

SEPARATE OPINION OF JUDGE BENNOUNA

[Translation]

Relationship between the principal proceedings and the request for the indication of provisional measures — Safeguard of rights and preservation of status quo — Violation of rights and risk of irreparable prejudice — Parties' agreement to a prima facie examination by the Court of the existence of the rights at issue — Circumstances authorizing the Court to rule prima facie on the existence of the rights at issue — The Court avoided a debate on the rights.

1. Although I voted in favour of the operative part of the Order adopted by the Court, I cannot fully accept the process of reasoning from which it sprang. In particular, I regret that the Court did not take the opportunity offered to it in this case to clarify the relationship between the principal proceedings and the request for the indication of provisional measures.

That relationship is inescapable, as was clearly stated by the Court in the case concerning *United States Diplomatic and Consular Staff in Tehran*:

“whereas, moreover, a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party; and whereas in the present case the purpose of the United States request appears to be not to obtain a judgment, interim or final, on the merits of its claims but to preserve the substance of the rights which it claims *pendente lite*” (*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 16, para. 28*).

2. The Court's jurisprudence has made it clear that the protection of the rights of each party is ensured by means of provisional measures adopted as a matter of urgency with a view to preventing irreparable prejudice from nullifying the rights at issue which have been flouted. The aim is undoubtedly to preserve the status quo and to make sure that there is no “aggravation or extension of the dispute”, to use the Court's terminology. Yet we have to ask ourselves whether this is to preserve the status quo prevailing at the time of the seisin of the Court or to restore that which existed prior to the Respondent's allegedly unlawful act¹.

¹ Even in this instance, the purpose of the provisional measure is still to safeguard the right at issue in the dispute before the Court, since there is no question of reparation for the prejudice at that stage, as was pointed out by E. Dumbauld: “interim protection looks to the future” (*Interim Measures of Protection in International Controversies*, 1932, p. 164).

3. If the latter is the case, the violation of protected rights of itself carries the risk of irreparable prejudice and the Court can indicate provisionally, as it did in the case concerning *United States Diplomatic and Consular Staff in Tehran*, measures to restore the situation existing before the allegedly unlawful act. The Court thus acknowledged prima facie the existence of the rights claimed, the violation of which in itself represented irreparable prejudice. In other words, the rights claimed by the United States in the *United States Diplomatic and Consular Staff in Tehran* case were presumed to exist, and the Court could more readily come to this prima facie conclusion since Iran did not appear before it and did not have the opportunity effectively to contest the rights concerned; and indeed Article 53 of the Statute makes it easier for the Court to decide in favour of the Applicant, in particular as regards the presumption in favour of the rights claimed.

4. Similarly, the Court can avoid a debate as to the prima facie existence of the rights to be protected, when it is not their actual existence but their extent which is at issue.

Thus in the case concerning *Passage through the Great Belt*:

“the Court notes that the existence of a right of Finland of passage through the Great Belt is not challenged, the dispute between the Parties being over the nature and extent of that right, including its applicability to certain drill ships and oil rigs” (*Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures, Order of 29 July 1991*, *I.C.J. Reports 1991*, p. 17, para. 22).

In the *Nuclear Tests* case, the Court was divided as to the existing legal situation which needed to be preserved *pendente lite*, *inter alia* on the scope of the right to carry out nuclear tests (*Nuclear Tests (New Zealand v. France)*, *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, p. 135; see notably the dissenting opinions of Judges Forster and Petré).

The issue raised by the request for the indication of provisional measures filed by Argentina against Uruguay is more complex, since the two Parties engaged in a full-scale debate before the Court as to the very existence of the right claimed by Argentina, namely that authorization to build the pulp mills could not be given, nor could work on the sites begin, without the prior agreement of both States.

5. Should the Court not have taken this opportunity to consider whether, in certain circumstances, it is not obliged to examine prima facie the existence of the right concerned? Especially as this is an issue on which both judges and doctrine are still divided (see the separate opinion of Judge Shahabuddeen appended to the above Order of 29 July 1991 in the case concerning *Passage through the Great Belt (Finland v. Denmark)*, *I.C.J. Reports 1991*, notably pp. 29 *et seq.*)

6. In my opinion, the Court could have addressed this issue, while taking all necessary precautions to avoid being accused of having, in so doing, prejudged the merits of the case. Argentina had not in any case asked the Court to rule finally on part of its claims; it had merely proposed that the status quo be maintained pending final judgment (in the *Factory at Chorzów* case, the Court held that

“the request of the German Government cannot be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application above mentioned” (*Order of 21 November 1927, P.C.I.J., Series A, No. 12, p. 10*)).

7. The Parties were, moreover, agreed that the Court should rule *prima facie* on the existence of the right claimed, that is to say the right whereby construction work could not be commenced without their prior agreement — a right described as “procedural”. And indeed, foremost of the rights that Argentina sought to safeguard in its request for provisional measures of 4 May 2006 was

“the right to ensure that Uruguay shall not authorize or undertake the construction of works liable to cause significant damage to the River Uruguay — a legal asset whose integrity must be safeguarded — or to Argentina”.

8. However, the issue of who, in the final analysis, authorizes such construction, in the event of disagreement between the Parties as to what constitutes “significant damage”, remained unanswered.

In oral argument, Argentina expressed its interpretation of the Statute more precisely:

“[W]here Argentina has objected to a project that is subject to the requirements of the Statute — and it has, time and time again, in the present case — Uruguay is not entitled to carry out any work at all . . . Argentina has the clear right that Uruguay may not carry out any works. Article 9 establishes a ‘no construction’ obligation. It is as simple as that.” (CR 2006/46, p. 31, para. 12 (Sands).)

9. Argentina effectively takes the view that, if the Parties differ over the issue of whether a project is liable to cause significant damage to the River Uruguay, there is a consequential obligation on Uruguay not to authorize that project and a right on the part of Argentina that it should not be authorized. Argentina accordingly argued that

“[t]he fact that Uruguay has allowed construction to continue . . . causes irreparable damage not only to Argentina’s rights but also . . . to the effective functioning of this Court, which has a very significant role in the scheme established by the Statute” (CR 2006/46, p. 32, para. 14 (Sands)).

10. Uruguay, for its part, acknowledged that this is the crux of the debate between the Parties over the indication of provisional measures:

“The last few days’ proceedings have been revealing, because they have shown up the real subject, or rather the very heart, of the dispute between the Parties. The heart of the dispute is represented by the question whether, yes or no, a right of veto exists under this Statute: in the last analysis everything comes down to this.

However, it goes without saying that such a fundamental difference of opinion cannot be settled by the Court at this stage of proceedings. The fact remains that your Court is obliged to deal with it summarily now because — it has to be said — it could not grant the provisional measures requested unless it recognized, at least *prima facie*, that the Statute did give the Parties a right of veto. If on the other hand, the Court were to find that there were serious reasons for doubting this, the granting of provisional measures would not be justified . . .” (CR 2006/49, pp. 19-20, paras. 8-9 (Condorelli).)

11. In these circumstances, the Court should have examined the issue of the *prima facie* existence of this right. It is, however, true that it would not have been appropriate to settle the issue, even *prima facie*, if doubt subsisted as a result of the possible complexity, ambiguity or silence of the texts concerned (in particular the 1975 Statute of the River Uruguay), making it impossible to decide at this stage between the Parties’ differing interpretations. In that case, all discussion would have to be postponed until the merits stage. And that was precisely the situation in which the Court found itself when faced with Argentina’s request for a finding that it had a right to make the works subject to joint authorization. Once a decision had been reached as to the existence of the rights at issue, the risk of irreparable prejudice and the indication or otherwise of provisional measures should then have followed from this. There is therefore, in my opinion, a link missing in the Court’s reasoning, namely as to the *prima facie* existence of the right claimed.

12. This link in the reasoning is significant, as the Parties themselves recognized, since it determined the answer to be given to the request for the indication of provisional measures, at least as far as the suspension of construction was concerned. If the Court found *prima facie* that Uruguay could not initiate the works without Argentina’s consent, then Argentina’s right would need to be safeguarded urgently by the withdrawal of the authorizations granted and the freezing of the situation on the ground. If, however, the 1975 Statute — correctly interpreted in accordance with accepted methods — and any later agreements did not permit of such a response, then debate on the issue would be postponed until consideration of the merits of the case.

13. The Court has chosen to evade the issue (whereas both Parties had addressed it) by confining itself to stating that, if the right claimed by

Argentina had been violated, this did not mean that redress would not be possible at the merits stage (paras. 70 and 71 of the Order) — in other words, that the prejudice would not be irreparable. That, however, begs the question, since, if the purpose of provisional measures is to preserve the rights at issue, the Court must ensure that these are not simply rendered nugatory. What, then, would be the fate of Argentina's possible right of consent in respect of the works if, having been authorized without its agreement, these could be continued to completion at a time when the Court was already seised of the matter²? That right would have simply ceased to exist and it is difficult to see what measure of redress could bring it back to life again. True, the construction of these massive pulp mills is not a "fait accompli" — as the Court has emphasized — but what do we know of the short- and medium-term impact it will have on the area concerned, which on the Argentine side of the border is due to be developed for tourism?

14. The Court preferred not to raise the veil which, in its jurisprudence, modestly conceals the rights at issue at this stage of the proceedings. We may conclude that it did so implicitly, without actually saying as much; but, as in all things, its task could only benefit from being made explicit.

15. Would that involve a risk of the Court addressing now issues which should properly be dealt with at the merits stage? I do not think so. Did not the Parties debate the right at issue and request a decision from the Court on a prima facie basis, while keeping within the time-limits allotted to them, without ever effectively addressing the merits? And, once again, it is all a question of dosage, of the extent to which the issues are addressed, rather than a matter of their nature, given that the proceedings on the request for provisional measures cannot be totally severed from the principal proceedings, as the rights at issue form an indissoluble link between them. The difference is that, in the case of the former, it is sought to safeguard rights on a temporary basis while, for the latter, the aim is to arrive at a final settlement of the disputes having arisen regarding them.

16. That is why I regret that the Court failed to take this opportunity to clarify that aspect of provisional measures. The fact remains that, since I also considered that the evidence presented to the Court was insufficient for it to determine prima facie whether the right claimed by Argentina existed and I agreed with the rest of the Court's reasoning, I voted in favour of the Order.

(Signed) Mohamed BENNOUNA.

² In her commentary on Article 41 of the Statute, Karin Oellers-Frahm pointed out that "what is to be preserved is the subject-matter of the right, the factual use of the right which would be impossible if the subject-matter were irreparably destroyed" (*The Statute of the International Court of Justice*, ed. A. Zimmermann *et al.*, 2006, p. 931).