

International Court of Justice — Provisional measures — Requirements for the indication of provisional measures — Prima facie jurisdiction — Jurisdiction under American Treaty on Pacific Settlement, 1948 (Pact of Bogotá) — Plausibility of rights claimed — Whether rights claimed by Costa Rica plausible — Irreparable damage — Whether rights claimed by Costa Rica at imminent risk of irreparable prejudice

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Damages — Environmental damage — Consequences of responsibility for environmental damage — Request by Costa Rica to determine amount of compensation — Obligation to make full reparation — Hierarchy of means of reparation — Punitive or exemplary damages — Three-step approach to awarding compensation — Establishment of unlawful act — Causal link between unlawful act and injury suffered — Quantification — Compensation for environmental damage — Compensation for expenses incurred by Costa Rica — Methodology to quantify amount due — Parties disagreeing on appropriate methodology — Expenses by Costa Rica as a result of unlawful activities in disputed territory — Expenses by Costa Rica as a result of Nicaragua's breach of provisional measures — Expenses by Costa Rica for construction and monitoring of a dyke — Costa Rica's claim for pre-judgment and post-judgment interest — Whether pre-judgment interest necessary to ensure full reparation — Date by which compensation to be paid by Nicaragua

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA
 IN THE BORDER AREA

(COSTA RICA *v.* NICARAGUA)

CERTAIN ACTIVITIES/CONSTRUCTION OF A ROAD
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CONSTRUCTION OF A ROAD IN COSTA RICA ALONG
 THE SAN JUAN RIVER

(NICARAGUA *v.* COSTA RICA)¹

International Court of Justice

Request by Costa Rica for the Indication of Provisional Measures.
 8 March 2011

(Owada, *President*; Tomka, *Vice-President*; Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cañado Trindade, Yusuf, Greenwood, Xue and Donoghue, *Judges*; Guillaume and Dugard, *Judges ad hoc*)

Joinder of Proceedings. 17 April 2013

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cañado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde and Bhandari, *Judges*; Guillaume and Dugard,² *Judges ad hoc*)

Counter-claims. 18 April 2013

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cañado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde and Bhandari, *Judges*; Guillaume and Dugard, *Judges ad hoc*)

¹ At the Merits stage, Costa Rica was represented by HE Mr Manuel A. González Sanz, Minister for Foreign Affairs and Worship of Costa Rica; HE Mr Edgar Ugalde Alvarez, Ambassador on Special Mission, as Agent; HE Mr Sergio Ugalde, Ambassador of Costa Rica to the Kingdom of the Netherlands, as Co-Agent, Counsel and Advocate; Professor Marcelo Kohen, Mr Samuel Wordworth QC, Mr Arnoldo Brenes, Ms Kate Parlett and Ms Katherine Del Mar as Counsel and Advocates; Mr Simon Olleson, as Counsel; Mr Ricardo Otárola, Ms Shara Duncan, Mr Gustavo Campos, Mr Rafael Sáenz and Ms Ana Patricia Villalobos as Assistant Counsel; Ms Elisa Rivero as Assistant.

The Republic of Nicaragua was represented by HE Mr Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands, as Agent and Counsel; Professor Stephen C. McCaffrey, Professor Alain Pellet, Mr Paul S. Reichler and Mr Andrew B. Loewenstein as Counsel and Advocates; Mr César Vega Masís, Mr Walner Molina Pérez and Mr Julio César Saborio as Counsel; Mr Edgardo Sobenes Obregon, Ms Claudia Loza Obregon, Mr Benjamin Samson, Ms Cicely O. Parseghian, Mr Benjamin K. Guthrie and Mr Ofilio J. Mayorga as Assistant Counsel; Mr Danny K. Hagans, Mr Robin Cleverly, Ms Blanca P. Ríos Touma PhD, Mr Scott P. Walls and Ms Victoria Leader as Scientific Advisers and Experts.

² A separate Order on Joinder of Proceedings was handed down for each case on the same date. In *Construction of a Road*, Judge ad hoc Simma was sitting instead of Judge ad hoc Dugard.

*Requests for the Modification of the Order of 8 March 2011
 Indicating Provisional Measures. 16 July 2013*

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cañado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde and Bhandari, *Judges*; Guillaume and Dugard, *Judges ad hoc*)

*Request by Costa Rica for the Indication of New Provisional
 Measures. 22 November 2013*

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Keith, Bennouna, Skotnikov, Cañado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde and Bhandari, *Judges*; Guillaume and Dugard, *Judges ad hoc*)

*Request by Nicaragua for the Indication of Provisional Measures.
 13 December 2013*

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cañado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde and Bhandari, *Judges*; Guillaume and Dugard, *Judges ad hoc*)

Merits. 16 December 2015

(Abraham, *President*; Yusuf, *Vice-President*; Owada, Tomka, Bennouna, Cañado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson and Gevorgian, *Judges*; Guillaume and Dugard, *Judges ad hoc*)

Compensation. 2 February 2018

(Abraham, *President*; Yusuf, *Vice-President*; Owada, Tomka, Bennouna, Cañado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson and Gevorgian, *Judges*; Guillaume and Dugard, *Judges ad hoc*)

SUMMARY:³ *The facts*:—On 18 November 2010, Costa Rica filed with the International Court of Justice (“the Court”) an application instituting

³ Prepared by Dr M. Lando.

proceedings against Nicaragua concerning the alleged incursion into, occupation and use by Nicaragua's army of Costa Rica's territory. Costa Rica sought to base the Court's jurisdiction on Article XXXI of the American Treaty on Pacific Settlement, 1948 ("the Pact of Bogotá"), as well as on the declarations made by both Costa Rica and Nicaragua under Article 36(2) of the Statute of the International Court of Justice, 1945.

Following hostilities between the Parties in 1857, Costa Rica and Nicaragua signed a Treaty of Limits on 15 April 1858 ("the 1858 Treaty"), which fixed their boundary from the Pacific Ocean to the Caribbean Sea. The 1858 Treaty established a boundary running along the Costa Rican bank of the San Juan River to the end of Punta de Castilla on the Caribbean Sea. Nicaragua was to have dominium and imperium over the waters of the San Juan River.

In 1886, the Parties agreed to submit to United States President Cleveland a dispute concerning the validity of the 1858 Treaty. In 1888, President Cleveland handed down the award upholding the validity of the 1858 Treaty, and deciding that the boundary started from Punta de Castilla as it existed on 15 April 1858 ("the Cleveland Award"). Under the Convention on Border Demarcation concluded between the Republic of Costa Rica and the Republic of Nicaragua, 1896 (Pacheco–Matus Convention), the Parties created two national Demarcation Commissions, both of which included an engineer appointed by the United States President, with wide powers to settle outstanding differences arising during the demarcation works. US Army General Alexander was appointed and made five awards. In his first award of 30 September 1897, General Alexander decided that the Costa Rica–Nicaragua boundary started at the headland as it existed on that day, followed the water's edge around Harbor Head Lagoon, and entered the San Juan River by the "first channel met".

In the 1980s, some differences arose between the Parties concerning Costa Rica's rights under the 1858 Treaty to navigation on the San Juan River. The Court ruled on those differences in its 2009 Judgment in *Dispute regarding Navigational and Related Rights*.⁴

On 18 October 2010, Nicaragua began dredging the San Juan River, creating artificial channels ("caños") on what Costa Rica claimed to be territory under Costa Rican sovereignty. On 18 November 2010, Costa Rica filed with the Court a case against Nicaragua and requested the Court to indicate provisional measures under Article 41 of its Statute (*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (the "*Certain Activities*" case)). The Court gave an Order indicating certain provisional measures on 8 March 2011.

In December 2010, Costa Rica began the construction of Road 1856 Juan Rafael Mora Porras ("the road"), along the Costa Rican bank of the San Juan River. On 22 December 2011, Nicaragua filed with the Court a case against Costa Rica claiming that the construction of the road was causing significant

⁴ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 151 ILR 615.

transboundary harm (*Construction of a Road by Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (the “*Construction of a Road*” case)).

On 17 April 2013, the Court delivered two separate and identical Orders, one for each case, joining the proceedings in the two cases. On 18 April 2013, the Court delivered an Order on the counter-claims presented by Nicaragua in *Certain Activities*. On 16 July 2013, the Court delivered an Order on the requests of Costa Rica and Nicaragua for the modification of the Order of 8 March 2011 on provisional measures in *Certain Activities* and *Construction of a Road* respectively. On 22 November 2013, the Court delivered a further Order on Costa Rica’s request for new provisional measures in *Certain Activities*. On 13 December 2013, the Court delivered an Order on Nicaragua’s request for provisional measures in the *Construction of a Road* case.

On 16 December 2015, the Court handed down its Judgment on the merits in the joined proceedings. Since the Parties were unable to reach agreement on compensation owed by Nicaragua to Costa Rica, the Court delivered a Judgment on compensation in the *Certain Activities* case on 2 February 2018.

Order on Costa Rica’s Request for the Indication of Provisional Measures (8 March 2011)

Costa Rica contended that Nicaragua had, without Costa Rica’s consent, undertaken the construction of a *caño* on the Isla Portillos, an uninhabited island at the mouth of the San Juan River over which Costa Rica and Nicaragua both claimed sovereignty. Costa Rica submitted that Nicaragua had deforested areas of internationally protected primary forests, thus causing environmental damage. According to Costa Rica, Nicaragua had also tried to divert the course of the San Juan River, which constituted the boundary between the two States. As a result of this attempted diversion, the waters of the Colorado River, located on Costa Rican territory, had been affected. Costa Rica added that it had never received the result of Nicaragua’s environmental impact assessment (“EIA”), and that there was no channel connecting the San Juan River to Harbor Head Lagoon.

According to Costa Rica, Nicaragua’s army prolonged its presence on Isla Portillos in breach of Costa Rica’s sovereignty over that area, and, by dredging the San Juan River, constituted a threat to the environment in that region. Costa Rica argued that activities such as the felling of trees, the clearing of vegetation, the removal of soil and the diversion of the waters of the San Juan River posed a real and imminent risk of irreparable prejudice to the rights which Costa Rica claimed on the merits. Costa Rica also argued that the Nicaraguan activities on Isla Portillos could result in irreparable prejudice before the Court could decide the merits of the case.

Nicaragua contended that it was acting within its own territory without any harm to Costa Rica, and that an EIA of its activities had been duly carried

out. Nicaragua added that no troops of its own were stationed in Isla Portillos, and that the activities of clearing of the *caño* had already been completed. Nicaragua thus concluded that there was no real and imminent risk of irreparable prejudice to Costa Rica's asserted rights.

Held:—(1) (unanimously) Each Party should refrain from sending to, or maintaining in, the disputed territory, including the *caño*, any personnel, whether civilian, police or security (para. 86(1)).

(2) (by thirteen votes to four, Judges Sepúlveda-Amor, Skotnikov, Xue and Judge ad hoc Guillaume dissenting) Costa Rica could dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it was necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory was situated. Costa Rica was required to consult with the Secretariat of the Convention on Wetlands of International Importance, especially as Waterfowl Habitat, 1971 (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 (para. 86(2)).

(3) (unanimously) Each Party should refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve (para. 86(3)).

(4) (unanimously) Each Party was to inform the Court of its compliance with the above provisional measures (para. 86(4)).

(a) Neither Party had disputed the Court's jurisdiction. The requirement of prima facie jurisdiction was therefore satisfied (para. 52).

(b) The rights asserted by both Parties derived from sovereignty over Isla Portillos, which was in dispute between the Parties. Costa Rica's sovereignty over Isla Portillos was plausible, while the Court was not called upon to decide on the plausibility of Nicaragua's asserted sovereignty over that same territory. Based on paragraph 6 of the 1888 Cleveland Award, Costa Rica's right to protect the environment of Isla Portillos was plausible. The provisional measures which Costa Rica had sought were linked to the rights Costa Rica had asserted on the merits (paras. 55-62).

(c) Nicaragua's assertion that works around the *caño* had been completed was noted. However, Nicaragua also intended to carry out further activities in the disputed area. Since the Parties had competing claims over the disputed area, Nicaragua's activities could cause irreparable prejudice to Costa Rica's claimed rights. Provisional measures different from those requested were indicated, in accordance with Article 75(2) of the Rules of Court. It could not be concluded that the dredging of the San Juan River could have caused irreparable prejudice to the rights claimed by Costa Rica (paras. 74-82).

Separate Opinion of Judge Koroma: The plausibility requirement for indicating provisional measures was unclear and ambiguous. It was unclear whether such a requirement concerned the rights of an applicant, or its factual

claims. It was also unclear whether plausibility would only apply to rights, or also to the factual claims of an applicant. The Court should have articulated plausibility as a standard requiring a Party to demonstrate that it had a reasonable chance of obtaining a judgment on the merits in its favour, similarly to *prima facie* jurisdiction (paras. 1-13).

Separate Opinion of Judge Sepúlveda-Amor: (1) There was an urgent need to clarify the standard of the plausibility requirement. The unclear plausibility standard would encourage States to over-address the merits of the case, and overburden the Court with evidence at the provisional measures stage (paras. 3-15).

(2) The Court should have conducted a closer assessment of whether there existed a risk of irreparable prejudice to Costa Rica's rights. The Court should have allowed both Parties, not just Costa Rica, to dispatch civilian personnel in the disputed area for protecting its environment (paras. 17-33).

Declaration of Judge Skotnikov: Irreparable prejudice and urgency were not met in respect of the second provisional measure indicated by the Court, which might have prejudged the merits. The presence of Costa Rica's personnel in the disputed area could equally be prejudicial to Nicaragua's claimed rights. The plausibility of Costa Rica's rights could not put Costa Rica itself in a position more favourable than that of Nicaragua. Neither Party had argued that the presence of Costa Rica's personnel was necessary to avoid irreparable prejudice (paras. 3-11).

Declaration of Judge Greenwood: (1) The Court should have gone further and required the Parties to cooperate to minimize prejudice to the environment pending the proceedings. The requirements for indicating provisional measures were established. It was not sufficient for a Party to assert that it had a right; it had to show that it had some prospect of success on the merits of its claim (paras. 1-5).

(2) Since the waters of Harbor Head Lagoon and the surrounding wetland were inseparable from the environmental point of view, and could have been found ultimately not to belong to the same State, the Court should have indicated that the Parties cooperate between themselves, and with the Ramsar Secretariat, to protect the environment in the disputed area (paras. 11-15).

Declaration of Judge Xue: The reasoning in support of the second provisional measure could be construed as a prejudgment of the merits. Since the dispute concerned title over the disputed territory, allowing only Costa Rican personnel to enter the disputed area for the purposes of environmental protection could be seen to prejudice the merits (pp. 73-4).

Declaration of Judge ad hoc Guillaume: The Court showed undue apprehension with respect to the possibility that visits by civilian personnel could

have been necessary to avoid the creation of irreparable prejudice to the environment. The responsibility for such visits should have been given to both Parties, since each Party had created one of the two protected areas of wetland, and since the Court's decision could have been interpreted as prejudicing the merits of the case (paras. 18-21).

Separate Opinion of Judge ad hoc Dugard: It was impossible for the Court completely to avoid considering the merits of a case at the provisional measures stage. Given the binding character of provisional measures, it would have been unjust to require that only the applicant did not show any prospect of success on the merits. The evidence indicated that Costa Rica's sovereignty over Isla Portillos was plausible, based on the 1858 Treaty, the 1897 Alexander Awards and numerous maps over a century. The evidence and arguments of Nicaragua fell short of showing that it had a plausible right to sovereignty over Isla Portillos. Given the importance of territorial integrity and of the prohibition of the use of force, provisional measures in territorial disputes required taking into account special considerations that aimed at fully vindicating the position of the invaded State. Such considerations applied both to inhabited and to uninhabited territory. The fact that the Court had indicated that both Parties should have kept out of the disputed territory gave Nicaragua's weak claim to sovereignty over Isla Portillos too much credibility and legitimacy. By contrast, the Court was correct in indicating that only Costa Rica's personnel were allowed to enter the disputed territory for the purposes of environmental protection (paras. 3-24).

*Orders on the Joinder of Proceedings (17 April 2013)*⁵

On 22 December 2011, Nicaragua filed with the ICJ an application instituting proceedings against Costa Rica, in a case concerning alleged violations of Nicaraguan sovereignty over its territory and environmental damage caused by Costa Rica as a result of the construction of a road on its territory along the San Juan River. Nicaragua reserved the right to request the Court to join the proceedings relating to this application with the proceedings in *Certain Activities*. Nicaragua later requested the joinder of the proceedings in that case to the proceedings in *Construction of a Road*, arguing that the two cases were closely linked in law and in fact.

According to Costa Rica, the joinder requested by Nicaragua was neither timely nor equitable, as the subject matter of the two cases was different. Costa

⁵ The present summary was written on the basis of the Order on Joinder of Proceedings in the *Certain Activities* case. The Order in the *Construction of a Road* case, which is substantially identical, is reproduced at p. 104 below. The Separate Opinion of Judge Cançado Trindade, which is identical in both cases, is only reproduced in the *Certain Activities* case.

Rica contended that *Certain Activities* concerned violations of Costa Rica's sovereignty, while *Construction of a Road* concerned environmental issues. Costa Rica also argued that the difference in the procedural timetable of the two cases would delay the final judgment in *Certain Activities*. Moreover, Costa Rica submitted that the two cases concerned separate geographical areas.

Held:—(1) (unanimously)⁶ The proceedings in *Certain Activities* were joined to the proceedings in *Construction of a Road* (para. 25).

(2) When the Court ordered the joinder of proceedings, it had done so for the sound administration of justice and for reasons of judicial economy, and any decision on joinder had to be taken based on the circumstances of each case. The two cases related to a similar area along the San Juan River, and were between the same Parties. Both cases related to works carried out along or in the vicinity of the San Juan River, and concerned the effect of such works on the environment. In both cases, the Parties argued that there had been violations of the 1858 Treaty, the Cleveland and Alexander Awards, and the Ramsar Convention. Hearing and deciding the cases together would have significant advantages, which would not cause unnecessary delays (paras. 18-23).

Separate Opinion of Judge Cançado Trindade: (1) With the beginnings of the law of international organizations, the concept of “implied powers” and “inherent powers” took shape, also on account of the Court's jurisprudence (paras. 4-6).

(2) In effecting joinder of proceedings, the Court could rely on its “inherent power” to ensure the sound administration of justice before it (paras. 7-18).

(3) The sound administration of justice guided the Court where no rule was indicated by its Statute or Rules. This principle had allowed international tribunals to ensure the procedural equality between the Parties. The sound administration of justice was a general principle of law, a source of international law which international tribunals had implicitly reaffirmed yet neglected to recognize (paras. 20-7).

Order on Counter-Claims (18 April 2013)

In its counter-memorial dated August 2012, Nicaragua raised four counter-claims to Costa Rica's claims set out in the Application instituting proceedings in *Certain Activities*. Costa Rica objected to the admissibility of Nicaragua's first, second and third counter-claims, while it did not in principle object to the admissibility of the fourth.

⁶ In the Order on Joinder of Proceedings in the *Construction of a Road* case, there were sixteen votes in favour, with Judge ad hoc Simma voting against.