

**WRITTEN OBSERVATIONS ON THE REQUEST BY NICARAGUA 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)***

A. INTRODUCTION

1. I have the honour to refer to Costa Rica’s 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) (Certain Activities case)* dated 21 May 2013 and filed with the Court on 23 May 2013, grounded on Article 41 of the Statute of the Court and Article 76, paragraph 1, of the Rules of Court (*Costa Rica’s Request*).
2. On 14 June 2013, Nicaragua filed with the Court written observations on Costa Rica’s Request in which it also set out a Request for the Modification of the second and third provisional measures indicated by the Court in the said Order on the basis of Article 76 of the Rules of Court (*Nicaragua’s Written Observations*). The present Written Observations are related to the requests for modification raised by Nicaragua. These two requests are each addressed in turn.

**B. NICARAGUA’S REQUEST FOR THE MODIFICATION OF THE SECOND
PROVISIONAL MEASURE INDICATED BY THE COURT: OVERVIEW**

3. In its Order of 8 March 2011, the Court indicated the second provisional measure in the following terms:

“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”.¹

4. Nicaragua requests the Court to modify the second provisional measure 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”.²

5. Nicaragua thus requests the Court to delete the reference to Costa Rica and to the Secretariat of the Ramsar Convention in the second provisional measure, and to permit Nicaraguan personnel charged with the protection of the environment to access the area indicated by the Court in its Order of 8 March 2011 (*the Area*).

6. Nicaragua’s request to modify the second provisional order must be rejected *inter alia* because:

- (1) the Court explicitly held that Costa Rica’s claim to title over Islas Portillos was “plausible”, whereas it made no such finding with respect to Nicaragua;³
- (2) the Court explicitly held that Costa Rica “must be able to dispatch civilian personnel charged with the protection of the environment” to the Area, whereas it made no such dispensation for Nicaragua;⁴

¹ *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*, p. 6 (‘*Certain Activities* case, *Order of 8 March 2011*’), at p. 27, para. 86(2).

² Nicaragua’s Written Observations, para. 53 (emphasis added).

³ *Certain Activities* case, *Order of 8 March 2011*, at p. 19, para. 58.

⁴ *Ibid.*, at pp. 25-26, para. 80.

- (3) Costa Rica has an obligation to monitor the Area which forms part of a protected wetland registered by Costa Rica under the Ramsar Convention, whereas as the Court explicitly recognized,⁵ Nicaragua has no such obligation;
- (4) the entire basis of the Court's order was that (with the exception of the dispensation for Costa Rican civilian personnel) neither party would send persons to the Area or maintain them there for any purpose; but this situation would be radically changed if Nicaragua's request were accepted in any form;⁶
- (5) the sponsoring on a large scale of activities calculated to change the *status quo* in an area which at this stage of the proceedings is considered by the Court as *ex hypothesi* a disputed area by the Court,⁷ is completely inconsistent not just with the provisional measures actually indicated by the Court but with the whole object and purpose of provisional measures;
- (6) Nicaragua's proposed reformulation of the second provisional measure implies the possibility of concomitant exercise of public environmental activities by two different States in the same area, increasing the risk of serious incidents, thus going directly contrary to the purpose and function of provisional measures';
- (7) Nicaragua's proposed deletion of any reference to the Ramsar Secretariat in the second provisional measure is an attempt to vitiate the role of this treaty body in providing administrative, scientific and technical support to Costa Rica in the environmental recovery process of the Area in line with the Ramsar Convention; and
- (8) The Road, and the joinder of the *Certain Activities* and *Road* cases, are not valid reasons to modify the second provisional measure.

7. Each of these points is briefly addressed below. Before doing so, it should be noted that nowhere in its Written Observations does Nicaragua deny that it is sponsoring, sending to and maintaining large numbers of persons in the Area. For the Court to fail to reinforce its

⁵ *Ibid.*

⁶ See *ibid.*, at pp. 24-25, paras. 75-76.

⁷ *Ibid.*, at p. 19, para. 56.

Order of 8 March 2011 to prevent this egregious pattern of conduct and to allow the addition of Nicaraguan environmental agents to those Nicaraguans already present in the area would amount to rewarding a State for violating a provisional measures order binding upon it.

C. NICARAGUA’S REQUEST FOR THE MODIFICATION OF THE SECOND PROVISIONAL MEASURE MUST BE REJECTED

(1) Nicaragua’s request to modify the second provisional measure must be rejected because the Court explicitly held that Costa Rica’s claim to title over Islas Portillos was “plausible”, whereas it made no such finding with respect to Nicaragua

8. Before indicating the second provisional measure requested by Costa Rica in its Order of 8 March 2011, the Court first determined that “the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible”.⁸ In the same Order, the Court declined to determine the plausibility of Nicaragua’s very recent claim of title to sovereignty over the Area.⁹ In order for the second provisional measure to be modified to authorise Nicaragua to dispatch to the Area personnel charged with the protection of the environment, Nicaragua must have a plausible title to sovereignty over the Area.¹⁰
9. Nicaragua has failed to demonstrate that it has a plausible title to sovereignty over the Area. Prior to Nicaraguan military personnel unlawfully occupying the Area in October 2010, Nicaragua never advanced any claim of title to sovereignty over the Area.¹¹ With regard to map evidence, it is recalled that the official cartography of both Parties has consistently shown the Area as Costa Rican.¹² The first articulated legal basis for Nicaragua’s claim to

⁸ *Ibid.*, at p. 19, para. 58.

⁹ *Ibid.*

¹⁰ *Ibid.*, at p. 18, para. 53; *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. 139, at p. 151, paras. 56-57.

¹¹ *Certain Activities case, CRM*, paras. 4.55-4.57.

¹² *Ibid.*, paras. 4.20-4.37.

the Area was made before the Court at the hearing on provisional measures.¹³ The Court does not, of course, need to assess these arguments on the merits at this stage of the proceedings. But the fact that (however weak they may be) they have never been made before is itself significant.

10. Additionally, the Court indicated the second provisional measure taking into account that the Area was, and remains, registered by Costa Rica as a protected wetland under the Ramsar Convention.¹⁴ Nicaragua's claim of title to sovereignty over the Area is inconsistent with its failure to register the Area as a protected wetland under the Ramsar Convention, despite the registration by Nicaragua of other nearby wetlands under that Convention.¹⁵

(2) The Court explicitly held that Costa Rica must be able to dispatch “civilian personnel charged with the protection of the environment” to the Area, whereas it made no such dispensation for Nicaragua

11. In its Order of 8 March 2011, the Court explicitly held that Costa Rica “must be able to dispatch civilian personnel charged with the protection of the environment” to the Area, whereas it made no such dispensation for Nicaragua.

12. The Court said:

“Whereas the disputed territory is moreover situated in the ‘Humedal Caribe Noreste’ wetland, in respect of which Costa Rica bears obligations under the Ramsar Convention; whereas the Court considers that, pending delivery of the Judgment on the merits, Costa Rica must be in a position to avoid irreparable prejudice being caused to the part of that wetland where that territory is situated; whereas for that purpose Costa Rica must be able to dispatch civilian personnel charged with the protection of the environment to the said territory, including the *caño*, but only in so far as it is necessary to ensure that no such prejudice be caused; and whereas Costa Rica shall consult with the Secretariat of the

¹³ *Certain Activities* case, CR 2011/2, p.12, para. 23 (Argüello Gomez), pp.27-28, para. 25 (McCaffrey). See also CRM, para. 4.55.

¹⁴ *Certain Activities* case, *Order of 8 March 2011*, at p. 25, para. 80.

¹⁵ *Ibid.*, at p. 25, para. 79.

Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with best endeavours to find common solutions with Nicaragua in this respect”.¹⁶

13. Thus, although Costa Rica is thereby required to consult with the Ramsar Secretariat (which it has done) and provide Nicaragua with prior notice (which it has done), in this passage the Court expressly recognised a Costa Rican responsibility and prerogative, not a Nicaraguan one. Nicaragua’s new request is completely inconsistent with the Court’s reasoning.

(3) Costa Rica is under an obligation to monitor the Area which forms part of a protected wetland under the Ramsar Convention

14. As stated in the preceding section, the Court indicated the second provisional measure taking into account *inter alia* that the Area was – and remains – registered by Costa Rica as a protected wetland under the Ramsar Convention. As a result, Costa Rica bears obligations under the Ramsar Convention with regard to the Area,¹⁷ including an obligation to monitor and ensure that it is informed about a change in the ecological character of the Area. In this regard, Article 3, paragraph 2, of the Ramsar Convention provides:

“Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List [of Wetlands of International Importance registered with Ramsar] has changed, is changing or is likely to change as a result of technological development, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8.”¹⁸

15. By contrast, the Area is not, and has never been, registered by Nicaragua under the Ramsar Convention, and it is not incumbent on Nicaragua to monitor and ensure that it is informed

¹⁶ *Ibid.*, at pp. 25-26, para. 80.

¹⁷ *Ibid.*, at p. 25, para. 80.

¹⁸ Ramsar Convention, Article 3, paragraph 2.

about a change in the ecological character of the Area under Article 3, paragraph 2, of the Ramsar Convention.

16. It is entirely appropriate that the State which registered the Area as a protected wetland under the Ramsar Convention, and which thereby bears the obligation under Article 3, paragraph 2, of the Convention in relation to the Area, is the only Party authorized to enter the Area in accordance with the requirements laid down by the Court in the second provisional measure. In this regard, the Court “consider[ed] that, pending delivery of the Judgment on the merits, Costa Rica must be in a position to avoid irreparable prejudice being caused to the part of that wetland where that territory is situated”.¹⁹ Inversely, it is highly inappropriate for a State which did not register the Area as a protected wetland under the Ramsar Convention, and which does not bear any obligation under Article 3, paragraph 2, of the Convention with regard to the Area, to nevertheless purport to comply with that obligation by undertaking the public act of entering the Area in order to carry out monitoring activities thereon and remain informed of a change in the ecological character of the Area.

17. Moreover, Nicaragua’s conduct to date demonstrates that it would be unable to act in accordance with its own reformulation of the second provisional measure, and dispatch personnel charged with the protection of the environment to the Area in order to avoid irreparable prejudice being caused to the part of the wetland where that Area is situated. This is because Nicaragua openly supports and sponsors the presence of Nicaraguan nationals in the Area and the harm caused by the activities that such individuals are undertaking there. In its Written Observations, Nicaragua continued to endorse the activities of Nicaraguan nationals in the Area who form part of the so-called “Guardabarranco Environmental Movement” noting that “Nicaraguan environmentalists are in the best position to take care of Nicaragua’s natural heritage [...] including the area in dispute”.²⁰ But this unwarranted and self-judging statement conflicts with the position taken by the Court, which was careful to ensure that no further environmental harm would be caused to the Area.

¹⁹ *Certain Activities case, Order of 8 March 2011*, at pp. 25-26, para. 80.

²⁰ Nicaragua’s Written Observations, para. 14.

18. With regard to the harm currently being caused to the Area by Nicaraguan nationals, Costa Rica notes that according to a recent satellite image,²¹ and contrary to Nicaragua's assertions,²² the artificial *caño* constructed by Nicaragua in the Area remains open. The evidence relied upon by Nicaragua to argue in its Written Observations that the artificial *caño* closed up due to an accumulation of sedimentation date back to 2011, and therefore do not cover the most recent period during which Nicaraguan nationals have been carrying out works in the Area in an attempt to keep the artificial *caño* open.²³ The actual harm being caused to the Area by Nicaraguan nationals further demonstrates the urgency of Costa Rica's Request for the modification of the Court's Order of 8 March 2011.²⁴

(4) The entire basis of the Court's Order was that (with the exception of the specific dispensation for Costa Rican civilian personnel) neither party would send persons to the Area or maintain them there for any purpose; but this situation would be radically changed if Nicaragua's request were accepted in any form.

19. In its Order of 8 March 2011 the Court recorded Nicaragua's statements "that the work on the area of the *caño* has come to an end".²⁵ for that reason, and for that reason alone, the Court did not indicate certain measures requested by Costa Rica.

20. Likewise the Court noted that "Nicaragua does not intend to send any troops or other personnel to the region", but at the same time noted that Nicaragua did intend "to carry out certain activities, *if only occasionally*, in the disputed territory".²⁶ It was by reason of the threat of such *occasional* activities that the Court concluded that there was...

"an imminent risk of irreparable prejudice to Costa Rica's claimed title to sovereignty over the said territory and to the rights deriving therefrom; whereas this situation

²¹ See Satellite Photo, 13 January 2013, Annex CRWO-1.

²² Nicaragua's Written Observations, para. 26.

²³ Costa Rica's Request, para. 8(b) and corresponding footnote.

²⁴ See also Costa Rica's Request, paras. 18-20.

²⁵ *Certain Activities* case, *Order of 8 March 2011*, at p. 24, para. 74..

²⁶ *Ibid.*, at p. 24, para. 75 (emphasis added).

moreover gives rise to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death”.²⁷

Moreover as the Court made clear in paragraphs 78 and 79 of its Order, it did not intend to allow *any* Nicaraguan personnel in the Area: those personnel were restricted to “the territory over which it unquestionably holds sovereignty, i.e., ... in Nicaragua’s case, the San Juan River and Harbor Head Lagoon, excluding the *caño*”.²⁸

21. One can only imagine the position if Nicaragua had disclosed its intention to send to the disputed area, and to maintain there, not dozens, not hundreds, but serially thousands of Nicaraguan “volunteers”, and to maintain them there with a view to furthering Nicaragua’s legally unsupportable aspirations for the *caño* and carrying out other activities there. In fact Nicaragua’s plan for “work in the Area” had not come to an end, whatever it may have told the Court; its intention was not to send a few personnel to the Area occasionally but large numbers on a continuous rolling basis. The conclusion reached by the Court in paragraph 75 of its Order applies *a fortiori* in the circumstances that now obtain.

(5) The sponsoring on a large scale of activities calculated to change the *status quo* in a *ex hypothesi* disputed area is completely inconsistent not just with the provisional measures actually indicated by the Court but with the whole object and purpose of provisional measures.

22. Not only is Nicaragua’s current course of conduct completely inconsistent with the Court’s Order, it is completely inconsistent with the very idea of provisional measures as measures intended to maintain the *status quo ante* and to avoid further disputes. As noted by the leading authority, “the premise [of provisional measures] is that the object of the litigation

²⁷ *Ibid.*, at p. 24, para. 75.

²⁸ *Ibid.*, at p. 25, para. 78.

will be protected and maintained in its state as it existed on the initiation of the proceedings”.²⁹

23. Furthermore the Court specifically ordered that each Party should “refrain from any act which may aggravate or extend the dispute or render it more difficult of solution”.³⁰
24. Nicaragua’s conduct ignores all these considerations and injunctions.

(6) Nicaragua’s proposed reformulation of the second provisional measure would increase the real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death occurring

25. The real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death as a result of the unlawful presence of Nicaraguan nationals in the Area was a principal reason that led Costa Rica to request the Court to modify its Order of 8 March 2011 so as to include 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 the 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.”³¹

26. The unlawful presence of Nicaraguan nationals in the Area is not in dispute between the Parties. This is a new situation that has arisen since the Court indicated the second

²⁹ S. Rosenne, *Provisional Measures in International Law* (Oxford, OUP, 2005), pp. 3-4.

³⁰ *Certain Activities case, Order of 8 March 2011*, at p. 26, para. 83.

³¹ Costa Rica’s Request, para. 21.

provisional measure in its Order on 8 March 2011 as there were no Nicaraguan nationals in the Area carrying out activities there allegedly for the protection of the environment prior to the indication of provisional measures by the Court. The situation before the Court at the time of the oral hearings on provisional measures in the *Certain Activities* case was the unlawful presence of Nicaraguan *military* personnel in the Area, which persisted after the close of the oral hearings on 13 January 2011 as documented by photographs submitted to the Court,³² contrary to Nicaragua's contention in its Written Observations.³³

27. Nicaragua contends that the presence of Nicaraguan nationals in the Area and the activities they are undertaking thereon is not in breach of the Court's Order of 8 March 2011. In this respect, Nicaragua wilfully misconstrues the Court's Order. Nicaragua states that the Court in its Order considered the issue of private individuals, and decided to require the Parties to monitor the Area and cooperate only to prevent criminal activity in the Area.³⁴ However, the paragraph of the Court's Order to which Nicaragua refers addresses private individuals as a consequence of the removal of police and security forces from the Area.³⁵ It is logical that the Court would only refer to the criminal activities of private individuals in that context. It does not mean that the Court implicitly recognized the right of private individuals to enter, remain on, and carry out unsupervised, unpoliced activities in the Area. On the contrary, the exacting requirements of the second provisional measure indicated by the Court demonstrate the care taken by the Court to ensure that the only persons authorized to enter the Area – Costa Rican personnel charged with the protection of the environment – did so only after Costa Rica first consulted with the Secretariat of the Ramsar Convention, gave Nicaragua prior notice, and used its best endeavours to find common solutions with Nicaragua in this respect. It is untenable for Nicaragua to maintain that the presence of unsupervised private individuals in the Area is in accordance with the Court's Order of 8 March 2011.

³² *Certain Activities* case, CRM, para. 3.53.

³³ Nicaragua's Written Observations, para. 10.

³⁴ *Ibid.*, para. 13.

³⁵ *Certain Activities* case, *Order of 8 March 2011*, at p. 25, para. 78.

28. It is obvious that the presence of Nicaraguans in the Area, carrying out a specifically Nicaraguan program which Costa Rica plausibly claims is unlawful, increases the real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death occurring. This would especially be the case if Costa Rica were itself to send to and maintain civilian persons on the disputed territory for any purpose.³⁶ To follow Nicaragua's reasoning, if Nicaragua can send persons to the Area so too must Costa Rica be entitled to do so.
29. In short the unlawful presence of Nicaraguan nationals in the Area presents a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death, as Costa Rica explained in its Request for the modification of the Court's Order of 8 March 2011.³⁷ A reformulation of the second provisional measure in line with Nicaragua's request would augment the risk of physical and verbal confrontations taking place between individuals, and thereby increase the risk of incidents leading to irremediable harm in the form of bodily injury or death occurring in the Area. This is because Nicaragua is requesting the Court's authorization for Nicaraguan personnel charged with the protection of the environment to access the Area, which by Order of the Court is an area from which the police and security forces of both Parties are prohibited from entering for the duration of the proceeding.³⁸ In view of the harassment and verbal abuse of technical Costa Rican personnel charged with protection of the environment by Nicaraguan nationals in the Area during a site visit undertaken in early April 2011,³⁹ and the heightened tensions between the two States, Costa Rica holds grave concerns for the welfare of its citizens should the Court authorize the presence of Nicaraguan personnel in the Area. The real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death in the Area demonstrates the urgency of Costa Rica's Request for the modification of the Court's Order of 8 March 2011.

³⁶ See *ibid.*, at p. 24, para. 75.

³⁷ Costa Rica's Request, para. 18.

³⁸ *Certain Activities case, Order of 8 March 2011*, at p. 27, para. 86(1).

³⁹ See Costa Rica's Request, para. 8, and corresponding footnote.

(7) Nicaragua's proposed deletion of any reference to the Ramsar Secretariat in the second provisional measure is an attempt to vitiate the role of this treaty body in providing administrative, scientific and technical support to Costa Rica in the environmental recovery process of the Area in line with the Ramsar Convention

30. Nicaragua's request to modify the second provisional order in order to exclude the supervisory and advisory role of the Secretariat of the Ramsar Convention in the environmental recovery process of the Area must be rejected in view of the administrative scientific and technical support provided by the Ramsar Secretariat to the Contracting Parties, and the fact that the Area forms part of a Wetland of International Importance registered by Costa Rica under the Ramsar Convention to which Nicaragua is also a Contracting Party.
31. When indicating the second provisional measure, the Court took care to assign the Ramsar Secretariat a supervisory and advisory role in the environmental recovery process of the Area. This decision was appropriate in light of this international organization's technical expertise in matters relating to protected wetlands, the obligations Costa Rica bears under the Ramsar Convention, and the Report on the Area issued by the Ramsar Secretariat.⁴⁰ In accordance with the requirements of the second provisional measure, in April 2011 a joint Ramsar-Costa Rica mission visited the Area, and Costa Rica subsequently submitted a report and working plan to the Ramsar Secretariat,⁴¹ which has formed the basis of subsequent visits by Costa Rican personnel charged with the protection of the environment to the Area. Nicaragua's request to exclude the involvement of the Ramsar Secretariat in the environmental recovery process of the Area is contrary to the reasoning of the Court when indicating the second provisional measure.

⁴⁰ Ramsar Secretariat, Ramsar Advisory Mission Report N° 69: North-eastern Caribbean Wetland of International Importance (Humedal Caribe Noreste), Costa Rica, 17 December 2010, produced in *Certain Activities* case, CRM, vol. IV, Annex 147.

⁴¹ Ministry of the Environment, Energy and Telecommunications of Costa Rica, Technical Report to Ramsar: "Assessment and Evaluation of the Environmental situation in the Humedal Caribe Noreste within the framework of the Order of the International Court of Justice", 28 October 2011; CRM in the *Certain Activities* case, Vol IV, Annex 155.

(8) The construction of a road on Costa Rican territory, and the joinder of the *Certain Activities* and *Road* cases are not valid reasons to modify the second provisional measure

32. Nicaragua argues that the construction of a road by Costa Rica on Costa Rican territory along the San Juan River and the joinder of the *Certain Activities* and *Road* cases justify the modification of the second provisional measure in order to allow Nicaraguan personnel charged with the protection of the environment to enter the Area in order to take action to avoid irreparable prejudice to the Area.⁴² Section C below addresses the joinder of the cases and its impact on provisional measures. The construction of the road on Costa Rican territory, whatever its effect on the San Juan River, is not a valid reason justifying the authorisation of the presence of Nicaraguan personnel charged with the protection of the environment in the Area for the following reasons.

33. No part of the road is in the Area, as recognised by Nicaragua.⁴³ Nicaragua contends, without any evidence, that that construction of the road would increase the accumulation of fluvial sediments in the Area. According to Nicaragua, since both Parties would abstain to undertake activities that would increase the “accumulation of fluvial sediments”, this would be the reason to allow *both* Parties to send their environment personnel to the Area.⁴⁴ Leaving aside the fact that Nicaragua failed to demonstrate the causal link between these two propositions, it suffices to note that Nicaragua, having sovereignty over the waters of the San Juan River, has ample opportunities at its disposal to verify any alleged accumulation of fluvial sediments, and to take any alleged necessary measures in this regard, without any need to send environmental personnel to the Area.

⁴² Nicaragua’s Request, paras. 49-50.

⁴³ “The 250 hectares of disputed land in Harbour Head are far removed from the areas where Costa Rica has placed its Road” (*Road* case, NM, vol. I, p.22, para. 2.18).

⁴⁴ Nicaragua’s Request, para. 50.

D. NICARAGUA'S REQUEST FOR THE MODIFICATION OF THE THIRD PROVISIONAL MEASURE INDICATED BY THE COURT

34. In its Order of 8 March 2011, the Court indicated the third provisional measure in the following terms:

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

35. Nicaragua requests the Court to modify this provisional measure to read as follows:

“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.*”⁴⁵

36. Nicaragua thus requests the Court to widen the scope of the third provisional measure to encompass matters arising in a different proceeding, namely the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) (Road case)*, and to include a positive obligation binding on both Parties, in addition to the prohibition currently in place.

37. Nicaragua's request to modify the third provisional order must be rejected because (1) the joinder of the *Certain Activities* case and the *Road* case does not mean that there is now one proceeding which should be the subject of joint orders; and in any event, (2) the mitigation works for the protection of the environment that Costa Rica is currently undertaking on the Road is a matter to be addressed only at the merits phase of the proceeding in the *Road* case.

⁴⁵ Nicaragua's Written Observations, para. 53 (emphasis added).

(1) The joinder of the *Certain Activities* case and the *Road* case does not mean that there is now one proceeding which should be the subject of joint orders

38. Nicaragua cannot rely on Article 76 of the Rules of Court in order to request the indication of provisional measures for matters that arise in the *Road* case before the Court because the joinder of the *Certain Activities* case and the *Road* case does not mean that there is now one proceeding which should be the subject of joint orders.

39. It is recalled that Nicaragua requested the Court to indicate provisional measures in the *Road* case, but its request was not accepted. Consequently, the only provisional measures that have been indicated are those related to the *Certain Activities* case. The proper avenue for Nicaragua to proceed with its request for the indication of a provisional measure in the *Road* case is by way of a new application for the indication of provisional measures pursuant to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court. Nicaragua cannot attempt to use the ‘back door’ method of requesting the modification of the Court’s Order of 8 March 2011 in the *Certain Activities* case for a separate proceeding in a joined case following its prior failure to obtain provisional measures in the *Road* case.

(2) The mitigation works for the protection of the environment that Costa Rica is currently undertaking on the Road are a matter to be addressed at the merits phase of the proceeding in the *Road* case.

40. It is not the case, as Nicaragua suggests in its Written Observations, that the Costa Rican works on the Road are recommencing.⁴⁶ Rather, Costa Rica is in the process of undertaking mitigation works for the protection of the environment on the Road. These will be illustrated in detail and duly explained in Costa Rica’s forthcoming Counter-Memorial in the *Road* case.

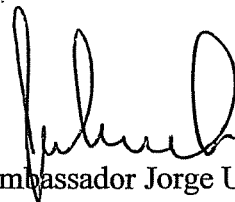
41. The construction of the Road, entirely on Costa Rican territory, including the mitigation works currently being undertaken, are matters to be addressed at the merits phase of the written proceedings in the *Road* case, and not by way of a request for the modification of

⁴⁶ Nicaragua’s Written Observations, para. 45.

provisional measures indicated by the Court in its Order of 8 March 2011 in the *Certain Activities* case.

E. CONCLUSION

42. For the foregoing reasons, Costa Rica respectfully requests the Court to reject the two requests by Nicaragua for the modification of the Court's Order of 8 March 2011.



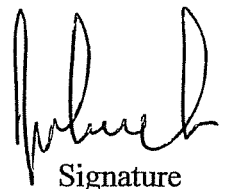
Ambassador Jorge Urbina

Co-Agent

20 June 2013

Certification

I certify that the following documents annexed to these Written Observations of 20 June 2013 are true copies and conform to the original documents.



Signature

List of Annexes

Annex Reference	Description
CRWO-1	Satellite Photo, 13 January 2013

