

DECLARATION OF JUDGE *AD HOC* DUGARD

1. I have voted in favour of the Order and fully support the measures contained in the Order. There is, however, one issue that was not dealt with in the Order, which I believe should have received attention. This is the question of Costa Rica's access to the disputed territory by means of the San Juan River to enable it to take appropriate measures relating to the two new *caños* if, after consultation with the Secretariat of the Ramsar Convention, and after giving notice to Nicaragua, it considers it necessary to take such measures to prevent irreparable prejudice to the environment of the disputed territory. In my view this matter should have been addressed as it is clear that there is no agreement between the Parties on this subject and without proper regulation it could lead to conflict.

2. In the proceedings Nicaragua made it clear that it regards the San Juan River as being subject to its absolute sovereignty and jurisdiction except for the right that Costa Rica enjoys to navigate it for the "purposes of commerce" in terms of the Treaty of Limits of 1858. Relying on the decision of the Court in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (*Judgment, I.C.J. Reports 2009*, p. 213), Nicaragua declared that it would not allow Costa Rica access to the San Juan River in order to carry out remediation work on the two *caños* in the disputed territory. At the same time it argued that the Court could not order provisional measures permitting Costa Rica to navigate on the San Juan River in order to gain access to the disputed territory on the grounds that this would impugn the territorial sovereignty of Nicaragua over the San Juan River.

3. Costa Rica, on the other hand, argued that the only way of reaching the disputed territory in order to carry out remediation work was by means of the San Juan River. It maintained that the terrain made it practically impossible to reach the two new *caños* by land or helicopter. Costa Rica argued that navigation on the San Juan River for the purpose of gaining access to the new *caños* would not prejudice the positions of the Parties *pendente lite* and pose no problem for Nicaragua.

4. In these circumstances I believe that the Court should in its Order have regulated Costa Rica's access to the two new *caños* in the disputed territory, if necessary by making provision for it to use the San Juan River. Instead provisional measure 2 (E) allows Costa Rica to "take appropriate measures related to the new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory" without any indication as to how this may be done. The only limitation imposed on Costa Rica in taking these measures is that it "shall avoid

any adverse effects on the San Juan River”. In effect this leaves it open to Costa Rica to access the new *caños* in the disputed territory by sea, land, air or river.

5. The uncertainty relating to access to the two new *caños* is aggravated by the fact that it is not clear that the decision of the Court in the *Dispute regarding Navigational Rights (I.C.J. Reports 2009*, p. 213) imposes an absolute prohibition on Costa Rica’s right to navigate the San Juan River for purposes other than commerce. There is language in the decision which suggests that the protection of the environment should be considered in interpreting the legal régime to govern navigation on the San Juan River and that Nicaragua should not regulate navigation in an unreasonable manner. The Court makes it clear that the protection of the environment is a “legitimate purpose” to consider in regulating traffic on the San Juan River (*ibid.*, p. 250, paras. 88-89; p. 261, para. 127). Moreover, it stated that the power of Nicaragua to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty of Limits “is not unlimited, being tempered by the rights and obligations of the Parties” (*ibid.*, p. 249, para. 87) and that any such regulation “must not be unreasonable, which means that its negative impact on the exercise of the right in question must not be manifestly excessive when measured against the protection afforded to the purpose invoked” (*ibid.*, pp. 249-250, para. 87 (5)). It may therefore be persuasively argued that it would be unreasonable for Nicaragua to prevent Costa Rica from using the San Juan River to gain access to the new *caños* to carry out remediation work on the grounds that the protection of the environment is a “legitimate purpose” for regulating traffic on the river. The legitimacy of such a purpose and the reasonableness of such action might be seen to be a necessary consequence of the illegality of Nicaragua’s construction of two new *caños* in an environmentally protected area.

6. In these circumstances it might have been wise for the Court to have ordered that Nicaragua should not obstruct Costa Rica’s free access to the two new *caños* by means of the San Juan River, along the lines of its Order by way of provisional measures to Thailand not to obstruct the free access of Cambodians to the Temple of Preah Vihear (*Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 555, para. 69 (2)).

7. The subject of how Costa Rica is to gain access to the disputed territory if it considers it necessary to take appropriate measures to prevent irreparable prejudice to the environment as a result of the construction of the two new *caños* remains unsettled. The fact that Costa Rica is required

to give prior notice of its intention relating to the taking of any such measures to Nicaragua provides some assurance that this process will be conducted peacefully. This is, however, a matter for the exercise of restraint on the part of both Parties. Both Nicaragua and Costa Rica attach great importance to the protection of the environment of the disputed territory. This should be the guiding and paramount interest on the part of both Parties in respect of any remediation works on the new *caños*.

*(Signed)* John DUGARD.

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