions environnementales, comme vous l'avez déjà signalé au paragraphe 75 de votre ordonnance du 8 mars 2011⁸⁸ et rendent même plus urgent l'indication de mesures conservatoires.

29. Monsieur le président, la Partie adverse vous dit que tout ce qui motive notre demande n'est pas si grave, que les dommages sont «mineurs» et pas irréparables et que les travaux sont en tout état de cause «incomplets» mais qu'ils ne seront pas poursuivis. Mais, Mesdames et Messieurs

⁸⁷ CR 2013/25, p. 29, par. 44 (Reichler).

⁸⁸ *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011 (I), p. 24, par. 75.*

les juges, avez-vous reçu une quelconque information en provenance du Nicaragua, en particulier des auteurs de ces travaux en territoire litigieux ? Quel était le but de ces canaux ? Où est le rapport de M. Pastora ou de l'autorité nationale portuaire sur ce qu'ils ont entrepris entre août et au moins — selon le Nicaragua — le 23 septembre 2013 ? Le Nicaragua, qui fait prétendument grand cas des études d'impact environnemental, n'a rien — absolument rien — montré à cet égard.

30. Si ces deux *caños* sont incomplets, ont été faits sans aucune autorisation et en définitive, à en croire nos contradicteurs, seraient sans importance, je pose alors la question suivante : où est le problème pour le Nicaragua d'accepter que des travaux visant à restaurer autant que possible la situation préexistante soient effectués ?

31. Mon collègue Alain Pellet a affirmé que le Costa Rica cherche un «blanc-seing» pour entrer en territoire litigieux. Mais qui cherche ce blanc-seing, Monsieur le président ? La demande nicaraguayenne de *non-indication de mesures conservatoires* ne ressemble-t-elle pas à une demande de laisser tout comme le Nicaragua l'a laissé ? Le défendeur vous suggère en fin de compte de le blâmer un peu, si vous voulez, dans les motifs de votre ordonnance peut-être, mais surtout de ne rien ordonner de nouveau en attendant l'arrêt sur le fond. Laisser les *caños* où ils sont et laisser faire la nature, voire l'humain, qui sait. Voilà en résumé, le message nicaraguayen.

32. Il y a dans cette position nicaraguayenne un sérieux oubli, ou plutôt, mépris, de la fonction des mesures conservatoires et de la façon dont les parties doivent se comporter *pendente lite*. C'est de cela, Mesdames et Messieurs les juges, rien de plus, rien de moins, dont il est question ici. Le Costa Rica ne veut pas et ne doit pas recouvrer un territoire morcelé, coupé par des canaux, et inondé par l'action de la Partie adverse durant la procédure en cours. Ce n'est pas comme cela qu'on protège les droits des parties en attendant l'arrêt sur le fond.

33. Le Costa Rica devrait-il attendre jusqu'à la fin d'une procédure, dont on ignore même quand elle adviendra, et subir les aléas naturels et humains qui pourraient intervenir sur ce territoire dont la géographie vient d'être modifiée par l'autre Partie ? La réponse, Mesdames et Messieurs les juges, s'avère négative.

34. Il y va de la notion même des mesures conservatoires, du comportement des parties durant la procédure, des droits des parties dans l'attente de l'arrêt sur le fond et du pur et simple respect de la fonction judiciaire.

35. Je vous remercie de l'attention que vous m'avez portée et vous prie, Monsieur le président, de bien vouloir donner la parole à l'agent du Costa Rica pour présenter ses conclusions.

Le PRESIDENT : Merci, Monsieur le professeur. I give now the floor to Ambassador Ugalde Álvarez, Agent for the Government of Costa Rica. You have the floor, Sir.

Mr. ÁLVAREZ:

CONCLUSIONS AND SUBMISSIONS

1. Mr. President, distinguished Members of the Court, I am honoured to appear before you to close Costa Rica's oral argument on this Request for New Provisional Measures.

2. Professors Crawford and Kohen have explained today that the conditions for the indication of new provisional measures set out in Article 41 of the Court's Statute are satisfied. Article 41 gives you the power to indicate "any provisional measures which ought to be taken to preserve the respective rights of either party".

3. They have also explained why Costa Rica considers that Nicaragua's belated explanations and false promises do not provide sufficient protection of Costa Rica's rights. Nicaragua's assurances do not provide Costa Rica any comfort, and they should not provide any comfort to the Court. Yesterday Nicaragua told you in one breath that it had breached your 2011 Order; it told you in the next that its word is to be trusted, that it fully complies with your decisions. And as the new images Costa Rica has been able to present to the Court today demonstrate beyond doubt, the measures Costa Rica requests are urgently needed to prevent irreparable prejudice to its rights. In these circumstances, the requested measures are not to punish Nicaragua; the consequences of its breach of your Order will be a matter for you on the merits. Costa Rica merely asks the Court to exercise its power to preserve and protect Costa Rica's rights; rights which are at imminent risk of being irreparably harmed.

4. Mr. President, distinguished Members of the Court, I will proceed to read out the submissions presented to the Court on behalf of Costa Rica.

5. Costa Rica requests the Court to order the following provisional measures:

- (1) the immediate and unconditional suspension of any work by way of dredging or otherwise in the disputed territory, and specifically the cessation of work of any kind on the two further artificial *caños* in the disputed territory, as shown in the satellite images attached as Attachment PM-8;
- (2) that Nicaragua immediately withdraw any personnel, infrastructure (including lodging tents) and equipment (including dredgers) introduced by it, or by any persons under its jurisdiction or coming from its territory, from the disputed territory;
- (3) that Costa Rica be permitted to undertake remediation works in the disputed territory on the two new artificial *caños* and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory; and
- (4) that each Party shall immediately inform the Court as to its compliance with the above provisional measures not later than one week of the issuance of the Order.

6. Mr. President, Members of the Court, allow me to express my thanks to you for your attention, as well as to the interpreters, the staff of the Court and the Registry, and to all those who have contributed to the smooth performance of our task. Thank you.

The PRESIDENT: Thank you very much, Ambassador Álvarez. This brings to an end the second round of oral argument of Costa Rica. The Court will meet again tomorrow at 10 a.m. to hear the second round of oral argument of Nicaragua. The Court expects that Nicaragua will provide oral answers to questions of Judges Donoghue and Gaja sent yesterday, because these questions are formulated on the basis of information available to the Court as of yesterday. If Costa Rica wishes to provide brief comments on answers of Nicaragua, the Court will reconvene tomorrow from 12.30 p.m. until 1 p.m. The sitting is closed.

The Court rose at 11.25 a.m.
