

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)

DEMANDES TENDANT À LA MODIFICATION DE L'ORDONNANCE
EN INDICATION DE MESURES CONSERVATOIRES DU 8 MARS 2011

ORDONNANCE DU 16 JUILLET 2013

2013

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)

REQUESTS FOR THE MODIFICATION OF THE ORDER OF 8 MARCH 2011
INDICATING PROVISIONAL MEASURES

ORDER OF 16 JULY 2013

Mode officiel de citation :

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), ordonnance du 16 juillet 2013, mesures conservatoires, C.I.J. Recueil 2013, p. 230

Official citation :

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), Order of 16 July 2013, Provisional Measures, I.C.J. Reports 2013, p. 230

ISSN 0074-4441
ISBN 978-92-1-071163-0

N° de vente: **1048**
Sales number

16 JUILLET 2013

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YEAR 2013

16 July 2013

2013
16 July
General List
Nos. 150 and 152

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REQUESTS FOR THE MODIFICATION OF THE ORDER OF 8 MARCH 2011
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ORDER

Present: President TOMKA; *Vice-President* SEPÚLVEDA-AMOR; *Judges* OWADA, ABRAHAM, 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 Article 41 of the Statute of the Court and Article 76 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”).

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. 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”, resulting from the extensive road construction works being carried out by Costa Rica in most of the border area between the two countries along the San Juan River, the opening-up of the Costa Rican bank of the said river to agriculture and the “uncontrolled industrial development taking place in the river basin” (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”).

6. 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.

7. At the time of the filing of the said Memorial, Nicaragua requested the Court, *inter alia*, to “examine *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*.

8. 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.

9. On 23 May 2013, Costa Rica filed with the Registry a request for the modification of the Order of 8 March 2011 (see paragraph 3 above). That request makes reference to Article 41 of the Statute of the Court and Article 76 of the Rules of Court.

The Registrar immediately communicated a copy of the said request to the Government of Nicaragua.

10. By letters dated 24 May 2013, the Registrar informed the Parties that the time-limit for the filing of any written observations that Nicaragua might wish to present on Costa Rica’s request had been fixed as 14 June 2013.

11. In its written observations, filed within the time-limit thus prescribed, 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.

A copy of Nicaragua’s written observations and request was immediately transmitted to Costa Rica, which was informed that the time-limit for the filing of any written observations that it might wish to present on the said request had been fixed as 20 June 2013.

Costa Rica filed such written observations within the time-limit thus prescribed.

12. At the end of its request for the modification of the Order of 8 March 2011, Costa Rica seeks the following measures:

“Pursuant to Article 76 of the Rules of Court, Costa Rica respectfully requests the Court as a matter of urgency to modify its Order on provisional measures of 8 March 2011 so as to prevent the presence of any person in the Area [indicated by the Court in the said Order] other than persons whose presence is authorized by paragraph 86 (2) of the Order, thereby preventing irreparable harm to individuals and further irreparable harm to the Area, pending its determination of this case on the merits. In particular, Costa Rica respectfully requests the Court as a matter of urgency to modify its Order by including in it the following provisional measures:

- (1) the immediate and unconditional withdrawal of all Nicaraguan persons from the Area indicated by the Court in its Order on provisional measures of 8 March 2011;
- (2) that both Parties take all necessary measures to prevent any person (other than persons whose presence is authorized by paragraph 86 (2) of the Order) coming from their respective territory from accessing the area indicated by the Court in its Order on provisional measures of 8 March 2011; and
- (3) that each Party shall inform the Court as to its compliance with the above provisional measures within two weeks of the issue of the modified Order.

Costa Rica reserves the right to amend this request and the measures sought.”

13. At the end of its written observations on Costa Rica’s request for the modification of the Order of 8 March 2011, Nicaragua “asks the Court to declare that the [said] request . . . does not fulfil the requirements for the modification [Costa Rica] has requested”.

*

14. At the end of its written observations and request for the modification of the Order of 8 March 2011 (see paragraph 11 above), Nicaragua contends that, although Costa Rica’s request is unsustainable, there has been a change in the factual and legal situations, namely the construction of the road and the joinder of the cases. As a result, on the basis of Article 76 of the Rules of Court, Nicaragua 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.”

15. At the end of its written observations on Nicaragua’s request, Costa Rica “requests the Court to reject the two requests by Nicaragua for the modification of the Court’s Order of 8 March 2011”.

* * *

16. In order to rule on the respective requests of Costa Rica and Nicaragua for the modification of the Order of 8 March 2011, the Court must determine whether the conditions set forth in Article 76, paragraph 1, of the Rules of Court have been fulfilled. That paragraph reads as follows:

“At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.”

17. The Court must therefore first ascertain whether, taking account of the facts now brought to its attention by each of the Parties, there is reason to conclude that the situation which warranted the indication of certain provisional measures in March 2011 has changed since that time. If that is so, then it will have to consider whether such a change justifies a modification by the Court, as sought by the Parties or otherwise, of the measures previously indicated.

* * *

18. The Court will therefore begin by determining whether there has been a change in the situation which warranted the measures indicated in its Order of 8 March 2011.

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19. Costa Rica contends that its request for the modification of that Order is prompted, in the first place, by Nicaragua's sending to the disputed area, as defined by the Court in the said Order, and maintaining thereon large numbers of persons, and, secondly, by the activities undertaken by those persons affecting that territory and its ecology. In particular, it objects to the "continuous presence of these individuals . . . sponsored by Nicaragua", claiming that Nicaragua is operating an educational programme by which young Nicaraguan nationals are sent to the disputed area. Costa Rica alleges that these individuals have the support of the Nicaraguan Government and challenges Nicaragua's contention that they are members of a private movement who are present in the said area for the purpose of carrying out activities to protect the environment. In Costa Rica's view, these actions, which have been taking place since the Court decided to indicate provisional measures, create a new situation necessitating the modification of the Order of 8 March 2011, in the form of further provisional measures, in particular so as to prevent the presence of any individual in the disputed territory other than those authorized to enter it under the terms of paragraph 86, point 2, of the said decision.

20. In its written observations, Nicaragua asserts that there has been no change in the situation that could be invoked by Costa Rica so as to obtain the modification of the Order of the Court in the way that it requests. It takes the view that paragraph 78 of that decision "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 co-operate to prevent "criminal" activity. It also states that the young people referred to by Costa Rica are only carrying out environmental sustainability programmes and that their activities are thus in no way harmful to the environment. Nicaragua therefore believes that Costa Rica's complaints do not derive from any change in the situation which formed the basis of the Order of 8 March 2011. Consequently, it asks the Court to declare that Costa Rica's request for modification of the Order does not fulfil the necessary requirements.

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21. In its request for the modification or adaptation of the Order of 8 March 2011, Nicaragua asserts that the only pertinent changes that have taken place since that decision, within the meaning of Article 76 of the Rules of Court, are Costa Rica's construction of a 160-km long road along the right bank of the San Juan River and the joinder of the proceedings in the *Costa Rica v. Nicaragua* and *Nicaragua v. Costa Rica* cases. It considers that the works along the San Juan River are having a harmful effect on the fragile fluvial ecosystem, including the disputed area near the mouth of the river. It further maintains that, following the joinder of the proceedings, certain measures indicated in the *Costa Rica v. Nicaragua* case should be extended to the *Nicaragua v. Costa Rica* case.

Nicaragua concludes that these are the changes which justify modifying the Order of the Court in the way that it is seeking.

22. In its written observations, Costa Rica responds that no part of the road in question is in the disputed area and that the joinder of the proceedings in the two above-mentioned cases “does not mean that there is now one proceeding which should be the subject of joint orders”. Moreover, it recalls that Nicaragua requested the Court to indicate provisional measures *proprio motu* in the *Nicaragua v. Costa Rica* case, but 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. Consequently, Costa Rica asks the Court to reject Nicaragua’s request for the modification of the Order of 8 March 2011.

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23. The Court will first examine the request of Costa Rica. It observes that its Order of 8 March 2011 deals with the sending to, or maintaining in the disputed territory, including the *caño*, “of any *personnel* [of the Parties], 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. 25, para. 77, and p. 27, para. 86, point 1, of the operative clause (emphasis added)). At no time during the proceedings on the request for the indication of provisional measures submitted by Costa Rica did it complain of the presence, in the said territory, of individuals or groups of individuals, much less that of “large numbers” of private persons. Nor did the Court specifically address in its decision the question of private persons entering the disputed territory. It confined itself to referring, in paragraph 78 of that decision, to the question of criminal activity in the disputed territory, because, during the oral proceedings, Nicaragua had drawn attention to the fact that it had until then been carrying out patrols in that territory, and argued that to prevent it from continuing with such action “would amount to creating a zone of impunity for drug dealers and other criminals”.

24. As indicated above (see paragraph 19), in its request for modification of that Order, Costa Rica now complains of the “continuous presence” in the disputed territory, since the rendering of the Order of 8 March 2011, of organized groups of Nicaraguan nationals. Nicaragua, although maintaining that those concerned “[are] neither part of the Government of Nicaragua nor acting under the Government’s direction or control”, acknowledges the presence in the said territory of members of the Guardabarranco Environmental Movement, an entity which it describes as a private movement whose main objective is to implement environmental conservation programmes and projects.

25. In light of the evidence communicated to it, the Court therefore regards it as having been established that, since the rendering of its Order of 8 March 2011, organized groups of persons, whose presence was not contemplated when it made its decision to indicate provisional measures, are regularly staying in the disputed territory. It considers that this fact does indeed constitute, in the present case, a change in the situation within the meaning of Article 76 of the Rules of Court, upon which Costa Rica may be entitled to rely in support of its request for the modification of the said Order.

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26. The Court will now examine the request of Nicaragua. As regards its first argument, concerning the construction of a road (see paragraph 21 above), the Court recalls that, in the Application instituting proceedings which it filed in the Registry on 21 December 2011, Nicaragua indicated that “[t]he most immediate threat to the [San Juan] river and its environment is posed by Costa Rica’s construction of a road running parallel and in extremely close proximity to the southern bank of the river, and extending for a distance of at least 120 kilometres”. When it filed its Memorial in the *Nicaragua v. Costa Rica* case, on 19 December 2012, Nicaragua also asked the Court to “examine *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures”, basing its argument once again on the construction of the road. However, the Court was of the view that this was not the case (see paragraph 7 above).

27. The Court consequently finds that Nicaragua’s request for the Order of 8 March 2011 to be modified or adapted does not have any bearing on the situation addressed in that Order. It cannot, as such, be based on any “change in the situation” that gave rise to the indication of provisional measures in the *Costa Rica v. Nicaragua* case.

28. With regard to Nicaragua’s second argument, the Court considers that the joinder of proceedings in the *Costa Rica v. Nicaragua* and *Nicaragua v. Costa Rica* cases has also not brought about such a change. That joinder is a procedural step which does not have the effect of rendering applicable *ipso facto*, to the facts underlying the *Nicaragua v. Costa Rica* case, the measures prescribed with respect to a specific and separate situation in the *Costa Rica v. Nicaragua* case. Moreover, even if the situation invoked in the *Nicaragua v. Costa Rica* case were to justify the indication of provisional measures, the appropriate method of securing that is not the modification of the Order made in the *Costa Rica v. Nicaragua* case.

29. The Court therefore considers that Nicaragua may not rely upon a change in the situation within the meaning of Article 76 of the Rules of Court in order to found its request for the modification of the Order of 8 March 2011.

* *

30. The Court must now examine whether the change in the situation upon which Costa Rica may rely is such as to justify the modification of that Order. That would only be the case if the new situation were, in its turn, to require the indication of provisional measures, i.e., if the general conditions laid down in Article 41 of the Statute of the Court were also to be met in this instance. The Court recalls in this respect that it may only indicate provisional measures if irreparable prejudice may be caused to rights which are the subject of dispute in judicial proceedings (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, *I.C.J. Reports 1993*, p. 19, para. 34). However, this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision (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*, pp. 152-153, para. 62).

31. In considering the request for modification of the Order of 8 March 2011, the Court will take account both of the circumstances that existed when it issued that Order and of the changes which have taken place in the situation that was considered at that time.

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32. Costa Rica argues that its request for the modification of the Order of 8 March 2011 is aimed at preventing irreparable prejudice from being caused to “its right to sovereignty, to territorial integrity, and to non-interference with its lands and its environmentally-protected areas”. It states that such prejudice could result from the presence in the disputed territory of any person other than those authorized to enter it under the terms of paragraph 86, point 2, of the Order. Costa Rica claims that the Nicaraguan nationals present in the area have carried out works in an attempt to keep the artificial *caño* open, planted trees in an uncontrolled manner, raised cattle, and erected wire fences to the north of, and running alongside, the *caño*. Costa Rica also complains that these Nicaraguan nationals harass and verbally abuse the Costa Rican personnel charged with the protection of the environment, and states that “of particular concern to [it] is the real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death”.

33. Costa Rica further considers that its request “is of real urgency”. It points out in this respect that the presence of large numbers of Nicaraguan nationals in the disputed territory, in breach of its sovereign rights and of the Order of 8 March 2011, and the fact that those concerned “are carrying out activities in the area that cause harm to the territory of Costa Rica”, pose a serious threat to its internationally protected wetlands and

forests. It concludes that, without a modification of the Court's Order of 8 March 2011, there is a real risk that action prejudicial to its rights will occur before the Court has had the opportunity to render its final decision on the questions for determination set out in the Application.

34. In its written observations, Nicaragua recalls that Costa Rica has made three visits to the disputed territory. It maintains that Costa Rica has not demonstrated, after these three visits, that there is any "serious threat" to the disputed territory, nor any "incidents liable to cause irreparable harm in [the] form of bodily injury or death". Nicaragua further notes that, at the date of its written observations, "neither [the] Ramsar [Secretariat] nor Costa Rica has issued any report regarding the threat of irreparable prejudice" to the disputed area. Nicaragua concludes that Costa Rica has neither demonstrated that any risk of irreparable prejudice exists, nor shown the slightest evidence of "urgency".

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35. In the light of the evidence before it, the Court considers that, as matters stand, it has not been demonstrated sufficiently that there is a risk of irreparable prejudice to the rights claimed by Costa Rica. The facts put forward by Costa Rica, whether the presence of Nicaraguan nationals or the activities which they are carrying out in the disputed territory, do not appear, in the present circumstances as they are known to the Court, to be such as to cause irreparable harm to "right[s] to sovereignty, to territorial integrity, and to non-interference with [Costa Rica's] lands". Nor does the evidence included in the case file establish the existence of a proven risk of irreparable damage to the environment.

Moreover, even assuming that a real risk of irreparable prejudice had been demonstrated, the Court does not see, in the facts as they have been reported to it, the evidence of urgency that would justify the indication of further provisional measures. As it has recalled above (see paragraph 30), the alleged risk must not only be "real", but also "imminent". However, most of the evidence put forward by Costa Rica relates to events which occurred some time ago. Thus, Costa Rica's complaint that Nicaraguan nationals obstructed a visit by Costa Rican environmental personnel to the disputed area concerns a visit which took place in April 2011. By contrast, reports of the most recent visits, on 30 January 2012 and 7 March 2013, contain no suggestion of any disruption. Concerning the 30 January 2012 visit, Costa Rica limits itself to stating that its personnel encountered some 25 Nicaraguans in the disputed territory. With regard to the 7 March 2013 visit, it merely mentions the presence of "a group of approximately 15 Nicaraguan nationals in the area".

36. Consequently, the Court considers that, despite the change that has occurred in the situation, the conditions have not been fulfilled for it to modify the measures that it indicated in its Order of 8 March 2011.

37. Nevertheless, the presence of organized groups of Nicaraguan nationals in the disputed area carries the risk of incidents which might aggravate the present dispute. That situation is exacerbated by the limited size of the area and the numbers of Nicaraguan nationals who are regularly present there. The Court wishes to express its concerns in this regard.

38. The Court thus considers it necessary to reaffirm the measures that it indicated in its Order of 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” (*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 3, of the operative clause). It notes that the actions thus referred to may consist of either acts or omissions. It reminds the Parties once again that these measures have binding effect (*LaGrand (Germany v. United States of America)*, *Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and therefore create international legal obligations which each Party is required to comply with (see, for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment, I.C.J. Reports 2005*, p. 258, para. 263, and *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).

39. The Court finally underlines that the present Order is without prejudice as to any finding on the merits concerning the Parties’ compliance with its Order of 8 March 2011.

* * *

40. For these reasons,

THE COURT,

(1) By fifteen votes to two,

Finds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011;

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

AGAINST: *Judge Cançado Trindade; Judge ad hoc Dugard;*

(2) Unanimously,

Reaffirms the provisional measures indicated in its Order of 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”.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this sixteenth day of July, 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 dissenting opinion to the Order of the Court; Judge *ad hoc* DUGARD appends a dissenting opinion to the Order of the Court.

(Initialled) P.T.

(Initialled) Ph.C.
