

204. 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) [PROVISIONAL MEASURES]

Order of 22 November 2013

On 22 November 2013, the International Court of Justice delivered its Order on the request for the indication of new provisional measures submitted by Costa Rica on 24 September 2013 in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, which has been joined to the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. In its Order, the Court reaffirmed unanimously the provisional measures indicated in its Order of 8 March 2011 and indicated several additional provisional measures.

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges *ad hoc* Guillaume, Dugard; Registrar Couvreur.

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The operative paragraph (para. 59) of the Order reads as follows:

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THE COURT,

(1) Unanimously,

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

(2) *Indicates* the following provisional measures:

(A) Unanimously,

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

(B) Unanimously,

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

(C) Unanimously,

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

(D) Unanimously,

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

(E) By fifteen votes to one,

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

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

AGAINST: *Judge ad hoc* Guillaume;

(3) Unanimously,

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

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Judge Cançado Trindade appended a separate opinion to the Order; Judges *ad hoc* Guillaume and Dugard appended declarations to the Order.

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Application and request for the indication of provisional measures (paras. 1-20 of the Order)

The Court begins by recalling that, on 18 November 2010, the Government of Costa Rica filed in the Registry of the Court an Application instituting proceedings against the Government of 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”. According to Costa Rica, these activities were

connected to the construction of a canal (referred to in Spanish as *caño*) across Costa Rican territory from the San Juan River to Laguna los Portillos.

Having filed its Application, Costa Rica, on the same day, 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. By an 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.”

The Court notes that by two separate Orders dated 17 April 2013, the Court joined the proceedings in the present case with those in the 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”, which had been brought by Nicaragua against Costa Rica on 22 December 2011.

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

The Court further recalls that, on 23 May 2013, Costa Rica, with reference to Article 41 of the Statute of the Court and Article 76 of the Rules of Court, filed with the Registry a request for the modification of the Order indicating provisional measures of 8 March 2011. In its written observations thereon, Nicaragua asked the Court to reject Costa Rica’s request, while in its turn requesting the Court to modify or adapt the Order of 8 March 2011 on the basis of Article 76 of the Rules of Court. By an Order of 16 July 2013, the Court found that the circumstances, as they then

presented themselves to the Court, were not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011. By the same Order, the Court also reaffirmed 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”.

The Court observes that, on 24 September 2013, Costa Rica, with reference to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court, filed in the Registry a new Request for the indication of provisional measures in the present case. Costa Rica clarified that it was not seeking the modification of the Order of 8 March 2011, but rather that its request was “an independent [one] based on new facts”. The Registrar immediately communicated a copy of the said request to the Government of Nicaragua.

The Court recalls that Costa Rica, in outlining the facts which led it to bring the present request, stated that since the Court’s Order of 16 July 2013 on the Parties’ requests to modify the measures indicated in its Order of 8 March 2011, it had found out about “new and grave activities by Nicaragua in the disputed territory”, through the receipt of satellite imagery of that area. In particular, Costa Rica contended that Nicaragua had commenced construction of two new artificial *caños* in the disputed territory.

The Court further recalls that, at the end of its Request for the indication of new provisional measures, Costa Rica asked the Court:

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

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

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The Court observes that public hearings on Costa Rica's Request for the indication of new provisional measures were held on 14, 15, 16 and 17 October 2013, during which oral observations were presented by the Agents and Counsel of the Governments of Costa Rica and Nicaragua. During the hearings, questions were put by some Members of the Court to Nicaragua, to which replies were given orally; Costa Rica availed itself of its right to comment orally on those replies.

The Court recalls that, at the end of its second round of oral observations, Costa Rica asked the Court to indicate provisional measures in the same terms as included in its Request, while Nicaragua, at the end of its second round of oral observations, stated the following:

“In accordance with Article 60 of the Rules of Court and having regard to the Request for the indication of provisional measures of the Republic of Costa Rica and its oral pleadings, the Republic of Nicaragua respectfully submits that,

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

Reasoning of the Court (paras. 21-58)

I. Prima facie jurisdiction (paras. 21-23)

The Court begins by observing that when dealing with a request for the indication of provisional measures, there is no need for the Court, before deciding whether or not to indicate such measures, to satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case; it only has to satisfy itself that the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded.

The Court notes that Costa Rica seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948, as well as on the declarations made by the Parties accepting compulsory jurisdiction.

The Court recalls that, in its Order of 8 March 2011, it found that “the instruments invoked by Costa Rica appear, *prima facie*, to afford a basis on which the Court might have jurisdiction to rule on the merits, enabling it to indicate provisional measures if it considers that the circumstances so require”. Moreover, the Court notes that, within the time-limit set out in Article 79, paragraph 1, of the Rules of Court, Nicaragua did not raise any objection to the jurisdiction of the Court. In these circumstances, the Court considers that it may entertain the present Request for the indication of new provisional measures.

II. The rights whose protection is sought and the measures requested (paras. 24-33)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought.

The Court notes that the rights which Costa Rica seeks to protect are the rights it claims to sovereignty over the territory which it refers to as Isla Portillos, to territorial integrity and its right to protect the environment in those areas over which it is sovereign. The Court recalls its statement, in its Order of 8 March 2011, that while “the provisional measures it may indicate would not prejudice any title”, it appears “that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible”. The Court sees no reason to depart from this conclusion in the context of Costa Rica’s present Request. Moreover, to the extent that Costa Rica’s claimed title is plausible, the Court considers that any future environmental harm caused in the disputed territory would infringe Costa Rica’s alleged territorial rights. The Court therefore finds that the rights for which Costa Rica seeks protection are plausible.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested. It recalls that the first provisional measure requested by Costa Rica is aimed at ensuring the immediate and unconditional suspension of dredging or other activity, and specifically the cessation of work of any kind on the two new *caños* in the disputed territory. In this regard, Costa Rica has called the Court’s attention to the possible effect of the construction of these two *caños* on the disputed territory and on the course of the San Juan River. The Court considers that this construction could affect Costa Rica’s rights of sovereignty, as well as environmental rights connected thereto, to be adjudged on the merits. Therefore, the Court concludes that a link exists between Costa Rica’s claimed rights and the first provisional measure being sought.

The Court observes that the second provisional measure requested by Costa Rica is that Nicaragua immediately withdraw from the disputed territory any personnel, infrastructure (including lodging tents) and equipment (including dredgers) introduced by it, or by any persons under its jurisdiction or coming from its territory. In this regard, the Court considers that the presence of Nicaraguan personnel, infrastructure and equipment on the disputed territory would be likely to affect the rights of sovereignty which might be adjudged on the merits to belong to Costa Rica. Therefore, the Court concludes that a link exists between Costa Rica’s claimed rights of sovereignty and the second provisional measure being sought.

With respect to the third provisional measure sought by Costa Rica, aimed at ensuring that it be permitted to undertake remediation works in the disputed territory on the two new *caños* and the surrounding areas, to the extent necessary to prevent

irreparable prejudice being caused to the disputed territory, the Court considers that this is linked to Costa Rica's claimed rights of sovereignty over the disputed territory.

Finally, the Court recalls that the fourth provisional measure requested by Costa Rica is that each Party shall inform the Court as to its compliance with any provisional measures that may be indicated by the Court, not later than one week from the issuance of the Order. The Court considers that this request does not aim to protect Costa Rica's rights and there is therefore no need to establish a link between it and Costa Rica's claimed rights.

III. Risk of irreparable prejudice and urgency (paras. 34-50)

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to the rights which are in dispute, and that 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 those rights.

It observes that, since its Order of 16 July 2013 on the requests for the modification of the Order of 8 March 2011 indicating provisional measures, there has been a change in the situation in the "disputed territory" as identified by the Court in its Order of 8 March 2011. It notes that the evidence submitted to it shows that two new *caños* have been built in that territory. Furthermore, a photograph of 18 September 2013 presented by Costa Rica depicts a shallow trench which begins at the seaward end of the eastern *caño*. In the Court's view, it is apparent from a satellite image of 5 October 2013 that this trench has been extended and currently cuts across the beach, with only a narrow stretch of sand separating it from the sea. The Court further notes that Nicaragua recognizes the existence of the two new *caños* and the trench, although it states that all work relating to these features stopped following instructions given by President Ortega on 21 September 2013.

The Court points out that Nicaragua admits that the dredging operations for the construction of the *caños* were carried out by a group of its nationals led by Mr. Pastora, in the context of the implementation of a project for the improvement of navigation on the San Juan River. It further recalls that this project was approved by the Nicaraguan Ministry of Environmental and Natural Resources, and that Mr. Pastora was appointed by the President of Nicaragua to carry out this project and was addressed by the National Port Authority as "Government Delegate for Dredging Works".

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

confirmed by satellite images of 5 and 14 September 2013 and the photograph of 18 September 2013.

The Court concludes that, in view of the length, breadth and position of the trench next to the eastern *caño*, as visible on the satellite image of 5 October 2013, there is a real risk that it could reach the sea either as a result of natural elements or by human actions, or a combination of both. Such an outcome would have the effect of connecting the San Juan River with the Caribbean Sea through the eastern *caño*. Given the evidence before it, the Court is satisfied that an alteration of the course of the San Juan River could ensue, with serious consequences for the rights claimed by Costa Rica. The Court is therefore of the opinion that the situation in the disputed territory reveals the existence of a real risk of irreparable prejudice to the rights claimed by the Applicant in this case.

The Court moreover considers that there is urgency. First, during the rainy season, the increased flow of water in the San Juan River and consequently in the eastern *caño* could extend the trench and connect it with the sea, thereby potentially creating a new course for the San Juan River. Secondly, the trench could also easily be connected to the sea, with minimum effort and equipment, by persons accessing this area from Nicaraguan territory. Thirdly, a Nicaraguan military encampment is located only metres away from the trench, in an area that Nicaragua regards as lying outside the disputed territory. Fourthly, in response to a question from a Member of the Court regarding the location of equipment used in the construction of the *caños*, Nicaragua advised the Court of the location of the dredgers, but did not rule out the presence in the disputed territory of other equipment that could be used to extend the trench.

IV. Measures to be adopted (paras. 51-58)

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

The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested. In the present case, having considered the terms of the provisional measures requested by Costa Rica, the Court finds that the measures to be indicated need not be identical to those requested.

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

With regard to the two new *caños*, the Court recalls that they are situated in the disputed territory in the “Humedal Caribe Noreste” wetland in respect of which Costa Rica bears obligations under the Ramsar Convention. Therefore, pending delivery of the Judgment on the merits, Costa Rica shall consult with the Secretariat of the Ramsar Convention for an evaluation of the environmental situation created by the construction of the two new *caños*. The Court states that, taking into account any expert input from the Secretariat, Costa Rica may take appropriate measures related to the new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory. The Court adds that, in taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River, and Costa Rica shall give Nicaragua prior notice of any such measures.

With regard to the presence of Nicaraguan personnel, infrastructure and equipment on the disputed territory, the Court considers that, in view of its findings with regard to the presence in the disputed territory of the personnel carrying out the dredging operations and the Nicaraguan army encampment, the first provisional measure indicated in its Order of 8 March 2011 must be reinforced and supplemented. Therefore, the Court considers that Nicaragua, after having filled the trench on the beach, shall (i) cause the removal from the disputed territory of any personnel, whether civilian, police or security; and (ii) prevent any such personnel from entering the disputed territory. In addition, in view of the continuing access of the members of the *Guardabarranco Environmental Movement* to the disputed territory, the Court considers that Nicaragua shall cause the removal from and prevent the entrance into the disputed territory of any private persons under its jurisdiction or control.

The Court emphasizes that its orders on provisional measures have binding effect and thus create international legal obligations with which both Parties are required to comply. It further recalls that the question of compliance with provisional measures indicated in a case may be considered by the Court in the principal proceedings. Finally, the Court adds that the decision given in the present proceedings in no way prejudices any questions relating to the merits or any other issues to be decided at that stage and leaves unaffected the right of the Governments of Costa Rica and Nicaragua to submit arguments in respect of those questions.

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Separate opinion of Judge Cançado Trindade

1. Judge Cançado Trindade begins his Separate Opinion, composed of five parts, by identifying some points, raised in the present Order, which appear to him deserving closer attention. Given the importance that he attributes to them, he feels obliged, moved by a sense of duty in the exercise of the international judicial function, to leave on the records the foundations of his own personal position thereon (part I).

2. He first examines the factual context, as presented to the Court by the submissions of the Parties in the course of the present proceedings, in both the written phase as well as in the two rounds of oral arguments (part II). The evidence submitted to the Court has led to its finding of a change in the situation (since its previous

Orders of 8 March 2011, and of 16 July 2013), given the construction of two new *caños*, and the presence of a Nicaraguan military encampment, in the disputed territory (paras. 16-19).

3. Judge Cançado Trindade then moves on, from the factual to the juridico-epistemological level, so as to focus his reflections on the questions of the configuration of the *autonomous legal regime* (as he perceives and conceives it) of Provisional Measures of Protection. In doing so, he addresses the task of international tribunals, and a reassuring jurisprudential construction (2000-2013), to this effect (part III). He recalls that “it has been in the era of contemporary international tribunals that Provisional Measures of Protection have seen the light of day, and have flourished, in international legal procedure” (para. 20).

4. This brings to the fore the issue of *compliance* with those measures and the legal consequences ensuing therefrom. This issue — he proceeds — has not yet been sufficiently studied and developed, in spite of being closely linked to the pursuit of the realization of justice at international level. Judge Cançado Trindade thus observes that closer attention needs to be drawn to the legal regime of provisional measures, their *legal effects* and the faithful compliance with them, and the legal consequences for non-compliance (paras. 22-24). In his perception, some endeavours have been undertaken to the effect of jurisprudential construction (paras. 25-28), but there still remains, in this domain, a long way to go, in the longstanding search for the realization of justice.

5. In sequence, Judge Cançado Trindade stresses the need to persevere in the on-going construction of an autonomous legal regime of provisional measures of protection (part IV). In his understanding, by means of such construction of the propounded autonomous legal regime of provisional measures of protection, contemporary international tribunals can contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of *all* subjects of international law, all *justiciables*, — States as well as groups of individuals, and *simples particuliers* (para. 31).

6. In his final considerations (part V), Judge Cançado Trindade observes that, once a new situation appears — like the present one in the disputed territory — disclosing urgency and the risk of irreparable harm, the Court ought to indicate or order promptly *new* provisional measures, without postponing a decision to this effect. To him, responsibility for non-compliance with those measures “is necessarily accompanied by the attribution of that responsibility to the State concerned. There is an autonomous breach of a conventional obligation (concerning provisional measures), without prejudice to what will later be decided by the Court as to the merits” (para. 37).

7. In Judge Cançado Trindade’s conception, non-compliance with provisional measures of protection “reveals an *additional* ground of responsibility (irrespective of any decision on the merits)” (para. 39), and the task ahead of the Court is “to extract the consequences ensuing therefrom” (para. 40). Without prejudice to the subsequent decision of the Court as to the merits of the case, the *legal effects* of such provisional measures can be more appropriately examined within the framework of their *autonomous* legal regime. The day this is done, — he concludes, — “an additional

service will be rendered to the cause of the realization of justice at international level” (para. 40).

Declaration of Judge *ad hoc* Guillaume

Judge *ad hoc* Guillaume disagrees with the Court as regards point 2 (E) of the operative part of the Order. In that point the Court envisages the very unlikely scenario that a risk of irreparable prejudice to the wetlands protected by the Ramsar Convention would become apparent in future in the disputed territory as a result of the works in question. The Court has given Costa Rica, and Costa Rica alone, the right to take the necessary measures to prevent the occurrence of such prejudice. Judge *ad hoc* Guillaume considers that it would have been preferable to provide for such action to be taken by the two States acting jointly.

Declaration of Judge *ad hoc* Dugard

In his declaration Judge *ad hoc* Dugard expresses his full support for the Order but states that the Court would have been wise to provide for the regulation of Costa Rica’s access to the disputed territory to carry out remediation works on the new *caños* on account of the disagreement among the Parties over the question whether Costa Rica might use the San Juan River for this purpose.
