

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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)

REQUEST PRESENTED BY COSTA RICA FOR THE INDICATION
OF NEW PROVISIONAL MEASURES

ORDER OF 22 NOVEMBER 2013

2013

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA
DANS LA RÉGION FRONTALIÈRE

(COSTA RICA *c.* NICARAGUA)

CONSTRUCTION D'UNE ROUTE AU COSTA RICA
LE LONG DU FLEUVE SAN JUAN

(NICARAGUA *c.* COSTA RICA)

DEMANDE EN INDICATION DE NOUVELLES MESURES
CONSERVATOIRES PRÉSENTÉE PAR LE COSTA RICA

ORDONNANCE DU 22 NOVEMBRE 2013

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22 November 2013

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ORDER

Present: President TOMKA; Vice-President SEPÚLVEDA-AMOR; Judges OWADA, KEITH, BENNOUNA, SKOTNIKOV, CAÑADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI; Judges ad hoc GUILLAUME, DUGARD; Registrar COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed in the Registry of the Court on 18 November 2010, the Government of the Republic of Costa Rica (hereinafter “Costa Rica”) instituted proceedings against the Government of the Republic of Nicaragua (hereinafter “Nicaragua”) for “the incursion into, occupation of and use by Nicaragua’s army of Costa Rican territory”, as well as for “serious damage inflicted to its protected rainforests and wetlands”, “damage intended [by Nicaragua] to the Colorado River” and “the dredging and canalization activities being carried out by Nicaragua on the San Juan River” (case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, hereinafter the “*Costa Rica v. Nicaragua* case”). According to Costa Rica, Nicaragua’s actions included the construction of a canal (referred to in Spanish as “caño”) across Costa Rican territory from the San Juan River to Laguna los Portillos.

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

3. By an Order of 8 March 2011 made in that case (hereinafter the “Order of 8 March 2011”), the Court indicated the following provisional measures to both Parties:

- “(1) Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security;
- (2) Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;
- (3) Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;
- (4) Each Party shall inform the Court as to its compliance with the above provisional measures.” (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, pp. 27-28, para. 86.)

4. By an Order of 5 April 2011, the Court fixed 5 December 2011 and 6 August 2012 as the respective time-limits for the filing in the case of a

Memorial by Costa Rica and a Counter-Memorial by Nicaragua. The Memorial and the Counter-Memorial were filed within the time-limits thus prescribed.

5. At a meeting held by the President of the Court with the representatives of the Parties on 19 September 2012, the Parties agreed not to request the Court's authorization to file a Reply and a Rejoinder in the *Costa Rica v. Nicaragua* case.

6. By an Application filed with the Registry of the Court on 22 December 2011, Nicaragua instituted proceedings against Costa Rica for "violations of Nicaraguan sovereignty and major environmental damages on its territory", contending, in particular, that Costa Rica was undertaking "major works . . . a few metres from the border area" between the two countries along the San Juan River in the context of the construction of a new road (case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, hereinafter the "*Nicaragua v. Costa Rica* case"). Further, Nicaragua, in its Application, claimed that the new road caused ongoing damage to the river, on a large scale, "by the impetus it inevitably gives to agricultural and industrial activities".

7. By an Order of 23 January 2012, the Court fixed 19 December 2012 and 19 December 2013 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Costa Rica in this latter case. The Memorial was filed within the time-limit thus prescribed.

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

9. By two separate Orders dated 17 April 2013, the Court joined the proceedings in the *Costa Rica v. Nicaragua* and *Nicaragua v. Costa Rica* cases.

10. On 23 May 2013, Costa Rica, with reference to Article 41 of the Statute of the Court and Article 76 of the Rules of Court, filed with the Registry a request for the modification of the Order of 8 March 2011 (see paragraph 3 above). In its written observations thereon, Nicaragua asked the Court to reject Costa Rica's request, while in its turn requesting the Court to modify or adapt the Order of 8 March 2011 on the basis of Article 76 of the Rules of Court.

11. By an Order of 16 July 2013, the Court found that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011. The Court however reaffirmed the provisional measures indicated on 8 March 2011, in particular the requirement that

the Parties “shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve”.

12. On 24 September 2013, Costa Rica, with reference to Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court, filed with the Registry a request for the indication of new provisional measures in the *Costa Rica v. Nicaragua* case, dated 23 September 2013. Costa Rica specified that it did not seek the modification of the Order of 8 March 2011, but rather that its request was “an independent [one] based on new facts”.

13. In its request, Costa Rica stated that, since the Court’s Order of 16 July 2013 on the Parties’ requests to modify the measures indicated in its Order of 8 March 2011, it had found out about “new and grave activities by Nicaragua in the disputed territory”, through satellite imagery of that area. In particular, Costa Rica contended that Nicaragua had commenced construction of two new artificial *caños* in the disputed territory. Both *caños* were located, according to the Applicant, in the northern part of the disputed territory, the larger of the two being that to the east (hereinafter the “eastern *caño*”).

14. Costa Rica further stated in its request that, following its discovery of these two new *caños*, it had “immediately protested to Nicaragua” by letter dated 16 September 2013. In that letter, it had requested that Nicaragua at once cease all construction activities in the disputed territory, provide an explanation regarding its activities and the presence of Nicaraguan equipment and personnel in the disputed territory, and keep the disputed territory clear of any persons coming from its territory. Costa Rica asserted that Nicaragua, in a letter in reply dated 18 September 2013, had “refused to immediately cease its construction activities”, even “going so far as to deny the existence of the new artificial *caños* in the face of incon[tr]vertible evidence in satellite images”.

15. At the end of its request for the indication of new provisional measures, Costa Rica asked the Court:

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

- (1) the immediate and unconditional suspension of any work by way of dredging or otherwise in the disputed territory, and specifically the cessation of work of any kind on the two further artificial *caños* in the disputed territory, as shown in the satellite images attached as Attachment PM-8 [to the request];
- (2) that Nicaragua immediately withdraw any personnel, infrastructure (including lodging tents) and equipment (including dredgers)

introduced by it, or by any persons under its jurisdiction or coming from its territory, from the disputed territory;

- (3) that Costa Rica be permitted to undertake remediation works in the disputed territory on the two new artificial *caños* and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory; and
- (4) that each Party shall immediately inform the Court as to its compliance with the above provisional measures not later than one week of the issuance of the Order”.

Costa Rica added that it “reserve[d] its right to amend [the] request and the measures sought in light of further information which [might] be received as to Nicaragua’s unilateral plans and actions”.

16. The Registrar immediately communicated a copy of the said request to the Government of Nicaragua. The registrar also notified the Secretary-General of the United Nations of the filing of the request for the indication of new provisional measures by Costa Rica.

17. At the public hearings held on 14, 15, 16 and 17 October 2013, in accordance with Article 74, paragraph 3, of the Rules of Court, oral observations on the request for the indication of new provisional measures were presented by:

On behalf of Costa Rica: H.E. Mr. Edgar Ugalde Alvarez, *Agent*,
Mr. Sergio Ugalde, *Co-Agent*,
Mr. Samuel Wordsworth,
Mr. James Crawford,
Mr. Marcelo Kohen.

On behalf of Nicaragua: H.E. Mr. Carlos José Argüello Gómez, *Agent*,
Mr. Paul S. Reichler,
Mr. Stephen C. McCaffrey,
Mr. Alain Pellet.

18. During the hearings, questions were put by some Members of the Court to Nicaragua, to which replies were given orally; Costa Rica availed itself of its right to comment orally on those replies.

19. At the end of its second round of oral observations, Costa Rica asked the Court to indicate provisional measures in the same terms as included in its request (see paragraph 15 above).

20. At the end of its second round of oral observations, Nicaragua stated the following:

“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 Costa Rica and its oral pleadings, the Republic of Nicaragua respectfully submits that,

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

* * *

I. PRIMA FACIE JURISDICTION

21. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Order of 28 May 2009*, *I.C.J. Reports 2009*, p. 147, para. 40).

22. Costa Rica seeks to found the jurisdiction of the Court in this case on Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948. In addition, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 (as amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court.

23. The Court recalls that, in its Order of 8 March 2011, it found that “the instruments invoked by Costa Rica appear, *prima facie*, to afford a basis on which the Court might have jurisdiction to rule on the merits, enabling it to indicate provisional measures if it considers that the circumstances so require” (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, p. 18, para. 52). Moreover, the Court notes that, within the time-limit set out in Article 79, paragraph 1, of the Rules of Court, Nicaragua did not raise any objection to the jurisdiction of the Court. In these circumstances, the Court considers that it may entertain the present request for the indication of new provisional measures.

II. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE MEASURES REQUESTED

24. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective

rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible (see, for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, p. 18, para. 53).

25. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought (*ibid.*, para. 54).

26. The rights which Costa Rica seeks to protect are the rights it claims to sovereignty over the territory which it refers to as Isla Portillos, to territorial integrity and its right to protect the environment in those areas over which it is sovereign. These rights are at issue because Nicaragua, for its part, contends that it holds the title to sovereignty over the northern part of Isla Portillos, that is to say, the area identified as the “disputed territory” in paragraph 55 of the Court’s Order of 8 March 2011.

27. At this stage of the proceedings, the Court does not need to settle the Parties’ claims to sovereignty over the disputed territory and is not called upon to determine definitively whether the rights which Costa Rica wishes to see protected exist, or whether those which Nicaragua considers itself to possess exist. For the purposes of considering the present request for the indication of new provisional measures, the Court need only decide whether the rights claimed by Costa Rica on the merits, and for which it is seeking protection, are plausible.

28. As the Court stated in its Order of 8 March 2011, while “the provisional measures it may indicate would not prejudge any title”, it appears “that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible” (*ibid.*, p. 19, para. 58). The Court sees no reason to depart from this conclusion in the context of Costa Rica’s present request. Moreover, to the extent that Costa Rica’s claimed title is plausible, the Court considers that any future environmental harm caused in the disputed territory would infringe Costa Rica’s alleged territorial rights. The Court therefore finds that the rights for which Costa Rica seeks protection are plausible.

29. The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

30. The first provisional measure requested by Costa Rica is aimed at ensuring the immediate and unconditional suspension of dredging or other activity, and specifically the cessation of work of any kind on the two new *caños* in the disputed territory. In this regard, Costa Rica has called the Court’s attention to the possible effect of the construction of

these two *caños* on the disputed territory and on the course of the San Juan River. This construction could affect Costa Rica's rights of sovereignty, as well as environmental rights connected thereto, to be adjudged on the merits. Therefore, a link exists between Costa Rica's claimed rights and the first provisional measure being sought.

31. The second provisional measure requested by Costa Rica is that Nicaragua immediately withdraw from the disputed territory 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. In this regard, the Court considers that the presence of Nicaraguan personnel, infrastructure and equipment on the disputed territory would be likely to affect the rights of sovereignty which might be adjudged on the merits to belong to Costa Rica. Therefore, a link exists between Costa Rica's claimed rights of sovereignty and the second provisional measure being sought.

32. The third provisional measure sought by Costa Rica is aimed at ensuring that Costa Rica be permitted to undertake remediation works in the disputed territory on the two new *caños* and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory. In the view of the Court, a link exists between Costa Rica's claimed rights of sovereignty over the disputed territory and the third provisional measure sought.

33. The fourth provisional measure requested by Costa Rica is that each Party shall inform the Court as to its compliance with any provisional measures that may be indicated by the Court, not later than one week from the issuance of the Order. This request, which supplements the first three, does not aim to protect Costa Rica's rights but rather seeks to ensure compliance with any provisional measures indicated by the Court. There is therefore no need to establish a link between Costa Rica's claimed rights and the fourth measure sought.

III. RISK OF IRREPARABLE PREJUDICE AND URGENCY

34. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of the judicial proceedings (see, for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, p. 21, para. 63).

35. The power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in

dispute before the Court has given its final decision (*I.C.J. Reports 2011 (I)*), pp. 21-22, para. 64). The Court must therefore consider whether such a risk exists in these proceedings.

* *

36. Costa Rica states that Nicaragua, through its construction and ongoing dredging of the *caños*, has sought unilaterally to modify, to its own benefit, the location and configuration of the San Juan River. According to Costa Rica these activities of Nicaragua create a real and imminent risk of irreparable prejudice to its rights. In support of its arguments, Costa Rica submitted two expert reports.

In that context, Costa Rica refers, in particular, to a trench on the beach to the north of the eastern *caño*, already visible in an aerial photograph taken on 18 September 2013, arguing that Nicaragua has been intent on artificially cutting across the beach with this trench, thus connecting the eastern *caño* to the Caribbean Sea in an attempt to create a new course for the San Juan River. It submits that, between 18 September 2013 and 5 October 2013, the works on the beach progressed to such an extent that the distance between the end of the trench and the sea was reduced to only seven metres.

Moreover, Costa Rica maintains that, during the same period, a new entrance to the eastern *caño* from the San Juan River was created.

37. Costa Rica argues that, although the dredging operations have been carried out under the direction of an individual, Mr. Pastora, Nicaragua is responsible for these works because Mr. Pastora was working with the National Port Authority and the Nicaraguan military was aware of his activities. According to Costa Rica, Mr. Pastora was appointed by the President of Nicaragua and his activities were approved by the Nicaraguan Ministry of Environmental and Natural Resources. Moreover, Costa Rica adds that Mr. Pastora himself said that he was conducting the operations under the instructions of the Nicaraguan Government.

38. Costa Rica further asserts that the presence of Nicaraguan nationals in the disputed territory, including members of Nicaragua's armed forces, risks causing further irreparable prejudice to Costa Rica's rights which are the subject of the present case. Costa Rica contends that Nicaragua's encampment near the eastern *caño* is a military encampment located in the disputed territory, i.e., in the territory between the right bank of the San Juan River and the Harbor Head Lagoon.

39. Finally, Costa Rica argues that remedial activities are necessary to avoid the risk of a shift in the San Juan River. It maintains that, if the course of the river were altered, it would be extremely difficult, perhaps impossible, to shift it back through civil engineering works, and that any such works would, in any event, be likely to cause environmental damage. It affirms that there is urgency because the rainy season is beginning, dur-

ing which the river flow will be at its highest, causing erosion and a potential switch in the alignment of the river from its natural course. According to Costa Rica, the works on the eastern *caño* are so advanced that there is a risk of a diversion of the course of the San Juan River. In addition to the risk presented by natural forces, Costa Rica refers to the risk of the San Juan River being diverted if Nicaragua should continue its dredging operations or proceed to enlarge further the trench next to the eastern *caño*.

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40. Nicaragua asserts that the two expert reports provided by Costa Rica both concluded that the course of the San Juan River could be altered only if the digging of the trench were to continue so as to connect the eastern *caño* to the sea. According to Nicaragua, all of Costa Rica's claims concerning irreparable prejudice are predicated on the assumption that the work on the *caños* will continue and result in the breaching of the barrier between the eastern *caño* and the Caribbean Sea. Nicaragua acknowledges that the trench has been dug next to the eastern *caño*, and that it could be extended seawards without significant effort. However, Nicaragua underlines the fact that, pursuant to instructions issued by the President of Nicaragua, Mr. Daniel Ortega, on 21 September 2013, all work on the *caños* and the beach, including work on the trench, has ceased. Although Nicaragua does not deny that dredging activities have occurred prior to this date, it argues that since those activities have now ceased and will not resume, there is no real and imminent risk that irreparable prejudice will be caused to Costa Rica's claimed rights before the Court has given its final decision.

With respect to the new entrance to the eastern *caño* which Costa Rica claims is visible on the image of 5 October 2013, Nicaragua argues that, if such a new entry does exist, it is miniscule and not of a size likely to divert a sufficient flow of the river and to trigger the scouring of the *caño* or carving of a new route to the sea.

Regarding the trench, which appears enlarged on the image of 5 October 2013, Nicaragua argues that the danger claimed by Costa Rica would only become real if the trench were completed.

41. Nicaragua maintains that it did not send Mr. Pastora to the disputed territory or authorize him to conduct dredging there, and that it became aware of his activities only on 18 September 2013. It acknowledges that Mr. Pastora was observed by its military but states that those who observed him may have assumed that he was authorized to be in the area. According to Nicaragua, any responsibility it might have for Mr. Pastora's actions cannot be determined at the provisional measures stage.

42. Referring to the presence of personnel and equipment in the disputed territory, Nicaragua points out that, as soon as it verified that there

had been an unauthorized entry into the disputed territory, President Ortega, on 21 September 2013, gave an instruction for the immediate withdrawal of all personnel, infrastructure and equipment, and that all such personnel, infrastructure and equipment were immediately removed in accordance with this instruction. Moreover, Nicaragua argues that it has the right to station troops, or anyone else, on what it describes as a sand bank running along the beach in front of the disputed territory. In response to a question from a Member of the Court, Nicaragua states that it understands the beach north of the two new *caños* to be “the sand bank, or island, that has always been considered part of Nicaraguan undisputed territory”.

43. Nicaragua contends that remediation works are not necessary since, even in the absence of any such works, the silting from the San Juan River would find its way into the *caños* and eventually fill them with mud, to the point where they will dry up. Nicaragua states, moreover, that it is willing to fill the trench on the beach back up again, and that this could be completed within a few days.

* *

44. The Court observes that, since its Order of 16 July 2013 on the requests for the modification of the Order of 8 March 2011 indicating provisional measures (see paragraph 11 above), there has been a change in the situation in the disputed territory. This territory was identified by the Court in its Order of 8 March 2011 as follows: “the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the [2011] disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon” (*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). The evidence submitted to the Court shows that two new *caños* have been built in that territory. The satellite images submitted by Costa Rica demonstrate that while, on 30 June 2013, there was no evidence of the existence of any *caños* in the northern part of the disputed territory, on 5 September 2013, two new *caños* were clearly visible. Furthermore, the photograph of 18 September 2013 presented by Costa Rica depicts a shallow trench which begins at the seaward end of the eastern *caño*. It is apparent from the satellite image of 5 October 2013 that this trench has been extended and currently cuts across the beach, with only a narrow stretch of sand separating it from the sea. Nicaragua furthermore recognizes the existence of the two new *caños* and the trench, although it states that all work relating to these features stopped following President Ortega’s instructions of 21 September 2013.

45. Nicaragua admits that the dredging operations for the construction of the *caños* were carried out by a group of its nationals led by Mr. Pas-

tora, in the context of the implementation of a project for the improvement of navigation on the San Juan River. This project, which, according to the Report of the National Port Authority, was designed “to guarantee the natural flow of the San Juan River into the river mouth Delta”, included the “use of a suction dredger”. It was approved by the Nicaraguan Ministry of Environmental and Natural Resources. Mr. Pastora was appointed by the President of Nicaragua to carry out this project and was addressed by the National Port Authority as “Government Delegate for Dredging Works”.

46. The Court further notes that the evidence submitted to it establishes the presence in the disputed territory of Nicaraguan personnel carrying out dredging operations, as well as infrastructure (including lodging tents), and equipment (including dredgers). In addition, the Court notes that the presence of a Nicaraguan army encampment on the beach is visible on a photograph dated 5 February 2013; thus, at least since that date, Nicaraguan military personnel have been stationed there. Nicaragua acknowledges the presence of its military encampment on the beach north of the two new *caños* which it understands to be a sand bank (see paragraph 42 above). The Court considers however that, contrary to what Nicaragua alleges, this encampment is located on the beach and close to the line of vegetation, and is therefore situated in the disputed territory as defined by the Court in its Order of 8 March 2011 (see paragraph 44 above). The ongoing presence of this encampment is confirmed by the satellite images of 5 and 14 September 2013 and the photograph of 18 September 2013.

47. With regard to the presence, in the disputed territory, of Nicaraguan nationals, other than those referred to in operative paragraph 1 of its Order of 8 March 2011 (see paragraph 3 above), the Court has already expressed its concerns in this respect in its Order of 16 July 2013. In particular, the Court referred to members of the Guardabarranco Environmental Movement, an entity which Nicaragua describes as a private movement whose main objective is to implement environmental conservation programmes and projects. The Court considered that their presence carried the risk of incidents which could aggravate the dispute, given that the situation may be exacerbated by the limited size of the area and the numbers of Nicaraguan nationals who were regularly present there (Order of 16 July 2013, para. 37). The continuing access of the members of the Guardabarranco to the disputed territory is referred to, in particular, in a diplomatic Note addressed on 16 September 2013 by the Costa Rican Minister for Foreign Affairs to his Nicaraguan counterpart.

*

48. The Court now turns to the question of whether the situation in the disputed territory, and in particular, the *caños* and the trench as they

currently stand, pose a risk of irreparable prejudice to the rights claimed by Costa Rica.

49. It observes that, while the two expert reports provided by Costa Rica and prepared in October 2013 concluded that the course of the San Juan River could be altered only if the digging of the trench next to the eastern *caño* were to continue, that assessment was made on the basis of information regarding the trench as shown on the satellite images taken on 5 and 14 September 2013 and in the photograph taken on 18 September 2013. However, in view of the length, breadth and position of that trench, as visible on the satellite image of 5 October 2013, the Court considers that there is a real risk that the trench could reach the sea either as a result of natural elements or by human actions, or a combination of both. Such an outcome would have the effect of connecting the San Juan River with the Caribbean Sea through the eastern *caño*. Given the evidence before it, the Court is satisfied that an alteration of the course of the San Juan River could ensue, with serious consequences for the rights claimed by Costa Rica. The Court is therefore of the opinion that the situation in the disputed territory reveals the existence of a real risk of irreparable prejudice to the rights claimed by the Applicant in this case.

50. The Court moreover considers that there is urgency. The risk of irreparable prejudice as identified in the previous paragraph is not only real but also appears to be imminent, for the following reasons. First, during the rainy season, the increased flow of water in the San Juan River and consequently in the eastern *caño* could extend the trench and connect it with the sea, thereby potentially creating a new course for the San Juan River. Secondly, the trench could also easily be connected to the sea, with minimum effort and equipment, by persons accessing this area from Nicaraguan territory. Thirdly, a Nicaraguan military encampment is located only metres away from the trench, in an area that Nicaragua regards as lying outside the disputed territory. Fourthly, in response to a question from a Member of the Court regarding the location of equipment used in the construction of the *caños*, Nicaragua advised the Court of the location of the dredgers, but did not rule out the presence in the disputed territory of other equipment that could be used to extend the trench. In this regard, the Court takes note of the instructions given on 21 September 2013 by the President of Nicaragua to the Executive President of the National Port Authority to “immediately cease the cleansing works in the Delta area” and to “withdraw the personnel and machinery” in the disputed territory. The Court further takes note of the assurances of Nicaragua, as formulated by its Agent at the hearings in response to a question put by a Member of the Court, that it considers itself bound not to undertake activities likely to connect any of the two *caños* with the sea and to prevent any person or group of persons from doing so. However, the Court is not convinced that these instructions and assurances remove the imminent risk of irreparable prejudice, since, as Nicaragua recognized, persons under its jurisdiction have engaged in activities in the disputed

territory, namely the construction of the two new *caños*, which are inconsistent with the Court's Order of 8 March 2011.

IV. MEASURES TO BE ADOPTED

51. The Court concludes from the foregoing that, in view of the circumstances, and given that all the conditions required by its Statute for it to indicate provisional measures have been met, it ought to indicate such measures to address the new situation prevailing in the disputed territory. These measures will supplement those already in force under the Order of 8 March 2011.

52. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 551, para. 58). In the present case, having considered the terms of the provisional measures requested by Costa Rica, the Court finds that the measures to be indicated need not be identical to those requested.

53. The Court is of the opinion that the filling of the trench next to the eastern *caño* must be carried out immediately. In light of the circumstances of the case and in particular of the fact that the digging of the trench was carried out by Nicaragua's personnel, it is for Nicaragua now to fill it, notwithstanding point 1 of paragraph 86 of the Court's Order of 8 March 2011. Nicaragua shall do so within two weeks of the date of the present Order. It shall immediately inform the Court of the completion of the filling of the trench and shall submit to it, within one week of said completion, a report containing all necessary details, including photographic evidence.

54. With regard to the two new *caños*, the Court recalls that they are situated in the disputed territory in the "Humedal Caribe Noreste" wetland in respect of which Costa Rica bears obligations under the Ramsar Convention. Therefore, pending delivery of the Judgment on the merits, Costa Rica shall consult with the Secretariat of the Ramsar Convention for an evaluation of the environmental situation created by the construction of the two new *caños*. Taking into account any expert input from the

Secretariat, Costa Rica may take appropriate measures related to the new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory. In taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River. Costa Rica shall give Nicaragua prior notice of any such measures.

55. With regard to the presence of Nicaraguan personnel, infrastructure and equipment on the disputed territory, the Court recalls that, in its Order of 8 March 2011, it indicated a first provisional measure, according to which, “[e]ach Party shall refrain from sending to, or maintaining in the disputed territory . . . any personnel, whether civilian, police or security” (*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. 27, para. 86, point 1). The Court now considers that, in view of its above findings with regard to the presence in the disputed territory of the personnel carrying out the dredging operations and the Nicaraguan army encampment, the provisional measure indicated in its Order of 8 March 2011 must be reinforced and supplemented. Therefore, the Court considers that Nicaragua, after having filled the trench on the beach, shall (i) cause the removal from the disputed territory of any personnel, whether civilian, police or security; and (ii) prevent any such personnel from entering the disputed territory.

56. With regard to the presence in the disputed territory of private persons under Nicaragua’s jurisdiction or control, the Court has already expressed its concern in this respect in its Order of 16 July 2013 (*I.C.J. Reports 2013*, p. 240, para. 37). In view of the continuing access of the members of the Guardabarranco Environmental Movement to the disputed territory (see paragraph 47 above), the Court considers that Nicaragua shall cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control.

* * *

57. The Court reiterates that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (*LaGrand (Germany v. United States of America)*, *Judgment*, *I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations with which both Parties are required to comply (see, for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, pp. 26-27, para. 84). It further recalls that the question of compliance with provisional measures indicated in a case may be considered by the Court in the principal proceedings (see *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)*,

Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013, p. 215, para. 40).

* * *

58. The decision given in the present proceedings in no way prejudices any questions relating to the merits or any other issues to be decided at that stage. It leaves unaffected the right of the Governments of Costa Rica and Nicaragua to submit arguments in respect of those questions.

* * *

59. For these reasons,

THE COURT,

(1) Unanimously,

Reaffirms the provisional measures indicated in its Order of 8 March 2011;

(2) *Indicates* the following provisional measures:

(A) Unanimously,

Nicaragua shall refrain from any dredging and other activities in the disputed territory, and shall, in particular, refrain from work of any kind on the two new *caños*;

(B) Unanimously,

Notwithstanding the provisions of point 2 (A) above and paragraph 86 (1) of the Order of 8 March 2011, Nicaragua shall fill the trench on the beach north of the eastern *caño* within two weeks from the date of the present Order; it shall immediately inform the Court of the completion of the filling of the trench and, within one week from the said completion, shall submit to it a report containing all necessary details, including photographic evidence;

(C) Unanimously,

Except as needed for implementing the obligation under point 2 (B) above, Nicaragua shall (i) cause the removal from the disputed territory of any personnel, whether civilian, police or security; and (ii) prevent any such personnel from entering the disputed territory;

(D) Unanimously,

Nicaragua shall cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control;

(E) By fifteen votes to one,

Following consultation with the Secretariat of the Ramsar Convention and after giving Nicaragua prior notice, Costa Rica may take appropriate measures related to the two new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory; in taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River;

IN FAVOUR : *President* Tomka ; *Vice-President* Sepúlveda-Amor ; *Judges* Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari ; *Judge ad hoc* Dugard ;

AGAINST : *Judge ad hoc* Guillaume ;

(3) Unanimously,

Decides that the Parties shall regularly inform the Court, at three-month intervals, as to the compliance with the above provisional measures.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-second day of November, two thousand and thirteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, respectively.

(*Signed*) Peter TOMKA,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court ; Judges *ad hoc* GUILLAUME and DUGARD append declarations to the Order of the Court.

(*Initialed*) P.T.

(*Initialed*) Ph.C.
