



INTERNATIONAL COURT OF JUSTICE

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Summary

Not an official document

Summary 2011/1

8 March 2011

Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)

Request for the indication of provisional measures

Summary of the Order of 8 March 2011

Application and request for the indication of provisional measures (paras. 1-48 of the Order)

1. Application instituting proceedings (paras. 1-10)

The Court begins by recalling that by an Application filed in the Registry of the Court on 18 November 2010, the Republic of Costa Rica (hereinafter “Costa Rica”) instituted proceedings against the Republic of Nicaragua (hereinafter “Nicaragua”) on the basis of the four following allegations: “the incursion into, occupation of and use by Nicaragua’s Army of Costa Rican territory as well as breaches of Nicaragua’s obligations towards Costa Rica” under several international law instruments.

Costa Rica maintains that the alleged violations concern “an initial area of around three square kilometres of Costa Rican territory, located at the northeast Caribbean tip of Costa Rica”, at the mouth of the San Juan border river, and more specifically in Laguna los Portillos (also known as “Harbor Head lagoon”), on the sea coast of Isla Portillos.

As a basis for the jurisdiction of the Court, the Applicant refers to Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the “Pact of Bogotá”) and to the declarations made under Article 36, paragraph 2, of the Statute of the Court, by Costa Rica on 20 February 1973 and by Nicaragua on 24 September 1929 (as amended on 23 October 2001).

In its Application, Costa Rica contends that

“[b]y sending contingents of its armed forces to Costa Rican territory and establishing military camps therein, Nicaragua is not only acting in outright breach of the established boundary regime between the two states, but also of the core founding principles of the United Nations, namely the principle of territorial integrity and the prohibition of the threat or use of force against any State in accordance with article 2 (4) of the Charter; also endorsed between the parties in Articles 1, 19 and 29 of the Charter of the Organization of American States.”

Costa Rica charges Nicaragua with having occupied, in two separate incidents, the territory of Costa Rica in connection with the construction of a canal (hereinafter also referred to as the “caño”) across Costa Rican territory from the San Juan river to Laguna los Portillos (also known as “Harbor Head lagoon”), and certain related works of dredging on the San Juan river.

Costa Rica states that the

“ongoing and planned dredging and the construction of the canal will seriously affect the flow of water to the Colorado River of Costa Rica, and will cause further damage to Costa Rican territory, including the wetlands and national wildlife protected areas located in the region”.

Costa Rica accordingly requests the Court

“to adjudge and declare that Nicaragua is in breach of its international obligations . . . as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has breached:

- (a) the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;
- (b) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;
- (c) the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;
- (d) the obligation not to damage Costa Rican territory;
- (e) the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;
- (f) the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;
- (g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;
- (h) the obligations under the Ramsar Convention on Wetlands;
- (i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica’s territorial integrity under international law.”

At the end of the Application, the Court is also requested to determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to in the paragraph above.

2. Request for the indication of provisional measures (paras. 11-48)

The Court recalls that on 18 November 2010, having filed its Application, Costa Rica also submitted a Request 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.

Costa Rica's Request for the indication of provisional measures is aimed at two separate Nicaraguan activities, namely:

1. the construction of an artificial canal (the caño) across Isla Portillos, over the entirety of which Costa Rica believes it is sovereign;
2. the dredging operations on the San Juan river, over which Nicaragua is sovereign.

First, as regards the alleged construction of the caño, Costa Rica contends in its Request for the indication of provisional measures that

“Nicaragua is currently destroying an area of primary rainforests and fragile wetlands on Costa Rican territory (listed as such under the Ramsar Convention's List of Wetlands of International Importance) for the purpose of facilitating the construction of a canal through Costa Rican territory, intended to deviate the waters of the San Juan River from its natural historical course into Laguna los Portillos (the Harbor Head Lagoon)”.

Second, with respect to the dredging works on the San Juan river, Costa Rica states that it has regularly protested to Nicaragua and called on it not to carry out such works “until it can be established that the dredging operation will not damage the Colorado River or other Costa Rican territory”. Costa Rica asserts that Nicaragua has nevertheless continued with its dredging activities on the San Juan river and that it “even announced on 8 November 2010 that it would deploy two additional dredges to the San Juan River”, one of which is reportedly still under construction.

In its Request for the indication of provisional measures, Costa Rica affirms that Nicaragua's statements demonstrate “the likelihood of damage to Costa Rica's Colorado River, and to Costa Rica's lagoons, rivers, herbaceous swamps and woodlands”, the dredging operation posing more specifically “a threat to wildlife refuges in Laguna Maquenque, Barra del Colorado, Corredor Fronterizo and the Tortuguero National Park”. Costa Rica also refers to the adoption on 12 November 2010 of a resolution of the Permanent Council of the Organization of American States (CP/RES. 978 (1777/10)), welcoming and endorsing the recommendations made by the Secretary-General of that Organization in his report of 9 November 2010 (CP/doc. 4521/10). It states that the Permanent Council called on the Parties to comply with those recommendations, in particular that requesting “the avoidance of the presence of military or security forces in the area where their existence might rouse tension”. Costa Rica asserts that Nicaragua's “immediate response to the Resolution of the Permanent Council of the OAS was to state [its] intention not to comply with [it]” and that Nicaragua has “consistently refused all requests to remove its armed forces from the Costa Rican territory in Isla Portillos”.

Costa Rica further affirms that “its rights to sovereignty and territorial integrity form the subject of its Request for the indication of provisional measures” (para. 18 of the Order).

At the end of its written Request for the indication of provisional measures, Costa Rica asks the Court

“as a matter of urgency to order the following provisional measures so as to rectify the presently ongoing breach of Costa Rica's territorial integrity and to prevent further

irreparable harm to Costa Rica's territory, pending its determination of this case on the merits:

- (1) the immediate and unconditional withdrawal of all Nicaraguan troops from the unlawfully invaded and occupied Costa Rican territories;
- (2) the immediate cessation of the construction of a canal across Costa Rican territory;
- (3) the immediate cessation of the felling of trees, removal of vegetation and soil from Costa Rican territory, including its wetlands and forests;
- (4) the immediate cessation of the dumping of sediment in Costa Rican territory;
- (5) the suspension of Nicaragua's ongoing dredging programme, aimed at the occupation, flooding and damage of Costa Rican territory, as well as at the serious damage to and impairment of the navigation of the Colorado River, giving full effect to the Cleveland Award and pending the determination of the merits of this dispute;
- (6) that Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court".

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At the public hearings held on 11, 12 and 13 January 2011 on the Request for the indication of provisional measures, oral observations were presented by the Agents and Counsel of the Governments of Costa Rica and Nicaragua.

During the hearings, Costa Rica reiterated the arguments developed in its Application and its Request for the indication of provisional measures, and argued that the conditions necessary for the Court to indicate the requested measures had been fulfilled.

The Applicant reaffirmed that,

"without its consent, Nicaragua has constructed an artificial canal across an area of Costa Rican territory unlawfully occupied by Nicaraguan armed forces; [that], to this end, Nicaragua is said to have illegally deforested areas of internationally protected primary forests; and [that], according to Costa Rica, Nicaragua's actions have caused serious damage to a fragile ecosystem and are aimed at establishing a *fait accompli*, modifying unilaterally the boundary between the two Parties, by attempting to deviate the course of the San Juan river, in spite of the Respondent's 'constant, unambiguous [and] incontestable' recognition of the Applicant's sovereignty over Isla Portillos, which the said canal would henceforth intersect" (para. 31 of the Order).

During its oral argument, Costa Rica declared that

"it is not opposed to Nicaragua carrying out works to clean the San Juan river, provided that these works do not affect Costa Rica's territory, including the Colorado river, or its navigation rights on the San Juan river, or its rights in the Bay of San Juan del Norte" (para. 32 of the Order).

The Applicant also

“asserted that the dredging works carried out by Nicaragua on the San Juan river did not comply with these conditions, firstly because Nicaragua has deposited large amounts of sediment from the river in the Costa Rican territory it is occupying and has proceeded to deforest certain areas; secondly, because these works, and those relating to the cutting of the disputed canal, have as a consequence the significant deviation of the waters of the Colorado river, which is situated entirely in Costa Rican territory; and, thirdly, because these dredging works will spoil portions of Costa Rica’s northern coast on the Caribbean Sea” (para. 32 of the Order).

At the end of its second round of oral argument, Costa Rica presented the following submissions:

“Costa Rica requests the Court to order the following provisional measures:

- A. Pending the determination of this case on the merits, Nicaragua shall not, in the area comprising the entirety of Isla Portillos, that is to say, across the right bank of the San Juan river and between the banks of the Laguna Los Portillos (also known as Harbor Head Lagoon) and the Taura river (‘the relevant area’):
 - (1) station any of its troops or other personnel;
 - (2) engage in the construction or enlargement of a canal;
 - (3) fell trees or remove vegetation or soil;
 - (4) dump sediment.
- B. Pending the determination of this case on the merits, Nicaragua shall suspend its ongoing dredging programme in the River San Juan adjacent to the relevant area.
- C. Pending the determination of this case on the merits, Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court.”

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For its part, during its first round of oral observations, Nicaragua stated that the activities it is accused of by Costa Rica took place on Nicaraguan territory and that they did not cause, nor did they risk causing, irreparable harm to the other Party.

Referring to the first Alexander Award, dated 30 September 1897, Nicaragua maintained that, in the region in question, its boundary with Costa Rica follows the eastern edge of the Harbor Head lagoon before joining the San Juan river by the first natural channel in a south-westerly and then a southerly direction. According to Nicaragua, that first channel is the caño. Nicaragua added that its title to sovereignty over the northern part of Isla Portillos delimited by the said caño is confirmed by the exercise of various sovereign prerogatives.

The Respondent indicated that in its view the caño was a “natural channel [which] had become obstructed over the years, [and that] it had undertaken to make it once more navigable for small vessels”, adding that “the works condemned by Costa Rica were not therefore aimed at the cutting of an artificial canal [and that] the cleaning and clearing of the channel had been carried out

manually in Nicaraguan territory, the right bank of the said channel constituting the boundary between the two Parties” (para. 38 of the Order).

Nicaragua further asserted that “the number of trees felled was limited and that it has undertaken to replant the affected areas, all located on the left bank of the said channel” — that is, according to Nicaragua, in Nicaraguan territory — “with ten trees for every one felled”, and affirmed that “the works to clean the channel are over and finished” (para. 39 of the Order).

Moreover, “Nicaragua disputed that elements of its armed forces had occupied an area of Costa Rican territory” (para. 42 of the Order). And although it did state that it had assigned some of its troops to the protection of staff engaged in the cleaning of the channel and the dredging of the river, it nevertheless maintained that “these troops had remained in Nicaraguan territory and that they were no longer present in the border region where those activities took place”.

In its second round of oral observations, Nicaragua once more

“contended that, contrary to Costa Rica’s affirmations, the caño existed before it was the subject of the clean-up operation; that this fact was evidenced by various maps, satellite photographs, the environmental impact assessment conducted by Nicaragua and affidavits, all of which pre-date the disputed works; and that the boundary between the Parties in the contested area does indeed follow this caño, in view of the specific hydrological characteristics of the region” (para. 46 of the Order).

Furthermore, the Respondent “reaffirmed that it has the right to dredge the San Juan river without having to obtain Costa Rica’s permission to do so”, before confirming that

“this limited operation, like that relating to the cleaning and clearing of the caño, had not caused any damage to Costa Rica and did not risk causing any, since, according to Nicaragua, there is no evidence to substantiate the Applicant’s claims” (para. 47 of the Order).

Nicaragua concluded that there was nothing to justify the indication by the Court of the provisional measures sought by Costa Rica and asked the Court “to dismiss the Request for provisional measures filed by the Republic of Costa Rica”.

Reasoning of the Court

1. Prima facie jurisdiction (paras. 49-52)

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 is seeking to found the jurisdiction of the Court on Article XXXI of the Pact of Bogotá and on the declarations made by the two States pursuant to Article 36, paragraph 2, of the Statute. Costa Rica also refers to a communication sent by the Nicaraguan Minister for Foreign Affairs to his Costa Rican counterpart dated 30 November 2010, in which the Court is presented as “the judicial organ of the United Nations competent to discern over” the questions raised by the present dispute.

The Court points out that, in the present proceedings, Nicaragua did not contest its jurisdiction to entertain the dispute.

The Court concludes from the foregoing 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. Accordingly, it finds that it is not obliged, at this stage of the proceedings, to determine with greater precision which instrument or instruments invoked by Costa Rica afford a basis for its jurisdiction to entertain the various claims submitted to it.

2. Plausible character of the rights whose protection is being sought and link between these rights and the measures requested (paras. 53-62)

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 of the parties pending its decision. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible, and that a link exists 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.

— Plausible character of the rights whose protection is being sought (paras. 55-59)

The Court notes that whereas Costa Rica alleges that the rights claimed by it and forming the subject of the case on the merits are, on the one hand, its right to assert sovereignty over the entirety of Isla Portillos and over the Colorado river and, on the other hand, its right to protect the environment in those areas over which it is sovereign, Nicaragua, for its part, contends that it holds the title to sovereignty over the northern part of Isla Portillos, that is to say, the area of wetland of some three square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan river up to its mouth at the Caribbean Sea and the Harbor Head lagoon (hereinafter the “disputed territory”), and argues that its dredging of the San Juan river, over which it has sovereignty, has only a negligible impact on the flow of the Colorado river, over which Costa Rica has sovereignty.

As regards the right to assert sovereignty over the disputed territory, the Court states that, at this stage of the proceedings, it cannot settle the Parties’ competing claims and is not called upon to determine once and for all whether the rights claimed by each of them exist; for the purposes of considering the request for the indication of provisional measures, the Court needs only to decide whether the rights claimed by the Applicant on the merits, and for which it is seeking protection, are plausible.

After a careful examination of the evidence and arguments presented by the Parties, the Court concludes that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible. It adds that it is not called upon to rule on the plausibility of the title to sovereignty over the disputed territory advanced by Nicaragua. The Court points out further that the provisional measures it may indicate would not prejudice any title, and that the Parties’ conflicting claims cannot hinder the exercise of the Court’s power under its Statute to indicate such measures.

As regards the right to protect the environment, the Court also finds that, at this stage of the proceedings, the right claimed by Costa Rica to request the suspension of the dredging operations on the San Juan river if they threaten seriously to impair navigation on the Colorado river or to damage Costa Rican territory is plausible.

— Link between the rights whose protection is being sought and the measures requested (paras. 60-62)

Taking the view that the continuation or resumption of the disputed activities by Nicaragua on Isla Portillos would be likely to affect the rights of sovereignty which might be adjudged on the

merits to belong to Costa Rica, the Court considers that a link exists between these rights and the first provisional measure being sought, which is aimed at ensuring that Nicaragua will refrain from any activity “in the area comprising the entirety of Isla Portillos”.

The Court further believes that, since there is a risk that the rights which might be adjudged on the merits to belong to Costa Rica would be affected if it were established that the continuation of the Nicaraguan dredging operations on the San Juan river threatened seriously to impair navigation on the Colorado river or to cause damage to Costa Rica’s territory, a link exists between these rights and the second provisional measure being sought, which concerns the suspension of Nicaragua’s “dredging programme in the River San Juan adjacent to the relevant area”.

Lastly, the Court considers that the final provisional measure sought by Costa Rica, aimed at ensuring that Nicaragua refrains “from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court” pending the “determination of this case on the merits”, being very broadly worded, is linked to the rights which form the subject of the case before the Court on the merits, in so far as it is a measure complementing more specific measures protecting those same rights.

3. Risk of irreparable prejudice and urgency (paras. 63-72)

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 Costa Rica maintains: (i) that “Nicaraguan armed forces continue to be present on Isla Portillos in breach of Costa Rica’s sovereign rights”; (ii) that Nicaragua “is continuing to damage the territory of Costa Rica, posing a serious threat to its internationally protected wetlands and forests”; and (iii) that “Nicaragua[, which] is attempting to unilaterally adjust, to its own benefit, a River the right bank of which forms a valid, lawful and agreed border . . . cannot be permitted to continue to deviate the San Juan River through Costa Rica’s territory in this manner, so as to impose on Costa Rica and the Court a *fait accompli*”.

The Court points out that Costa Rica wishes the *status quo ante* to be restored, pending the Court’s judgment on the merits, and has indicated that the following rights, which it considers itself to possess, are under threat of irreparable prejudice as a result of Nicaragua’s activities: the right to sovereignty and territorial integrity, the right not to have its territory occupied, the right not to have its trees chopped down by a foreign force, the right not to have its territory used for depositing dredging sediment or as the site for the unauthorized digging of a canal, and the several rights corresponding to Nicaragua’s obligation not to dredge the San Juan if this affects or damages Costa Rica’s land, environment or the integrity and flow of the Colorado river.

The Court notes that Costa Rica adds that the works undertaken by Nicaragua in the disputed territory will have the effect of causing flooding and damage to Costa Rican territory, as well as geomorphological changes, and that the dredging of the San Juan river carried out by Nicaragua will result in similar effects, as well as significantly reducing the flow of the Colorado river.

It further observes that Costa Rica bases the urgency of its Request for the indication of provisional measures on the need to prevent the pursuit of action prejudicial to the rights of Costa Rica significantly altering the factual situation on the ground before the Court has the opportunity to render its final decision on the merits of the case, and contends that the ongoing presence of Nicaraguan armed forces on Costa Rica’s territory is contributing to a political situation of extreme hostility and tension which may lead to the aggravation and/or extension of the dispute.

The Court also notes that Nicaragua, having maintained that the activities carried out within its own territory, the environmental impact of which had been duly assessed beforehand, were not likely to cause imminent damage to Costa Rica, asserted that the cleaning and clearing operations in respect of the caño were over and finished, that none of its armed forces were presently stationed on Isla Portillos, and that it did not intend to send any troops or other personnel to the disputed area, nor to establish a military post there in the future.

However, the Court points out that Nicaragua has stated that, in connection with the current replanting of trees, its Ministry of the Environment “will send inspectors to the site periodically in order to monitor the reforestation process and any changes which might occur in the region, including the Harbor Head lagoon”, and that since “[t]he caño is no longer obstructed”, “[i]t is possible to patrol the area on the river, as has always been the case, for the purposes of enforcing the law, combating drug trafficking and organized crime, and protecting the environment”.

4. Consideration of the provisional measures requested by Costa Rica, and decision of the Court (paras. 73-85)

The Court states that it is in the light of this information that the first provisional measure requested by Costa Rica in its submissions presented at the end of its second round of oral observations should be considered, namely, that

“[p]ending the determination of this case on the merits, Nicaragua shall not, in the area comprising the entirety of Isla Portillos, that is to say, across the right bank of the San Juan river and between the banks of the Laguna Los Portillos (also known as Harbor Head Lagoon) and the Taura river (‘the relevant area’): (1) station any of its troops or other personnel; (2) engage in the construction or enlargement of a canal; (3) fell trees or remove vegetation or soil; (4) dump sediment”.

Taking note of Nicaragua’s statements concerning the ending of the works in the area of the caño, the Court concludes that, in the circumstances of the case as they now stand, there is no need to indicate the measures numbered (2), (3) and (4) requested by Costa Rica in its submissions presented at the end of the second round of oral observations (see paragraph above).

Given that Nicaragua intends to carry out certain activities, if only occasionally, in the disputed territory, the Court finds that provisional measures should be indicated, since this situation creates an imminent risk of irreparable prejudice to Costa Rica’s claimed title to sovereignty over the said territory and to the rights deriving therefrom, and gives rise to a real and present risk of incidents liable to cause irreparable harm in the form of bodily injury or death.

The Court therefore considers that each Party must refrain from sending to, or maintaining in the disputed territory, including the caño, any personnel, whether civilian, police or security, until such time as the dispute on the merits has been decided or the Parties have come to an agreement on this subject. The Court further concludes that each Party has the responsibility to monitor that territory from the territory over which it unquestionably holds sovereignty, and that it is for the Parties’ police or security forces to co-operate with each other in a spirit of good neighbourliness, in particular to combat any criminal activity which may develop in the disputed territory.

Having observed that, in the disputed border area, Costa Rica and Nicaragua have respectively designated, under the Ramsar Convention, the “Humedal Caribe Noreste” and the “Refugio de Vida Silvestre Río San Juan” as wetlands of international importance, 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 that part of the “Humedal Caribe Noreste” wetland where the disputed territory is situated. It finds that, for this 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". It adds that "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".

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As regards the second provisional measure requested by Costa Rica, requiring Nicaragua to suspend its dredging programme in the San Juan river adjacent to the relevant area, the Court finds that it cannot be concluded at this stage from the evidence adduced by the Parties that the dredging of the San Juan river is creating a risk of irreparable prejudice to Costa Rica's environment or to the flow of the Colorado river; nor has it been shown that, even if there were such a risk of prejudice to rights Costa Rica claims in the present case, the risk would be imminent. The Court concludes from the foregoing that in the circumstances of the case as they now stand the second provisional measure requested by Costa Rica should not be indicated.

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Having pointed out that it has the power under its Statute to indicate provisional measures that are in whole or in part other than those requested, or measures that are addressed to the party which has itself made the request, and that its orders on provisional measures have binding effect and thus create international legal obligations which both Parties are required to comply with, the Court considers it appropriate in the circumstances to indicate complementary measures, calling on both Parties to refrain from any act which may aggravate or extend the dispute or render it more difficult of solution.

The Court adds that the decision given in the present proceedings in no way prejudices the question of its jurisdiction to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and that it leaves unaffected the right of the Governments of Costa Rica and Nicaragua to submit arguments in respect of those questions.

Operative clause (para. 86)

The last paragraph of the Order reads in full as follows:

"For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) Unanimously,

Each Party shall refrain from sending to, or maintaining in the disputed territory, including the caño, any personnel, whether civilian, police or security;

(2) By thirteen votes to four,

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;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood, Donoghue; Judge ad hoc Dugard;

AGAINST: Judges Sepúlveda-Amor, Skotnikov, Xue; Judge ad hoc Guillaume;

(3) Unanimously,

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) Unanimously,

Each Party shall inform the Court as to its compliance with the above provisional measures.”

Judges Koroma and Sepúlveda-Amor append separate opinions to the Order. Judges Skotnikov, Greenwood and Xue append declarations to the Order. Judge ad hoc Guillaume appends a declaration to the Order. Judge ad hoc Dugard appends a separate opinion to the Order.

Synopses of those separate opinions and declarations are appended to the present Summary.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma states that, although he has voted in favour of the Order, he has misgivings about the Court's decision to use "plausibility" as a criterion for indicating provisional measures. Judge Koroma notes that the Court's ability to indicate provisional measures under Article 41 of its Statute is vital to ensuring that parties' legal rights are preserved pending the Court's decision on the merits. He agrees with both the outcome and the bulk of the reasoning in the Order, but decided to write a separate opinion on the issue of "plausibility", which is raised in the Order.

Judge Koroma recalls that this "plausibility standard" was first enunciated in Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). He maintains that the plausibility criterion seems to have appeared out of nowhere in that case, without any supporting citations or explanation. He also emphasizes that the plausibility standard would appear inconsistent with the settled jurisprudence of the Court, which requires the applicant to demonstrate that an existing right needs to be protected.

Judge Koroma expresses two concerns with the plausibility standard: its ambiguity and the fact that it is unclear whether the standard applies to legal rights, factual claims, or both. With regard to the first concern, Judge Koroma notes that the word "plausible" in English can have multiple meanings. "Plausible" often carries a negative connotation: an implication that, although a plausible claim basically sounds truthful, it is in reality deceitful, specious, only partially true, or completely false. Judge Koroma points out that this makes "plausible" unreliable as a legal standard that the parties must meet to obtain provisional measures from the Court. The Court's use of the plausibility standard also, in his view, gives the impression that the threshold for the indication of provisional measures has been lowered. He notes, however, that the word "plausible" in French appears not to have a negative connotation and may therefore have better reflected the Court's intention when the term was initially used in the Belgium v. Senegal case.

With regard to the second concern, Judge Koroma maintains that the Court has not clarified whether the plausibility standard requires an applicant to show that its legal claims are plausible or that its factual claims are plausible. He points out that the Court has applied the standard to both legal and factual claims. In Belgium v. Senegal, the Court, after articulating the plausibility standard, stated that "the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible". Judge Koroma writes that this implies that the Court engaged solely in a legal analysis. He observes that in the present Order, however, the Court evaluates the plausibility of Costa Rica's factual claims. He finds that the actual legal rights at issue, including Costa Rica's rights to sovereignty and territorial integrity, are self-evident. What the Order examines instead is whether "the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible" (Order, paragraph 58).

Judge Koroma believes that it would have been worth articulating a clear standard of some sort to evaluate, prima facie, the legitimacy of an applicant's claims at the provisional measures stage. He notes that such a standard would be similar to the Court's existing prima facie jurisdiction requirement, and would help ensure that parties do not abuse the provisional measures process by bringing claims that are patently without merit. He further observes that the Court has on occasion informally evaluated the legitimacy of a party's claim when deciding to indicate provisional measures, often within its analysis of jurisdictional questions or irreparable prejudice. The more difficult question, according to Judge Koroma, is what the precise standard should be. He states that one option would be to require a party to establish, prima facie, that it enjoys certain rights. Another possibility would be to require that the rights asserted by a party be grounded in a reasonable interpretation of the law or of the facts.

Judge Koroma concludes that, if the Court does decide to adopt a new standard, it should do so in a transparent manner that explains the rationale behind it. He emphasizes that adopting an order indicating provisional measures by reference to plausibility may prove a mistake.

Separate opinion of Judge Sepúlveda-Amor

In his separate opinion, Judge Sepúlveda-Amor agrees that interim measures of protection should be afforded by the Court in the present case. He recalls that the Court has the power to indicate any provisional measure it may deem necessary in order to preserve the respective rights of either party, and that the measures indicated may be different, in whole or in part, from those originally requested. Judge Sepúlveda-Amor considers useful to reaffirm that an Order on the indication of provisional measures has a binding effect and that the Parties to the case must comply with any international obligation arising under the Order.

According to Judge Sepúlveda-Amor, the Court addresses an important concern: the risk of criminal activity in the disputed territory. The Court has decided, and rightly so, to give each Party the responsibility for policing the area over which it unquestionably has sovereignty. It is to be hoped that the effectiveness of the bilateral collaboration required will be sufficient to keep the operation of organized crime away from this transitory no-man's land.

On a different note, Judge Sepúlveda-Amor believes the Court should have seized the opportunity to elucidate further the "plausibility requirement" for the purposes of Article 41 of the Statute. The indeterminacy surrounding the concept of plausibility in the Order could prove problematic in future requests for the indication of provisional measures, as will be shown in his opinion.

Although concurring with the need to grant measures of interim protection in the present case, Judge Sepúlveda-Amor does not subscribe to the second paragraph of the operative clause of the Order, nor does he share some of the reasons adduced in it as a basis for the Court's decision. He considers insufficient and unsatisfactory the treatment given by the Court in the Order to the imminent risk of irreparable prejudice to the possible rights of Costa Rica. His view is that the provisional measures indicated fall far short of what is needed to properly preserve and protect the Humedal Caribe Noreste. It must be recalled that the Humedal is intimately linked to the Refugio de Vida Silvestre Corredor Fronterizo and the Refugio de Vida Silvestre Río San Juan Ramsar site. The fact that these wetlands are interconnected means that their environmental protection requires a wider bilateral collaboration and the full assistance of the Ramsar Secretariat.

Declaration of Judge Skotnikov

Judge Skotnikov fully supports the Court's decision directing both Parties to "refrain from sending to, or maintaining in the disputed territory, including the caño, any personnel, whether civilian, police or security". However, he is unable to concur in the second provisional measure indicated by the Court.

He points out that two conditions, well established by the jurisprudence of the Court, namely the existence of a risk of irreparable harm to the rights in dispute and urgency, have not been met in this instance. He is also of the view that the majority voting in favour of the second provisional measure has treated the Court's duty not to prejudge the outcome of the merits of the case rather lightly. Moreover, this provisional measure, according to Judge Skotnikov, may contribute to aggravating or extending the dispute.

The following reason is given for indicating the second provisional measure, which allows Costa Rica to dispatch civilian personnel charged with protecting the environment to the disputed

territory: “the disputed territory is . . . situated in the ‘Humedal Caribe Noreste’ wetland, in respect of which Costa Rica bears obligations under the Ramsar Convention” and, therefore, “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”.

Judge Skotnikov agrees that Costa Rica bears obligations under the Ramsar Convention in respect of “Humedal Caribe Noreste”. However, in his view, the question as to whether those obligations extend to the disputed territory can only be answered at the merits stage.

The Court has decided that Nicaragua must cease the replanting of the trees in the disputed territory and must not send inspectors to periodically monitor the reforestation process and any changes which might occur in the region, because “this situation creates an imminent risk of irreparable prejudice to Costa Rica’s claimed title to sovereignty over the said territory and to the rights deriving therefrom”. However, the presence in the disputed territory of Costa Rica’s personnel charged with protecting the environment can only be equally prejudicial to Nicaragua’s claimed title to sovereignty over that territory.

Actions which may be taken by Costa Rica under the second provisional measure potentially go well beyond the reforestation and monitoring contemplated by Nicaragua. Unfortunately, this does create a risk of aggravating and extending the dispute before the Court and making it more difficult to resolve.

In the view of the Court, Nicaragua’s activities in the disputed territory give rise “to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death”. However, Costa Rica’s activities, which the Court is allowing in the disputed territory by indicating the second provisional measure, may pose the same danger.

Judge Skotnikov notes that it has not been shown that any presence of either Party’s personnel in the tiny disputed territory is necessary in order to avoid irreparable prejudice being caused to the part of the wetland where this territory is situated. It is clear from the case file that no personnel were present in the disputed territory before Nicaragua embarked on its caño operation in October 2010.

Costa Rica itself did not request the Court to indicate a provisional measure allowing it to send personnel to the disputed territory. The second provisional measure is indicated purely on the Court’s initiative.

In Judge Skotnikov’s view, the Court should have dealt with the issue of protection of the environment in exactly the same way as it dealt with the issue concerning the prevention of criminal activity in the disputed territory: it should have called on the Parties to co-operate in a spirit of good neighbourliness in the area protected under the Ramsar Convention irrespective of their competing claims to sovereignty over the disputed territory.

Declaration of Judge Greenwood

Judge Greenwood considers the criteria to be applied when the Court is asked to indicate provisional measures of protection and concludes that the Court must be satisfied that the rights claimed by a party are plausible, i.e., that there is a reasonable prospect that the Court will find on the merits that those rights exist and are applicable in the instant case. The Court must also be satisfied that there is a real risk of irreparable prejudice being caused to those rights before any judgment on the merits. He finds that the first requirement is satisfied in respect of Costa Rica’s claims, but the second is satisfied only in respect of possible prejudice to rights which might be adjudged to belong to Costa Rica in respect of the Isla Portillos. He would have preferred that the second operative paragraph of the Order be more explicit in calling upon the Parties to adopt a

concerted approach to prevent environmental damage to the Isla Portillos and Harbor Head lagoon in accordance with the Ramsar Convention.

Declaration of Judge Xue

Judge Xue declared that she voted against the second operative paragraph of the Order because she considers that the present case essentially relates to territorial dispute over the area in question. Unless otherwise provided, the territorial application of an international treaty is bound with the territorial sovereignty of the State parties. To allow one Party to dispatch to the disputed area personnel, even civilian and for environmental purpose, would very likely lead to undesired interpretation of the Order prejudging on the merits of the case and, more seriously, it may incline to aggravate the situation on the ground. In accordance with Article 41 of the Statute of the Court and its case law, the interim procedure for provisional measures must not prejudice any question relating to the merits of the case before the Court, and must leave intact the rights of the Parties in that respect.

In her view, the Court could have, pending the final decision on the merits, indicated the measure to both Parties with the assistance of the Secretariat of the Ramsar Convention, if any actions have to be taken to prevent possible irreparable harm to the environment. Her vote is intended to remind the Parties that the second operative paragraph should in no way be construed as affecting the substance of the case.

Declaration of Judge ad hoc Guillaume

1. In his declaration, Judge ad hoc Gilbert Guillaume recalls firstly that, according to the Judgment delivered by the Court on 13 July 2009, Nicaragua may execute at its own expense such works to improve navigation on the San Juan river as it deems suitable, provided such works do not seriously impair navigation on the river or on tributaries of the San Juan belonging to Costa Rica. He adds that if, in the course of such works, damage is caused to the territory of Costa Rica, the latter is not entitled to prevent the continuation of the works on Nicaragua's territory, but to obtain reparation for the damage suffered. He goes on to observe that, without ruling on the merits, the Court has found that the dredging envisaged by Nicaragua was not "creating a risk of irreparable prejudice to Costa Rica's environment or to the flow of the Colorado river". Supporting this finding, he endorses the Court's decision to reject the request for provisional measures submitted on this point by Costa Rica.

2. Turning to the dispute regarding the activities carried out by Nicaragua on the territory of some three square kilometres claimed by both States, Judge ad hoc Guillaume likewise endorses the decision of the Court to instruct each Party to refrain from sending to, or maintaining in that territory any personnel, whether civilian, police or security. In his view, this solution clearly preserves the rights to sovereignty put forward by both Nicaragua and Costa Rica, whilst at the same time helping to safeguard peace in the region.

3. There remains the environmental impact of the works carried out in this area by Nicaragua. In this respect, Judge ad hoc Guillaume takes note, as does the Court, of Nicaragua's assertion that the works are finished, and therefore concludes, like the Court, that there is no need to request Nicaragua not to continue with those works. He shares the Court's opinion that the existence of the disputed caño does not create an imminent risk of irreparable prejudice to the environment.

4. On the other hand, Judge ad hoc Guillaume differs from the Court with regard to subparagraph (2) of the operative part of the Order. In this subparagraph, the Court contemplates the somewhat unlikely situation in which a risk of irreparable prejudice to the wetlands protected by the Ramsar Convention might appear in future because of the disputed works. It has given Costa Rica, and Costa Rica alone, the right in such circumstances to dispatch civilian personnel charged with the protection of the environment to the disputed territory, in order to establish whether any measures need to be taken.

Before acting in this way, Costa Rica must indeed consult with the Secretariat of the Ramsar Convention and endeavour to reach agreement with Nicaragua; should the negotiations fail, however, the final decision rests with Costa Rica. Judge ad hoc Guillaume regrets this fact, since he believes that protection of the environment in the disputed territory cannot be separated from protection of the environment in the adjacent territories falling under the undisputed sovereignty of one State or the other. It would therefore have been preferable to entrust that protection to both States acting jointly. Such a solution would also have made it possible to avoid giving the impression that the Court intended to favour Costa Rica's rights to the disputed territory, which is obviously not the case, since the Order specifically states that it in no way prejudges the merits of the case, nor in particular sovereignty over the territory at issue.

Separate opinion of Judge ad hoc Dugard

Judge ad hoc Dugard voted in favour of the dispositif in its entirety. Nevertheless he expressed misgivings about the first paragraph of the dispositif which requires the civilian, police or security personnel of both Parties to keep out of the disputed territory.

In his Opinion Judge ad hoc Dugard examines the need for the Applicant to demonstrate a "plausible right" as a requirement for provisional measures and shows that this right can only be proved by some consideration of the merits of the case. The 1858 Treaty of Limits, the First Alexander Award of 1897, and a number of maps provide evidence of such a plausible right to sovereignty and territorial integrity on the part of Costa Rica.

Respect for the territorial integrity of a State by other States, a norm of jus cogens, and the principle of respect for the stability of boundaries, requires an order for provisional measures which vindicates the right of the invaded State, Costa Rica, to its territorial sovereignty. The nature of the territory does not justify a different conclusion as a State has full sovereignty over both inhabited and uninhabited portions of its territory. The appropriate order in such a case is one that restores the status quo ante.

Judge ad hoc Dugard warns that an even-handed order of the kind contained in the first paragraph of the dispositif requiring both Parties to refrain from sending to, or maintaining in the disputed territory, any personnel, whether civilian, police or military, will give unwarranted credibility and legitimacy to the Respondent's claim to the territory and create a dangerous precedent.

Judge ad hoc Dugard's misgivings about the first paragraph of the dispositif are to some extent remedied by the second paragraph of the dispositif which, in allowing Costa Rica to take measures to protect the environment of the disputed territory, recognizes the stronger claim of Costa Rica to the territory. This allowed him to vote for the dispositif as a whole.
