



EMBASSY OF NICARAGUA
THE HAGUE

**WRITTEN OBSERVATIONS ON THE REQUEST BY COSTA RICA FOR THE
MODIFICATION OF THE COURT'S ORDER OF 8 MARCH 2011 IN THE
CASE CONCERNING *CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA*
*IN THE BORDER AREA (COSTA RICA v. NICARAGUA)***

I. INTRODUCTION

1. On 21 May 2013, Costa Rica filed a Request for the Modification of the Court's Order of 8 March 2011 on Provisional Measures in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (hereinafter the "*Certain Activities case*"), based on Article 41 of the Statute of the Court and Article 76, paragraph 1, of the Rules of the Court.
2. Costa Rica claims that its request to "Modify the Court's Order on provisional measures of 8 March 2011 is prompted by Nicaragua's sending to the area indicated by the Court in its Order (the Area) and maintaining thereon large numbers of persons, and by the activities undertaken by these persons affecting that territory and its ecology,"¹ thus claiming a change in the situation.²
3. Costa Rica's assertions are groundless. There has been no change in the situation requiring a modification of the Court's Order in the way, or for the reasons, alleged by Costa Rica, and there are no grounds to assert that Nicaragua has breached any of the provisional measures indicated by the Court on 8 March 2011.³ The only pertinent changes that have taken place since that Order are: (1) Costa Rica's construction of a 160 km-long road along the right bank of the San Juan River, which has caused, and is still causing, irreparable damage to the River and its surrounding ecosystem⁴, including the area in dispute as defined in the Order of 8 March

¹ Costa Rica's Request of 21 May 2013 for the modification of the Court's Order of 8 March 2011 on provisional measures, p.1, para.2.

² Costa Rica's Request of 21 May 2013 for the modification of the Court's Order of 8 March 2011 on provisional measures, p.1, para.4.

³ See Nicaragua's Counter-Memorial in the case concerning *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* (hereinafter "NCM"), Chapter 7.

⁴ See letter from Nicaragua to the ICJ, 23 July 2012, Reference 23072012-01; See also letter from Nicaragua to the ICJ, 28 February 2013, Reference 28022013-01; See also NCM Chapter 9; See



**EMBASSY OF NICARAGUA
THE HAGUE**

2011 and (2) the Joinder of proceedings⁵. These developments warrant modification of the Order in the ways requested by Nicaragua below⁶, but *not* the modifications requested by Costa Rica.

II. JURISDICTION OF THE COURT

4. In its request, Costa Rica recalls that Nicaragua has not challenged the jurisdiction of the Court in the present case, which is invoked pursuant to Article XXXI of the American Treaty on Pacific Settlement of Disputes of 30 April 1948 (the Pact of Bogotá) and in accordance with the declarations of acceptance of the Court's compulsory jurisdiction pursuant to Article 36(2) of the Statute of the Court made respectively by Costa Rica on 20 February 1973 and by Nicaragua on 24 September 1929.⁷
5. Nicaragua requests the modification or adaptation of the 8 March 2011 Order to the circumstances of the joined cases on the same jurisdictional basis.

III. COSTA RICA'S REQUEST FOR THE MODIFICATION OF PROVISIONAL MEASURES

6. On 8 March 2011, the Court indicated the following four provisional measures:

“(1) Unanimously,

Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security;

(2) By thirteen votes to four,

Memorial of Nicaragua in the case concerning *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (hereinafter *NM*), Chapter 3: See also IV (a) 1. below.

⁵ See the two separate Orders of the Court dated 17 April 2013, available at <http://www.icj-cij.org/docket/files/150/17332.pdf> and <http://www.icj-cij.org/docket/files/152/17354.pdf>; See also IV (a) 2. below.

⁶ See section IV below.

⁷ Costa Rica's Request of 21 May 2013 for the modification of the Court's order of 8 March 2011 on provisional measures, p.1, para.3.



**EMBASSY OF NICARAGUA
THE HAGUE**

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) Unanimously,

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) Unanimously,

Each Party shall inform the Court as to its compliance with the above provisional measures.”⁸

7. In its request for the modification of these provisional measures, Costa Rica asserts⁹:

“The activities being carried out in the area by Nicaraguan nationals include the following:

- (a) deliberately interfering with a site visit, which was conducted in accordance with the Court's Order of 8 March 2011, by harassing and verbally abusing technical Costa Rican personnel charged with protection of the environment;
- (b) carrying out works in an attempt to keep the artificial *caño* open;
- (c) engaging in the uncontrolled planting of trees in the Area;
- (d) raising of cattle in the Area; and
- (e) erecting wire fences in the Area to the north of and running alongside the *caño*.”

⁸ I.C.J., Order, 08 March 2011, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for the indication of provisional measures, para. 86.

⁹ Costa Rica's Request of 21 May 2013 for the modification of the Court's Order of 8 March 2011 on provisional measures, p. 3-4, para.8 (footnote omitted)



EMBASSY OF NICARAGUA
THE HAGUE

8. As an initial matter, Nicaragua calls the attention of the Court to the fact that Costa Rica's assertions in the present request were first raised in its Memorial in the *Certain Activities case*¹⁰ and thoroughly refuted in Nicaragua's Counter Memorial¹¹. Thus, the allegations are not new and do not reflect any change in what Costa Rica has been alleging since shortly after the Court's Order was issued over two years ago. As a result, they are more properly addressed to the merits and are not matters of urgency justifying a request for the modification of the existing Order. Costa Rica cannot obtain through (changed) interim measures what it precisely claims in its Memorial.¹²
9. Nonetheless, it is useful to recall what Nicaragua has always said in response to the allegations that Costa Rica has now placed before the Court as a matter of "real urgency".
10. As Nicaragua has stated on other occasions,¹³ all Nicaraguan military personnel were withdrawn from the disputed territory by December 2010,¹⁴ and since then Nicaragua has acted with due diligence and taken appropriate measures to ensure that the disputed territory remains free of Nicaraguan personnel. In short, Nicaragua has fully and peacefully implemented the measures indicated by the Court.
11. As for the presence of members of the Guardabarranco Environmental Movement, Nicaragua has repeatedly emphasized that Costa Rica's attitude is not only surprising¹⁵ but also contradictory vis-à-vis its professed concern for the environment. It should be noted that in its request for the indication of provisional measures, Costa Rica requested the "*Immediate and*

¹⁰ See Costa Rica's Memorial in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (hereinafter CRM), Chapter VI.

¹¹ See NCM, Chapter 7.

¹² See CRM, pp. 267-288, paras. 6.7-6.44 and pp. 297-298, para. 7.3 and p. 299, para. 7.6. See e.g. I.C.J., Order, 13 September 1993, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, I.C.J. Reports 1993*, p. 347, para. 48.

¹³ See NCM, pp.385-406, paras. 7.1-7.52.

¹⁴ Letter from H.E. Carlos José Argüello Gómez to the Registrar of the ICJ, Ref: REF: 18012011-01, 18 January 2011. "No Nicaraguan troops are currently stationed in the area in question and Nicaragua does not intend to establish a military post in the future. There was a military presence in the area for a period of six weeks during which the *caño* was cleaned, but that was only solely for the protection of workers conducting this operation. Nicaragua has no intention to station agents in that area. The only operation that is currently being conducted there is the replanting of trees. The Ministry of Environment of Nicaragua (MARENA) will periodically send inspectors on site to monitor the process of reforestation, as well as changes that may occur in the region, including the Harbour Head Lagoon"; See also NCM, Chapter 7, section B, p.402.

¹⁵ See NCM, p. 392, para. 7.20.



EMBASSY OF NICARAGUA
THE HAGUE

unconditional withdrawal of all Nicaraguan troops from the unlawfully invaded and occupied Costa Rican territories."¹⁶ It did not request the withdrawal of private individuals. Likewise, in its submissions during the second round of the oral hearing on provisional measures, Costa Rica asked the Court to indicate that Nicaragua was prohibited from "*station[ing] any of its troops or other personnel*" in the disputed area,¹⁷ again choosing not to request that private individuals be barred from entering the area. However, Costa Rica has now attempted to rewrite what is a very clear use of the word "personnel" in the Court's Order of 8 March 2011 by reinterpreting that word to imply that the Court ordered not only employees or staff of the government, but also private individuals, such as the members of the Guardabarranco Environmental Movement, not to enter the area in dispute.¹⁸

12. In this vein, Costa Rica's present request that the existing Order of the Court be modified to call for "the immediate and unconditional withdrawal of *all Nicaraguan persons*" confirms that the Court did not, in its 8 March 2011 Order, prohibit the entrance of private persons into the area in dispute. Therefore, it cannot be inferred from the Court's Order that the Parties had an obligation to "patrol and impede private individuals from entering the area in dispute,"¹⁹ particularly when these individuals are not criminals and, far from having shown any intent to cause damage, are interested in the protection and preservation of the environment in the entire river area.
13. Indeed, paragraph 78 of the 8 March 2011 Order demonstrates that the Court considered the issue of private individuals entering and undertaking activities in the disputed area, and decided to require the Parties to monitor the area and cooperate to prevent only *criminal* activity. Thus, the presence of private individuals is not a new issue, and the Court has already fashioned an Order establishing the Parties' limited obligations regarding such individuals.
14. The members of the Guardabarranco Environmental Movement are private individuals, as Costa Rica concedes. The movement is neither part of the Government of Nicaragua nor acting under the Government's direction or control.²⁰ The alleged bases for Costa Rica's claims to the contrary are limited to statements by Nicaraguan officials and diplomatic notes expressing

¹⁶ Request for the Indication of Provisional Measures submitted by the Republic of Costa Rica, 18 November 2011, *available at* <http://www.icj-cij.org/docket/files/150/16281.pdf>

¹⁷ 12 January 2011 Submissions of Costa Rica, a). *available at* <http://www.icj-cij.org/docket/files/150/16286.pdf>

¹⁸ *See* NCM, p. 390-392, paras. 7.15-7.20.

¹⁹ NCM, p.391, para 7.17-7.18.

²⁰ *See* NCM, p. 392-398, paras. 7.21-7.23.



EMBASSY OF NICARAGUA
THE HAGUE

what is only logical: that Nicaraguan environmentalists are in the best position to take care of Nicaragua's natural heritage²¹. This heritage encompasses the whole San Juan de Nicaragua River and its surroundings, including the area in dispute, which is being threatened by Costa Rica's construction of a 160 km road without having undertaken a prior Environmental Impact Study or prepared a preventative Environmental Management Plan,²² and without any of the other technical documents required by international law or regional and bilateral agreements.²³

15. Regarding the allegedly harmful activities that Costa Rica attributes to the members of the Guardabarranco Environmental Movement, Nicaragua wishes to make the following remarks:

(a) Deliberately interfering with a site visit, which was conducted in accordance with the Court's Order of 8 March 2011, by harassing and verbally abusing technical personnel.

16. Contrary to Costa Rica's assertion, on 5-7 April 2011, a joint Costa Rica/RAMSAR mission visited the disputed territory,²⁴ and the Vice Minister of the Environment of Costa Rica publicly proclaimed the mission a success:

"the visit fulfilled its objective, we could corroborate much of the secondary information that we have and we have procured other first-hand information."²⁵

This contemporaneous official statement, which made no mention of interference by Nicaraguan nationals, contradicts Costa Rica's request for the modification of the Court's existing Order, in which Costa Rica now alleges that Nicaraguan nationals "deliberately interfer[ed] with a site visit."²⁶

²¹ See Statement by President Ortega cited in NCM, p. 396-397, para. 7.32.

²² Note from the Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs and Worship of Costa Rica Ref: MRE/DM-AJ/127-03-13, 5 March 2013 (Annex 2 Diplomatic Correspondence to the Letter from Costa Rica to the ICJ, 15 March 2013, Reference ECRPB-016-13).

²³ See NM Submission, p.251-253.

²⁴ See NCM para.7.38

²⁵ *Ibid.*

²⁶ Costa Rica's Request of 21 May 2013 for the modification of the Court's order of 8 March 2011 on provisional measures, p. 3, para.8 (a) (footnote omitted).



EMBASSY OF NICARAGUA
THE HAGUE

17. On 30 January 2012, Costa Rica carried out another visit in the disputed territory. Costa Rica informed the Court of this visit in the report submitted on 3 July 2012.²⁷ As the Court can see, nothing in Costa Rica's report indicates that the visit was blocked or its personnel harassed or verbally abused, nor indeed that the visit was in fact "necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated" as the Court's Order requires.
18. Likewise, on 7 March 2013, Costa Rica carried out a third visit in the disputed territory. Costa Rica informed the Court about this visit in the report it submitted on 15 March 2013, stating that "*A team of nine professionals working with Costa Rica's Ministry of Environment carried out a site inspection*"²⁸ in the disputed area. Again, nothing in Costa Rica's report suggests that this visit was blocked or interfered with; to the contrary, Costa Rica reaffirms that the mission was successfully "carried out".²⁹

(b) Carrying out works in an attempt to keep the artificial caño open and engaging in the uncontrolled planting of trees in the Area.

19. In its letter submitted to the Court on 15 March 2013 requesting the modification of provisional measures, Costa Rica repeatedly quotes and heavily relies upon an article written by Mr. Tim Rogers of the *Nicaragua Dispatch* on 26 September 2012. Although the statements in this article do not come close to constituting conclusive evidence of Costa Rica's claims, it must be pointed out that Costa Rica omits the following statements by Mr. Rogers:

"The values that the camp tries to inculcate are also not much different either. The kids learn to take care of the environment, socialize with their fellow campers and respect their country..."³⁰

Mr. Rogers continues:

²⁷ Letter from H.E. Mr. Jorge Urbina-Ortega, co-Agent of Costa Rica, to the Registrar of the ICJ, Ref: ECRPB-025-12, 3 July 2012, p. 267 (NCM, Vol. III, Annex 66).

²⁸ See Letter from Costa Rica to the ICJ, 15 March 2013, Reference ECRPB-016-13.

²⁹ See Letter from Costa Rica to the ICJ, 15 March 2013, Reference ECRPB-016-13.

³⁰ See "*Greytown Journal; Camp Harbour Head*" by Tim Rogers, September 26, 2012. Annexed (not listed in the certification of the annexes) to the Letter from Costa Rica to the ICJ, 15 March 2013, Reference ECRPB-016-13.



EMBASSY OF NICARAGUA
THE HAGUE

“Despite the concerns of Costa Rican authorities, I found no indication that the kids staying on the island were anything other than normal teenagers who were excited to be away from home and appreciative of an overnight camp experience to socialize with like-minded youth, learn about the environment and see a different part of their country.”³¹

20. The absence of harm to the disputed area has been confirmed by Costa Rica’s highest authorities in charge of protection of the environment. For example, on 6 April 2011, during the first joint Costa Rica/RAMSAR mission, the Costa Rican Vice-Minister of the Environment stated that the joint mission had observed vegetation growth in the area of the caño. She concluded that “the wetland tends to recover quickly”³² as long as “no intervention takes place,”³³ thereby reaffirming what has been said by Nicaragua, namely that the clearing of the caño had ceased, and that no harm to the environment had been caused by Nicaragua’s prior activities.
21. Moreover, Professor Thorne, an expert retained by Costa Rica, noted during his July 2011 site visit that “vegetation regrowth” began immediately after Nicaragua had finished its works to clear the caño. He also observed the “recovery of the vegetation on the banks, bars, and berms” of the caño and that “the shrubs and understory appeared to be recovering from disturbance.”³⁴
22. Likewise, UNITAR/UNOSAT, acting under contract with Costa Rica, stated in a report dated 8 November 2011 that:

“A review of vegetation cover changes in the immediate vicinity of the channel [caño] between the San Juan and Laguna Los Portillos indicated no significant instances of deforestation or other measurable areas of vegetation cover removal between 7 June and 25 October 2011.”³⁵

³¹ *Ibid.*

³² Excerpt of the Statement by the Deputy Minister of Environment of Costa Rica, Ana Lorena Guevara, in the radio program “Nuestra Voz” (Our Voice) hosted by Amelia Rueda, April 6, 2011 (NCM, Vol. II, Annex 25).

³³ *Ibid.*

³⁴ See NCM, p. 249, para. 5.220 (footnote omitted).

³⁵ UPDATE 4: Morphological & Environmental Change Assessment for the San Juan River, Costa Rica (covering the period from 7 June to 25 October 2011), Annex 150 to CRM.



EMBASSY OF NICARAGUA
THE HAGUE

23. In the same report UNITAR/UNOSAT also pointed out that "the water flow through this channel continued to fall since 7 June 2011 but it appears that the water flow may have actually stopped altogether, with significant stretches of the channel apparently dry or covered with surface vegetation or loose debris."³⁶ UNITAR/UNOSAT also concluded that there was a "clear narrowing of the channel's width from a maximum of 14 meter on 22 February to only 3 meter ... as on 7 June 2011."³⁷ This negates Costa Rica's allegation that Nicaraguan nationals were engaged in the clearing of the channel.
24. Of particular significance, however, is the observation in the November 2011 UNITAR/UNOSAT report of a "highly probable ... trend of falling water flow through this channel over the course of the last six to eight months, likely due to *the continued accumulation of fluvial sediments including those from bank erosion* as well as the lack of maintenance dredging."³⁸ Costa Rica ignores this key observation, which demonstrates that:
- The caño has been closing, and therefore cannot have been the subject of further efforts to clean it; and
 - The reason the caño has been closing is the "continued accumulation of fluvial sediments including those from bank erosion as well as the lack of maintenance dredging."³⁹
25. In other words, the closing of the caño is caused by the accumulation of sediments from erosion of the river bank and adjacent areas. It is noteworthy that after several site visits Costa Rica has not said a word on this matter. UNITAR/UNOSAT's observation highlights the fact that the changes occurring in the disputed area are due to the silting process that has been substantially augmented by the sediments and debris deposited in the river by Costa Rica's road construction works along the right bank of the river.
26. Thus, the evidence shows that, since the Court's Order of 8 March 2011, there has not been any clearing or other activity carried out by Nicaraguan personnel in the caño, which has closed up

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*



EMBASSY OF NICARAGUA
THE HAGUE

due to the accumulation of sedimentation in the entire area around the caño, large deposits of which are attributable to Costa Rica's road construction activities.

27. As previously stated by Nicaragua, the Guardabarranco Environmental Movement is a private organization that carries out environmental sustainability programs and environmental campaigns for raising awareness throughout Nicaraguan territory, as is evidenced in the documents that Costa Rica attaches to its request.⁴⁰ The San Juan de Nicaragua River is no exception when it comes to their efforts, which have been carried out since 2009,⁴¹ long before the present case was submitted to the Court, and the Order on provisional measures was issued.
28. Costa Rica claims that over 6,000 youths have visited the Area⁴². The evidence in support is a news item that only states that over 6,000 youth have carried out activities in the San Juan River⁴³. Thus, the work undertaken by the members of the movement is being performed along the entire River, all of which is part of an internationally protected wetland that is being seriously threatened by the construction of the road along the Costa Rican bank.⁴⁴ In the news report attached by Costa Rica to its request for modification of the 8 March 2011 Order,⁴⁵ it is remarked there has been an increase in interest regarding the entire River area making the activities of the Guardabarranco Environmental Movement "more visible,"⁴⁶ particularly because the "main purpose of these trips is to reverse the damage caused by Costa Rica to over

⁴⁰ El 19 Digital, Nicaragua "*Movimiento Guardabarranco, fighting for Nature in Nicaragua*", March 17, 2013 (Annex CRPM-3 to Costa Rica's Request of 21 May 2013 for the modification of the Court's order of 8 March 2011 on provisional measures); *see also* Note from the Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs and Worship of Costa Rica Ref: MRE/DM-AJ/127-03-13, 5 March 2013 (Annex 2 Diplomatic Correspondence to the Letter from Costa Rica to the ICJ, 15 March 2013, Reference ECRPB-016-13).

⁴¹ El 19 Digital, Nicaragua "*Movimiento Guardabarranco, fighting for Nature in Nicaragua*", March 17, 2013 (Annex CRPM-3 to Costa Rica's Request of 21 May 2013 for the modification of the Court's order of 8 March 2011 on provisional measures).

⁴² Costa Rica's Request of 21 May 2013 for the modification of the Court's order of 8 March 2011 on provisional measures, p. 2, para.7.

⁴³ El 19 Digital, "*Cleaning and reforestation activities to be performed, New Group heads to San Juan River*", Annex 2 Translation of Media Reports, attached to Letter from Costa Rica to the ICJ, 15 March 2013, Reference ECRPB-016-13.

⁴⁴ *See* paras.23-25 above.

⁴⁵ El 19 Digital, Nicaragua "*Movimiento Guardabarranco, fighting for Nature in Nicaragua*", March 17, 2013 (Annex CRPM-3 to Costa Rica's Request of 21 May 2013 for the modification of the Court's order of 8 March 2011 on provisional measures).

⁴⁶ El 19 Digital, Nicaragua "*Movimiento Guardabarranco, fighting for Nature in Nicaragua*", March 17, 2013 (Annex CRPM-3 to Costa Rica's Request of 21 May 2013 for the modification of the Court's order of 8 March 2011 on provisional measures); *see also* Note from the Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs and Worship of Costa Rica Ref: MRE/DM-AJ/127-03-13, 5 March 2013 (Annex 2 Diplomatic Correspondence to the Letter from Costa Rica to the ICJ, 15 March 2013, Reference ECRPB-016-13).



**EMBASSY OF NICARAGUA
THE HAGUE**

23 thousand species of flora and fauna surrounding the riverbed, as they build a highway on the southern bank.”⁴⁷

29. In any case, there is no uncontrolled planting of trees in the area, as Costa Rica states, but rather a group of young people undertaking environmental sustainability programs that are in no way harmful to the environment. The news articles attached to Costa Rica’s request describes the activities of these young people as “...a learning process, covering both theory and practice, regarding this important river that borders with Costa Rica...”⁴⁸; and “...performing cleaning and reforestation activities on the banks of the Nicaraguan river...”⁴⁹.

(c) Raising of cattle and erecting wire fences in the Area

30. Costa Rica asserts that activities allegedly carried out in the disputed area by Nicaraguan nationals include the raising of cattle and the erecting of wire fences to the north of, and running alongside, the caño. In support of this assertion Costa Rica limits itself to stating:

“... the Government of the Republic of Nicaragua has continued its policy of maintaining its citizens in the area, whose activities include raising cattle in the protected wetland, among others. In addition to the constant presence of Nicaraguan citizens in the area, Costa Rica recently became apprised of the fact that a wire fence has been erected to the north and running alongside part of the caño...”⁵⁰

31. Apparently Costa Rica is suggesting that this creates a new situation in the area. This is rather surprising, considering that Costa Rica’s own Memorial in the *Certain Activities case* cites the *Annotated Ramsar List of Wetlands of international Importance: Costa Rica*, which describes the region as follows:

⁴⁷ El 19 Digital, Nicaragua “*Movimiento Guardabarranco, fighting for Nature in Nicaragua*”, March 17, 2013 (Annex CRPM-3 to Costa Rica’s Request of 21 May 2013 for the modification of the Court’s order of 8 March 2011 on provisional measures).

⁴⁸ *Ibid.*

⁴⁹ El 19 Digital, “*Cleaning and reforestation activities to be performed, New Group heads to San Juan River*” attached to Letter from Costa Rica to the ICJ, 15 March 2013, Reference ECRPB-016-13.

⁵⁰ See letter from Costa Rica to the ICJ, 21 November 2012, Reference ECRPB-045-12.



EMBASSY OF NICARAGUA
THE HAGUE

“The area is used largely for agriculture, and cattle ranching, tourism and fishing ...”⁵¹

32. As indicated by Costa Rica in its Report to RAMSAR on 2011, the southern portion of the caño is located in “an area of livestock pasture.”⁵² On this point, Nicaragua highlighted in its Counter-Memorial in the *Certain Activities case* that “land that has been subjected to such uses can hardly be described as undisturbed.”⁵³
33. The technical report undertaken by the Ministry of Environment, Energy and Telecommunication of Costa Rica, annexed to Costa Rica’s Memorial in the *Certain Activities case*,⁵⁴ acknowledged that the forest around the caño was already cleared for agricultural purposes: “[F]rom 1997 to 2011 ... there has been an expansion of the agricultural frontier to make way for sparsely forested pastures ... [T]his aspect is not a direct consequence of the 2010 activities in the wetland....”⁵⁵
34. Costa Rica’s Memorial also acknowledges that it has allowed the Humedal Caribe Noreste to be “used largely for agriculture,” as well as “cattle ranching”.⁵⁶ The same is true of the disputed area, which according to Costa Rica’s October 2011 report to Ramsar, has experienced “an expansion of the agricultural frontier to make way for sparsely-forested pastures.”⁵⁷
35. In conclusion, and as indicated above, it is clear that the existence of cattle and fences in the area is a situation that existed long before the dispute with Costa Rica over the area arose, and that the activities in question are not attributable to Nicaragua.

(d) Costa Rica's requests lack any urgency

36. To date, Costa Rica has sent three missions (5-7 April 2011, 30 January 2012 and 7 March 2013) into the disputed territory as defined in the Court's Order of 8 March 2011. However, Costa Rica, in a breach of the Order,⁵⁸ has never justified those visits in accordance with the

⁵¹ CRM, pp. 38-39, para.2.13.

⁵² Costa Rican 2011 Report to Ramsar, p. 56 (CRM, Vol. IV, Annex 155), p.235.

⁵³ See NCM, p. 249, para. 5.219 (footnote omitted).

⁵⁴ CRM, Vol. IV, Annex 155.

⁵⁵ CRM, Vol. IV, Annex 155, p. 278.

⁵⁶ CRM, pp. 38-39, para. 2.13, quoting Annotated Ramsar list (CRM, Vol. IV, Annex 119).

⁵⁷ Costa Rican 2011 Report to Ramsar, p. 56 (CRM, Vol. IV, Annex 155).

⁵⁸ See NCM, p.439, paras. 9.46-9.63.



EMBASSY OF NICARAGUA
THE HAGUE

Court's Order, which specifies not only that Costa Rica must provide prior notice to Nicaragua and endeavor to find common solutions with Nicaragua, but also that visits may only be carried out if there is a threat of irreparable prejudice to the disputed territory. Costa Rica has not satisfied these conditions in regard to any of its three visits to the area.

37. Costa Rica asserts that its request for the modification of the Court's Order of 8 March 2011 is "of real urgency".⁵⁹ Nonetheless, after three technical visits to the site, Costa Rica has not demonstrated that there is any "serious threat"⁶⁰ to the disputed territory, nor any "incidents liable to cause irremediable harm in form of bodily injury or death."⁶¹
38. As for the first visit, conducted in April 2011, Costa Rica explained on 30 March 2011 that "the purpose of the mission [was] to make a preliminary evaluation of the situation of the wetland."⁶² No "serious threat" was alleged and, indeed, no such threat could reasonably have been alleged, given that the Court had found a few weeks before, in its 8 March 2011 Order:

"it cannot be concluded at this stage from the evidence adduced by the Parties that the dredging of the San Juan river is creating a risk of irreparable prejudice to Costa Rica's environment or to the flow of the Colorado river; . . . nor has it been shown that, even if there were such a risk of prejudice to rights Costa Rica claims in the present case, the risk would be imminent."⁶³

39. Costa Rica's second visit took place on 30 January 2012 and "had the purpose of surveying the area,"⁶⁴ "evaluat[ing] any progress on the recovery of the area,"⁶⁵ and determining "additional actions needing to be taken."⁶⁶ In its Counter Memorial in the *Certain Activities case*, Nicaragua indicated that "[t]his visit ... lies outside the scope of the second provisional measure ordered by the Court. This visit appears to be even less justified considering that in April 2011, during the

⁵⁹ Costa Rica's Request of 21 May 2013 for the modification of the Court's order of 8 March 2011 on provisional measures, p. 7, para.18

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Diplomatic Note from the Ministry of Foreign Affairs of Costa Rica to the Minister of Foreign Affairs of Nicaragua, Ref: DM-DVM-217-2011, 30 March 2011 (NCM, Vol. III, Annex 68).

⁶³ I.C.J., Order, 28 March 2011, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for the indication of provisional measures, para. 82.

⁶⁴ Letter from H.E. Mr. Jorge Urbina-Ortega, co-Agent of Costa Rica, to the Registrar of the ICJ, Ref: ECRPB-025-12, 3 July 2012 (NCM, Vol. III, Annex 66.).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*



EMBASSY OF NICARAGUA
THE HAGUE

first mission, the Costa Rican Vice-Minister of Environment acknowledged an amelioration of the environmental situation of the area, and in November 2011, UNITAR reported that ‘no significant instances of deforestation or other measurable areas of vegetation cover removal’ occurred in the area in dispute.”⁶⁷

40. Costa Rica’s third visit was “carried out”⁶⁸ on 7 March 2013, and the only report⁶⁹ presented by Costa Rica in relation to that visit seems to be intended to inform the Court regarding the presence of members of the Guardabarranco Environmental Movement. Indeed, Costa Rica dedicated three full pages to describing the works of “teens interested in environmentalism”⁷⁰ who “spend a full week at the camp working on environmental projects such as reforestation.”⁷¹ It is only at the very end of the four-page report that Costa Rica includes information regarding the 7 March 2013 visit, and what is actually said confirms that the visit was successful and that there was nothing to report regarding a “serious threat”⁷² to the disputed area or “incidents liable to cause irremediable harm in form of bodily injury or death.”⁷³
41. In conclusion, after several visits led contrary to the provisions of the Order, Costa Rica has not been able to show the slightest evidence of “urgency” or any “irreparable prejudice”⁷⁴ to the area, much less any change of “situation requiring the modification of the Court’s Order.”⁷⁵ Furthermore, the fact that, to date, neither Ramsar nor Costa Rica has issued any report regarding the threat of irreparable prejudice to the area confirms that such threat exists only in Costa Rica’s imagination.

⁶⁷ NCM, p. 443, paras. 9.55-9.56 (footnote omitted).

⁶⁸ See Letter from Costa Rica to the ICJ, 15 March 2013, Reference ECRPB-016-13, p.4.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, p.2.

⁷¹ *Ibid.*

⁷² Costa Rica’s Request of 21 May 2013 for the modification of the Court’s Order of 8 March 2011 on provisional measures, p. 7, para. 18.

⁷³ *Ibid.*

⁷⁴ I.C.J., Order, 08 March 2011, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for the indication of provisional measures, para. 86(2).

⁷⁵ Costa Rica’s Request of 21 May 2013 for the modification of the Court’s Order of 8 March 2011 on provisional measures, p. 7, para. 17.



**EMBASSY OF NICARAGUA
THE HAGUE**

(e) Costa Rica's request should not be accepted

42. For all the foregoing reasons, Nicaragua asks the Court to declare that the request made by Costa Rica for the Modification of its Order of 8 March 2011 does not fulfil the requirements for the Modification it has requested.



EMBASSY OF NICARAGUA
THE HAGUE

IV. REQUEST BY NICARAGUA THAT THE COURT'S ORDER OF 8 MARCH 2011 ON PROVISIONAL MEASURES IN THE CASE CONCERNING CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA v. NICARAGUA) BE MODIFIED OR ADAPTED TO THE SITUATION CREATED BY THE JOINDER OF THE CASE CONCERNING CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER (NICARAGUA v. COSTA RICA)

(a) Facts and Law relevant to Nicaragua's request

1. The new factual situation: The construction of a 160 km-long road along the San Juan de Nicaragua River and its effects

43. Apparently dissatisfied with the provisional measures indicated by the Court, Costa Rica chose to take “justice” into its own hands and unilaterally decided to construct a road along the right bank of the San Juan de Nicaragua River, without informing or consulting with Nicaragua, and without conducting a Transboundary Environmental Impact Assessment prior to the initiation of construction activities. This irresponsible activity carried out by Costa Rica has been the most significant factual development in the area⁷⁶ since the Court's Order of 8 March 2011.
44. Indeed, “the siltation of the San Juan de Nicaragua River that is caused by the Road project constitutes an intentional trespass upon Nicaraguan sovereign territory. And there is no doubt that this trespass was and continues to be intentional, in that it was either a deliberate response to Nicaragua's dredging project and cleaning of the caño, or a consequence substantially certain to follow from the manner in which the Road was constructed.”⁷⁷
45. Furthermore, Costa Rica has announced the recommencement of the construction of Road 1856. In particular, as Nicaragua reported to the Court in its letter of 28 February 2013, “[d]espite the request of the Republic of Nicaragua not to continue or undertake any future development in the area without an appropriate transboundary Environmental Impact Assessment and to present this assessment in a timely fashion to Nicaragua for its analysis and reaction, and also despite the order of the Central American Court of Justice to ‘immediately suspend the construction of

⁷⁶ The Court identifies the area as “the area where the common border between them runs along the right bank of the San Juan River” *see* Joinder of Proceedings <http://www.icj-cij.org/docket/files/150/17332.pdf>.

⁷⁷ NM, p. 187, para. 5.59.



**EMBASSY OF NICARAGUA
THE HAGUE**

the road...so that the situation does not escalate, thus protecting the rights of each of the parties and preventing the occurrence of irreversible and irreparable damage,' the Government of Costa Rica has announced that the work on Road 1856 is about to be restarted, as has been confirmed by the Minister of Public Works, Mr. Pedro Castro."⁷⁸

46. The construction of the road has resulted in increased sedimentation and other pollution of the River, with attendant adverse impacts on water quality, aquatic life, navigation and other general uses and enjoyments of the River by the population, as has been extensively detailed by Nicaragua in its Counter-Memorial in the Certain Activities case,⁷⁹ its Memorial in the Road Construction case,⁸⁰ and several reports submitted to the Court pursuant to the Court's Order⁸¹.

2. The new legal situation: Joinder of Proceedings

47. There has also been a significant new legal development since the 8 March 2011 Order was issued. This consists of the two separate Orders dated 17 April 2013 by which the Court joined the proceedings in the Certain Activities case and Road Construction case.⁸²

48. In both Orders, the Court considered that:

"19. The two cases here concerned involve the same Parties and relate to the area where the common border between them runs along the right bank of the San Juan River.

20. Both cases are based on facts relating to works being carried out in, along, or in close proximity to the San Juan River, namely the dredging of the river by Nicaragua and the construction of a road along its right bank by Costa Rica. Both sets of proceedings are about the effect of the aforementioned works on the local environment and on the free navigation on, and access to, the San Juan River. In this regard, both Parties refer to the risk of sedimentation of the San Juan River.

⁷⁸ Letter from Nicaragua to the International Court of Justice, 28 February 2013, Ref: 28022013-01 (footnote omitted).

⁷⁹ NCM, pp. 417-428.

⁸⁰ See NM Chapter 3.

⁸¹ See letter from Nicaragua to the ICJ, 23 July 2012, Reference 23072012-01; See also letter from Nicaragua to the ICJ, 28 February 2013, Reference 28022013-01.

⁸² <http://www.icj-cij.org/docket/files/150/17332.pdf>



**EMBASSY OF NICARAGUA
THE HAGUE**

21. In the present case and in the *Nicaragua v. Costa Rica* case, the Parties make reference, in addition, to the harmful environmental effect of the works in and along the San Juan River on the fragile fluvial ecosystem (including protected nature preserves in and along the river).”

49. In this regard, Nicaragua wishes to draw the attention of the Court to the fact that the “harmful environmental effect of the works in and along the San Juan River on the fragile fluvial ecosystem (including protected nature preserves in and along the river),” covers the area in dispute located at the mouth of the River. As quoted above in paragraph 24, the UNITAR/UNOSAT report commissioned and submitted by Costa Rica observes that the area in dispute is being affected by the “accumulation of fluvial sediments including those from bank erosion,” and this is attributable in part to the sediments transmitted to the river by Costa Rica’s road construction activities. The logical consequence is that the Order of 8 March 2011 should be adjusted in order to take account of this, and to extend to both Parties the measures provided by the Order regarding the need to protect the environment of the area in dispute, and avoid activities that may be harmful to it.

50. Consequently, both Parties should be precluded from undertaking unilaterally any activities that increase the “accumulation of fluvial sediments” in the area in dispute. And, to this end, both Parties should be allowed to “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”.⁸³

51. The other measure ordered by the Court that should be modified in light of the new factual and legal situations is that the requirement that the Parties should “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve” should be expressly made applicable to both of the now-joined cases. This provision should apply to all activities by either Party that might harm the environment of the disputed area – including the renewal by Costa Rica of its road construction work and the consequent deposit of sediments and other debris into the River that accumulate all along its mouth – because any such harmful activities inevitably aggravate the dispute. Costa Rica’s failure to take all appropriate

⁸³ I.C.J., Order, 28 March 2011, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for the indication of provisional measures, para. 86(2).



**EMBASSY OF NICARAGUA
THE HAGUE**

measures to avoid further damage to the River and its surrounding ecosystems also aggravates the dispute.

52. In that regard, it is pertinent to recall the list of urgent measures to prevent further damage to the River that Nicaragua described in its Memorial in the Road Construction case.⁸⁴ As pointed out in Nicaragua's Memorial, many of these measures have been called for by Costa Rican institutions. The following are just some of the "temporary, emergency measures" that must be "implemented to control erosion, mass wasting and sediment delivery to the Río San Juan de Nicaragua and its tributaries."⁸⁵ In other words, these measures are simply triage, intended to momentarily stabilize the situation and stop the "bleeding".

**"RECOMMENDED EMERGENCY STABILIZATION AND
EROSION CONTROL MEASURES TO PREVENT CONTINUING
AND FUTURE IMPACTS TO THE RÍO SAN JUAN,**

Task 1: Reduce the rate and frequency of road fill failure slumps and landslides where the road crosses the steeper hill slopes, especially in locations where failed or eroded soil materials have been or could potentially be delivered to the Río San Juan.

Task 2: Eliminate or significantly reduce the risk of future erosion and sediment delivery at all stream crossings along Route 1856.

Task 3: Immediately reduce road surface erosion and sediment delivery by improving dispersion of concentrated road runoff and increasing the number and frequency of road drainage structures.

Task 4: Control surface erosion and resultant sediment delivery from bare soil areas that were exposed during clearing, grubbing and construction activities in the last several years. "

⁸⁴ See NM, pp. 114-121, paras. 3.94-3.98.

⁸⁵ Kondolf Report, Section 5.6 (NM, Vol. II, Annex 1).



EMBASSY OF NICARAGUA
THE HAGUE

(b) The Measures Requested

53. Even though Nicaragua has demonstrated that Costa Rica's Request for the Modification of Provisional Measures is unsustainable, Nicaragua agrees that there has been a change in the factual and legal situations, namely the construction of Road 1856 and the Joinder of the cases, as a result of which, on the basis of Article 76 of the Rules, Nicaragua respectfully requests that the Court modify its Order in the following ways:

- The second measure ordered by the Court should be modified to read as follows:

Notwithstanding point (1) above, both Parties 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; both Parties shall consult in regard to these actions and use their best endeavours to find common solutions with the other Party in this respect;

- The third measure ordered by the Court should be modified to read as follows, to make clear that the Order is applicable to the case as now joined.

Each Party shall refrain from any action, which might aggravate or extend the dispute before the Court in either of the joined cases or make it more difficult to resolve, and will take those actions necessary for avoiding such aggravation or extension of the dispute before the Court.



Carlos Argüello Gómez
Agent of the Republic of Nicaragua

14 June 2013