

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CERTAIN ACTIVITIES CARRIED OUT
BY NICARAGUA
IN THE BORDER AREA

(COSTA RICA *v.* NICARAGUA)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER OF 8 MARCH 2011

2011

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

CERTAINES ACTIVITÉS MENÉES
PAR LE NICARAGUA
DANS LA RÉGION FRONTALIÈRE

(COSTA RICA *c.* NICARAGUA)

DEMANDE EN INDICATION
DE MESURES CONSERVATOIRES

ORDONNANCE DU 8 MARS 2011

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8 March 2011

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REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER

Present: President OWADA; Vice-President TOMKA; Judges KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CAÑADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; Judges ad hoc GUILLAUME, DUGARD; Registrar COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. Whereas 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 (herein-

after “Nicaragua”) on the basis of an alleged “incursion into, occupation of and use by Nicaragua’s army of Costa Rican territory” as well as alleged breaches of Nicaragua’s obligations towards Costa Rica under:

- “(a) the Charter of the United Nations and the Charter of the Organization of American States;
- (b) the Treaty of Territorial Limits between Costa Rica and Nicaragua of 15 April 1858 . . . , in particular Articles I, II, V and IX;
- (c) the arbitral award issued by the President of the United States of America, Grover Cleveland, on 22 March 1888 . . . ;
- (d) the first and second arbitral awards rendered by Edward Porter Alexander dated respectively 30 September 1897 and 20 December 1897 . . . ;
- (e) the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat . . . ;
- (f) the Judgment of the Court of 13 July 2009 in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*; and
- (g) other applicable rules and principles of international law”;

2. Whereas Costa Rica states in its Application 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 principles of territorial integrity and the prohibition of the threat or use of force against any State in accordance with Article 2, paragraph 4, of the Charter; also endorsed as between the parties in Articles 1, 19 and 29 of the Charter of the Organization of American States”;

3. Whereas Costa Rica contends in the said Application that

“Nicaragua has, in two separate incidents, occupied the territory of Costa Rica in connection with the construction of a canal 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”;

whereas it states that during the first incursion, which occurred on or about 18 October 2010, Nicaragua was reported “felling trees and depositing sediment from the dredging works on Costa Rican territory”; whereas it adds that, “[a]fter a brief withdrawal, on or about 1 Novem-

ber 2010 a second contingent of Nicaraguan troops entered Costa Rican territory and established a camp”;

4. Whereas Costa Rica maintains that “[t]his second incursion has resulted in the continuing occupation by armed Nicaraguan military forces of an initial area of around 3 square kilometres of Costa Rican territory, located at the north-east Caribbean tip of Costa Rica”, but that “evidence shows that Nicaraguan military forces have also ventured further inside Costa Rican territory, to the south of that area”; whereas it contends that Nicaragua has “also seriously damaged that part of Costa Rican territory under its occupation”;

5. Whereas Costa Rica also asserts in the said Application that “[t]he 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”;

6. Whereas, relying on statements made by the Nicaraguan head of the dredging operations and the President of Nicaragua, Costa Rica asserts that Nicaragua is seeking to divert the flow of the San Juan River to what that State erroneously describes as its “historic channel” by cutting a canal which would join the seaward course of the river to the Laguna los Portillos; whereas, in so doing, Nicaragua would cause harm to an area of territory which Costa Rica maintains, for the reasons set out at length in its Application, falls under its sovereignty;

7. Whereas Costa Rica contends in particular that the border line, which it claims Nicaragua is violating by its military and dredging operations, has for the last 113 years “consistently been respected and depicted, in all official maps of both countries, as constituting the international boundary line between Costa Rica and Nicaragua”;

8. Whereas in its Application, as a basis for the jurisdiction of the Court, Costa Rica 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);

9. Whereas, at the end of its Application, Costa Rica presents the following submissions:

“For these reasons, and reserving the right to supplement, amplify or amend the present Application, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application 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";

10. Whereas Costa Rica also requests the Court to "determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to . . . above" (para. 9);

11. Whereas 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;

12. Whereas, in its Request for the indication of provisional measures, Costa Rica refers to the same bases of jurisdiction of the Court relied on in its Application (see paragraph 8 above) and to the facts set out therein;

13. Whereas, in support of the said Request, Costa Rica states 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)”;

whereas it observes that “Nicaraguan officials have indicated that the intention of Nicaragua is to deviate some 1,700 cubic metres per second . . . of the water that currently is carried by the Costa Rican Colorado River”;

14. Whereas Costa Rica contends that it has regularly protested to Nicaragua and called on it not to dredge the San Juan River “until it can be established that the dredging operation will not damage the Colorado River or other Costa Rican territory”, but 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;

15. Whereas Costa Rica asserts 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”;

16. Whereas Costa Rica 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); and whereas 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”;

17. Whereas 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”;

18. Whereas Costa Rica affirms that its rights to sovereignty and territorial integrity form the subject of its Request for the indication of provisional measures submitted to the Court; whereas it maintains that Nicaragua’s obligation “not to dredge the San Juan if this affects or dam-

ages Costa Rica's lands, its environmentally protected areas and the integrity and flow of the Colorado River" corresponds to these rights;

19. Whereas, at the end of its 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”;

20. Whereas on 18 November 2010, the date on which the Application and the Request for the indication of provisional measures were filed in the Registry, the Registrar informed the Nicaraguan Government of the filing of these documents and transmitted certified copies of them to it forthwith, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also notified the Secretary-General of the United Nations of this filing;

21. Whereas on 19 November 2010 the Registrar informed the Parties that the Court, in accordance with Article 74, paragraph 3, of the Rules of Court, had fixed 11, 12 and 13 January 2011 as the dates for the oral proceedings on the Request for the indication of provisional measures;

22. Whereas, pending the notification provided for by Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court by transmission of the printed bilingual text of the Application to the Members of the

United Nations, the Registrar informed those States of the filing of the Application and its subject, and of the filing of the Request for the indication of provisional measures;

23. Whereas, on the instructions of the Court and in accordance with Article 43 of the Rules of Court, the Registrar addressed to all the States parties to the Pact of Bogotá the notification provided for in Article 63, paragraph 1, of the Statute; and whereas the Registrar also addressed to the Secretary-General of the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute;

24. Whereas, since the Court includes upon the Bench no judge of the nationality of the Parties, each of them proceeded, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, to choose a judge *ad hoc* in the case; whereas, for this purpose, Costa Rica chose Mr. John Dugard, and Nicaragua chose Mr. Gilbert Guillaume;

25. Whereas on 4 January 2011 Costa Rica transmitted to the Court certain documents relating to the Request for the indication of provisional measures, to which it intended to refer during the oral proceedings; whereas these documents were communicated forthwith to the other Party;

26. Whereas, on the same day and to the same end, Nicaragua in turn transmitted certain documents to the Court, which were communicated forthwith to the other Party; whereas on the same occasion Nicaragua filed in the Registry electronic copies of documents, including video material which it intended to present to the Court during the oral proceedings; whereas Costa Rica informed the Registrar that it had no objection to such a presentation; and whereas the Court authorized the presentation of the video material at the hearings;

27. Whereas, on 4 January 2011, Nicaragua also asked the Court, in the exercise of its power under Article 62, paragraph 1, of the Rules of Court, to call upon Costa Rica to produce, before the opening of the oral proceedings, studies it had carried out with regard to the impact of the dredging of the San Juan River on the flow of the Colorado River; whereas, following this request, Costa Rica produced such a study on its own initiative on 6 January 2011;

28. Whereas on 10 January 2011 Costa Rica also transmitted to the Court electronic versions of a Nicaraguan atlas from which it intended to produce certain maps during the oral proceedings; whereas this document was communicated forthwith to Nicaragua;

29. Whereas at the public hearings held on 11, 12 and 13 January 2011, in accordance with Article 74, paragraph 3, of the Rules of Court, oral observations on the Request for the indication of provisional measures were presented the following representatives of the Parties:

On behalf of Costa Rica: H.E. Mr. Edgar Ugalde Álvarez, *Agent*,
Mr. Arnaldo Brenes,
Mr. Sergio Ugalde, *Co-Agent*,
Mr. Marcelo Kohen,
Mr. James Crawford;

On behalf of Nicaragua: H.E. Mr. Carlos José Argüello Gómez, *Agent*,
Mr. Stephen C. McCaffrey,
Mr. Paul S. Reichler,
Mr. Alain Pellet;

and whereas, during the hearings, questions were put by certain Members of the Court to Nicaragua, to which replies were given in writing by the latter; whereas, in accordance with Article 72 of the Rules of Court, Costa Rica then commented upon Nicaragua's written replies;

* * *

30. Whereas, in its first round of oral observations, 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;

31. Whereas Costa Rica reaffirmed that, without its consent, Nicaragua has constructed an artificial canal across an area of Costa Rican territory unlawfully occupied by Nicaraguan armed forces; whereas, to this end, Nicaragua is said to have illegally deforested areas of internationally protected primary forests; and whereas, 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;

32. Whereas 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; whereas Costa Rica 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;

33. Whereas Costa Rica asserted that the part of its territory affected by Nicaragua's activities is protected under the Convention on Wetlands

of International Importance especially as Waterfowl Habitat, done at Ramsar on 2 February 1971 (*United Nations Treaty Series (UNTS)*, Vol. 996, No. I-14583, p. 245, hereinafter the “Ramsar Convention”), and that on 17 December 2010, further to a mission, a report by the Ramsar Secretariat (hereinafter the “Ramsar Report”) stated that the work undertaken by Nicaragua had inflicted serious damage on the protected wetlands; whereas Costa Rica also referred to a report of 4 January 2011 drawn up by the Operational Satellite Applications Programme of the United Nations Institute for Training and Research (hereinafter the “UNITAR/UNOSAT report”) relating to the geomorphological and environmental changes likely to be caused by Nicaragua’s activities in the border region;

34. Whereas, according to Costa Rica, the Court is not seized of a boundary dispute arising from a divergence of interpretation, between the Parties, of a treaty or an arbitral award, because, until the unexpected emergence of the present dispute, Nicaragua had always recognized Isla Portillos as falling in its entirety under Costa Rican sovereignty; whereas, to this end, Costa Rica recalled the history and substance of the territorial demarcation between the Parties through the 1858 Treaty of Limits, the 1888 Cleveland Award, the 1896 Pacheco-Matus Convention and the five arbitral awards of General Alexander; whereas, in support of its assertions, it produced a number of maps, including some drawn up at the time of the above-mentioned awards and, more recently, by Nicaragua itself or by third States; and whereas Costa Rica maintained that Nicaragua is attempting, in a new and artificial way, to portray these proceedings as a territorial dispute, even though it is indisputably established that, from the point on the coast originally identified as Punta Castilla, the boundary runs all around the Harbor Head Lagoon and along the sea coast of Isla Portillos before joining the mouth of the San Juan River, in such a way that the canal cut by Nicaragua across Isla Portillos is on Costa Rican territory;

35. Whereas Costa Rica also asserted that its title to territory was confirmed by *effectivités*, namely the exercise of elements of governmental authority in the disputed territory, including the deeds of possession inscribed in the Costa Rican cadastre;

*

36. Whereas, in 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 do they risk causing, irreparable harm to the other Party;

37. Whereas, referring to the first Alexander Award dated 30 September 1897 (*United Nations, Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, pp. 215-222), Nicaragua maintained that, from the point

on the coast originally identified as Punta Castilla, the boundary 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; that this boundary line in the area in dispute derives from the very terms of the Alexander Award and is more rational than the line claimed by Costa Rica, since it links, by the said channel, the bed of the San Juan River to the Harbor Head Lagoon, over which Nicaragua is indisputably sovereign; and that the exercise in various forms and over several years of sovereign prerogatives in the region in question by the Nicaraguan public authorities is confirmation of Nicaragua's title to territory;

38. Whereas Nicaragua asserted that since the said natural channel had become obstructed over the years, it had undertaken to make it once more navigable for small vessels; whereas the works condemned by Costa Rica were not therefore aimed at the cutting of an artificial canal; and whereas 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;

39. Whereas Nicaragua also 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, with ten trees for every one felled; whereas it stated that the works to clean the channel are over and finished;

40. Whereas Nicaragua indicated that the dredging operations on the San Juan River were made necessary by the progressive sedimentation of its bed and that it has not only a sovereign right to dredge the river, but also an international obligation to do so; whereas it stated that these operations, aimed at improving the navigability of the river, had only been authorized after an environmental impact assessment had been duly completed; whereas it added that, as in the case of the cleaning and clearing of the channel, any debris from the dredging of the river had been set on Nicaragua's side of the border, at various clearly identified sites;

41. Whereas Nicaragua contended that Costa Rica did not suffer, nor was it likely to suffer, any harm on account of these disputed activities; whereas it contested the scientific value of the Ramsar Report on the grounds that it was drawn up on the basis of information supplied solely by Costa Rica; whereas, according to Nicaragua, the impact of the dredging works on the San Juan River on the flow of the Colorado River is and will remain negligible, as recognized by a Costa Rican study; and whereas Nicaragua referred to a report by Dutch experts confirming the validity of the environmental impact assessment carried out by the Nicaraguan administration and the non-injurious character of the dredging works undertaken;

42. Whereas Nicaragua disputed that elements of its armed forces had occupied an area of Costa Rican territory; whereas it stated 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, but clarified that these

troops had remained in Nicaraguan territory and that they were no longer present in the border region where those activities took place;

*

43. Whereas, in its second round of oral observations, Costa Rica repudiated the existence of a natural channel joining the San Juan River to the Harbor Head Lagoon and maintained that the narrow waterway in question had been artificially constructed by Nicaragua in Costa Rican territory; whereas, according to Costa Rica, Nicaragua's territorial claim to the area in dispute is not "plausible" and derives from a dangerous challenge to the principle of the stability of borders; whereas Costa Rica contended that the *effectivités* invoked by Nicaragua are supported only by affidavits gathered from Nicaraguan State officials after the introduction of the present proceedings;

44. Whereas Costa Rica indicated that, in spite of its requests, it had not received, before the present proceedings, a copy of the environmental impact assessment conducted by Nicaragua; whereas it observed that this study concerned only the dredging operation on the San Juan River and not the activities relating to the canal cut by Nicaragua and considered by the latter to be a natural channel (hereinafter the "*caño*", the Spanish designation adopted by both Parties as from the second round of oral argument); and whereas Costa Rica called into question the probative value of the report of the Dutch experts submitted by Nicaragua and maintained that it has suffered environmental harm which has the potential to be aggravated, thereby rendering necessary the indication of provisional measures by the Court;

45. Whereas, at the end of its second round of oral observations, 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”;

*

46. Whereas, in its second round of oral observations, Nicaragua 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;

47. Whereas Nicaragua reaffirmed that it has the right to dredge the San Juan River without having to obtain Costa Rica’s permission to do so; whereas it confirmed 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; and whereas it concluded that there was nothing to justify the indication by the Court of the provisional measures sought by Costa Rica;

48. Whereas, at the end of its second round of oral observations, Nicaragua presented the following submissions:

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

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

* * *

PRIMA FACIE JURISDICTION

49. Whereas, the Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded; whereas the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards

the merits of the case (see, for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Order of 28 May 2009*, *I.C.J. Reports 2009*, p. 147, para. 40);

* *

50. Whereas 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; whereas it 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;

51. Whereas Nicaragua, in the present proceedings, did not contest the jurisdiction of the Court to entertain the dispute;

52. Whereas, in view of the foregoing, the Court considers 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; whereas, at this stage of the proceedings, the Court is not obliged 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 (see *ibid.*, p. 151, para. 54);

* * *

PLAUSIBLE CHARACTER OF THE RIGHTS WHOSE PROTECTION
IS BEING SOUGHT AND LINK BETWEEN THESE RIGHTS
AND THE MEASURES REQUESTED

53. Whereas the power of the Court 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; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong to either party; whereas, therefore, the Court may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible (*ibid.*, p. 151, paras. 56-57);

54. Whereas, moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought (see, for example, *ibid.*, p. 151, para. 56);

*Plausible Character of the Rights Whose
Protection Is Being Sought*

55. Whereas the rights claimed by Costa Rica 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; whereas, however, Nicaragua 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 3 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 whereas Nicaragua 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;

56. Whereas, therefore, apart from any question linked to the dredging of the San Juan River and the flow of the Colorado River, the rights at issue in these proceedings derive from the sovereignty claimed by the Parties over the same territory (cf. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 22, para. 39); and whereas the part of Isla Portillos in which the activities complained of by Costa Rica took place is *ex hypothesi* an area which, at the present stage of the proceedings, is to be considered by the Court as in dispute (cf. *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 10, para. 28);

57. Whereas, at this stage of the proceedings, the Court cannot settle the Parties’ claims to sovereignty over the disputed territory and is not called upon to determine once and for all whether the rights which Costa Rica wishes to see respected exist, or whether those which Nicaragua considers itself to possess exist; whereas, 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;

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

59. Whereas paragraph 6 of the third clause of the Cleveland Award of 22 March 1888 reads as follows:

“The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, provided such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.” (*RIAA*, Vol. XXVIII, p. 210.);

whereas Costa Rica contends that it has the right 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; whereas, relying on the second sentence of paragraph 6 of the third clause of that Award, quoted above, Nicaragua argues that, if any damage results from the works to maintain and improve the San Juan River, Costa Rica can only seek indemnification, and therefore that Costa Rica, in the event of risk of harm, cannot obtain by means of provisional measures a remedy which the Award would exclude on the merits; whereas Costa Rica responds that indemnification is not the only remedy available to it; whereas at this stage of the proceedings, the Court finds that the rights claimed by Costa Rica are plausible;

*Link between the Rights Whose Protection Is Being Sought
and the Measures Requested*

60. Whereas the first provisional measure requested by Costa Rica is aimed at ensuring that Nicaragua will refrain from any activity “in the area comprising the entirety of Isla Portillos”; whereas 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; whereas, therefore, a link exists between these rights and the provisional measure being sought;

61. Whereas the second provisional measure requested by Costa Rica concerns the suspension of Nicaragua’s “dredging programme in the River San Juan adjacent to the relevant area”; whereas 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 (see paragraph 59 above) or to cause damage to Costa Rica’s territory; whereas, therefore, there exists a link between these rights and the provisional measure being sought;

62. Whereas the final provisional measure sought by Costa Rica is 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”; whereas on a number of occasions the Court has already indicated provisional measures ordering one or other of the parties, or even both, to refrain from any action which would aggravate or extend the dispute or make it more difficult to resolve (see, for example, *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. 21, para. 47, point B; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, *I.C.J. Reports 1993*, p. 24, para. 52, point B; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Provisional Measures, Order of 15 March 1996*, *I.C.J. Reports 1996 (I)*, p. 24, para. 49, point 1); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Provisional Measures, Order of 1 July 2000*, *I.C.J. Reports 2000*, p. 129, para. 47, point (1)); whereas “in those cases provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures, Order of 23 January 2007*, *I.C.J. Reports 2007 (I)*, p. 16, para. 49); whereas the final provisional measure sought by Costa Rica, 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;

* * *

RISK OF IRREPARABLE PREJUDICE AND URGENCY

63. Whereas the Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of the judicial proceedings (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, *I.C.J. Reports 1993*, p. 19, para. 34);

64. Whereas the power of the Court to indicate provisional measures 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 the rights in dispute before the Court has given its final decision (see, for example,

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, pp. 152-153, para. 62); and whereas the Court must therefore consider whether such a risk exists in these proceedings;

* *

65. Whereas, in its Request for the indication of provisional measures, Costa Rica states that “Nicaraguan armed forces continue to be present on Isla Portillos in breach of Costa Rica’s sovereign rights” and that Nicaragua “is continuing to damage the territory of Costa Rica, posing a serious threat to its internationally protected wetlands and forests”; whereas it contends, moreover, 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*”;

66. Whereas, during the course of the oral proceedings, Costa Rica stated that it wished the *status quo ante* to be restored, pending the Court’s judgment on the merits, and indicated that the following rights, which it considers itself to possess, are under threat of irreparable prejudice as a result of Nicaragua’s activities:

- “1. the right to sovereignty and territorial integrity;
2. the right not to have its territory occupied;
3. the right not to have its trees chopped down by a foreign force;
4. the right not to have its territory used for depositing dredging sediment or as the site for the unauthorized digging of a canal; and
5. 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”;

67. Whereas Costa Rica maintained that it “does not, at the present stage, need to establish that its rights have actually been harmed irreparably” nor to “prove actual harm”, and that it is sufficient to establish “that there is a risk of irreparable prejudice [being caused] to the rights in dispute, and that the risk of such harm is sufficiently serious and imminent that provisional measures are required to protect the rights”;

68. Whereas Costa Rica asserted that the works undertaken by Nicaragua at the site of the *caño*, in particular the felling of trees, the clearing of vegetation, the removal of soil and the diversion of the waters of the San Juan River, not only entail a violation of Costa Rica’s territorial

integrity, but will have the effect of causing flooding and damage to Costa Rican territory, as well as geomorphological changes; whereas, according to Costa Rica, 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; and whereas it contended that the harm caused will not merely be irreparable as such, but that it is Nicaragua's intention for it to be irreparable, because it is not doing this for temporary purposes;

69. Whereas, moreover, Costa Rica affirms in its Request for the indication of provisional measures that the request "is of . . . real urgency", because of "the continued damage being inflicted on [its] territory" by Nicaragua's activities, in particular its repeated dredging of the San Juan River; whereas, according to Costa Rica, "[t]here is a real risk that . . . action prejudicial to the rights of Costa Rica will continue and may significantly alter the factual situation on the ground before the Court has the opportunity to render its final decision on the questions for determination set out in the Application"; whereas it adds that "[t]he ongoing presence of Nicaraguan armed forces on Costa Rica's territory is contributing to a political situation of extreme hostility and tension" and that "[a] provisional measure ordering the withdrawal of Nicaraguan forces from Costa Rican territory is . . . justified so as to prevent the aggravation and/or extension of the dispute"; and whereas, in the oral proceedings, Costa Rica reaffirmed the urgent nature of its request;

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70. Whereas, during the oral proceedings, Nicaragua contended that it acted within its own territory and caused no harm to Costa Rica; whereas it maintained that its activities, the environmental impact of which had been duly assessed beforehand, were not likely to cause or aggravate the damage feared by Costa Rica and that, in any case, the risk of harm was not imminent;

71. Whereas Nicaragua asserted at the hearings that the cleaning and clearing operations in respect of the *caño* were over and finished, and that none of its armed forces were presently stationed on Isla Portillos; whereas, in a written reply to questions put by a Member of the Court at the end of the hearings, Nicaragua confirmed these assertions, adding that it did "not intend to send any troops or other personnel to the region" contested by the Parties nor to "[establish] a military post there in the future", while the issue of the felling of trees and the dumping of sediment in certain areas along the *caño* "no longer arises", since the operation to clean the latter is "over and finished";

72. Whereas Nicaragua stated in its written replies that it does not "intend to have any personnel stationed in [the disputed] area"; whereas it nevertheless added that "[t]he only operation currently being carried out there is the replanting of trees" and that "[t]he Ministry of the Environment of Nicaragua (MARENA) will send inspectors to the site periodi-

cally in order to monitor the reforestation process and any changes which might occur in the region, including the Harbor Head Lagoon”; whereas Nicaragua also observed that “[t]he *caño* is no longer obstructed” and further stated that “[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”;

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73. Whereas 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”;

74. Whereas Nicaragua’s written responses set out above (see paragraph 71) indicate that the work in the area of the *caño* has come to an end; whereas the Court takes note of that; whereas the Court therefore 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) as set out in paragraph 73 above;

75. Whereas those written responses nevertheless also show that Nicaragua, while stating that “[t]here are no Nicaraguan troops currently stationed in the area in question” and that “Nicaragua does not intend to send any troops or other personnel to the region” (see paragraph 71 above), does intend to carry out certain activities, if only occasionally, in the disputed territory, including on the *caño* (see paragraph 72 above); whereas the Court recalls that there are competing claims over the disputed territory; whereas 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; whereas this situation moreover gives rise to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death;

76. Whereas the Court concludes under these circumstances that provisional measures should be indicated; whereas it points 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, as Article 75, paragraph 2, of the Rules of Court expressly states (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures*, *Order of 8 April 1993*, *I.C.J. Reports 1993*, p. 22, para. 46);

77. Whereas, given the nature of the disputed territory, the Court considers that, subject to the provisions in paragraph 80 below, 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 Court has decided the dispute on the merits or the Parties have come to an agreement on this subject;

78. Whereas, in order to prevent the development of criminal activity in the disputed territory in the absence of any police or security forces of either Party, each Party has the responsibility to monitor that territory from the territory over which it unquestionably holds sovereignty, i.e., in Costa Rica's case, the part of Isla Portillos lying east of the right bank of the *caño*, excluding the *caño*; and, in Nicaragua's case, the San Juan River and Harbor Head Lagoon, excluding the *caño*; and whereas it shall be 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;

79. Whereas the Court observes that there are two wetlands of international importance, within the meaning of the Ramsar Convention, in the boundary area in question; whereas, acting pursuant to Article 2 of that Convention, Costa Rica has "designate[d]" the "Humedal Caribe Nor-este" wetland "for inclusion in [the] List of Wetlands of International Importance . . . maintained by the [continuing] bureau" established by the Convention, and whereas Nicaragua has done likewise in respect of the "Refugio de Vida Silvestre Río San Juan" wetland, of which Harbor Head Lagoon is part; whereas the Court reminds the Parties that, under Article 5 of the Ramsar Convention:

"[t]he Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna";

80. Whereas the disputed territory is moreover situated in the "Humedal Caribe Noreste" wetland, in respect of which Costa Rica bears obligations under the Ramsar Convention; whereas 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 the part of that wetland where that territory is situated; whereas for that 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; and whereas 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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81. Whereas the second provisional measure requested by Costa Rica in its submissions presented at the conclusion of the hearings is an order requiring Nicaragua to “suspend its ongoing dredging programme in the River San Juan adjacent to the relevant area”; whereas in support of this request Costa Rica asserts that the programme creates an imminent risk of irreparable prejudice to its environment, in particular to the flow, and hence navigability, of the Colorado River, as well as to the hydrodynamic balance of the area’s waterways, which Nicaragua disputes;

82. Whereas 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; whereas 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; and whereas 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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83. Whereas, in the light of what the Court has already said on the subject of the final provisional measure requested by Costa Rica (see paragraph 62 above) and of the Court’s conclusions above on the subject of the specific provisional measures to be indicated, it is in addition 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;

* * *

84. Whereas the Court’s “orders on provisional measures under Article 41 [of the Statute] have binding effect” (*LaGrand (Germany v. United*

States of America), *Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations which both Parties are required to comply with (see, for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment, I.C.J. Reports 2005*, p. 258, para. 263));

* * *

85. Whereas the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court 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 whereas it leaves unaffected the right of the Governments of Costa Rica and Nicaragua to submit arguments in respect of those questions;

* * *

86. 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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of March, two thousand and eleven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges KOROMA and SEPÚLVEDA-AMOR append separate opinions to the Order of the Court; Judges SKOTNIKOV, GREENWOOD and XUE append declarations to the Order of the Court; Judge *ad hoc* GULLAUME appends a declaration to the Order of the Court; Judge *ad hoc* DUGARD appends a separate opinion to the Order of the Court.

(Initialed) H.O.

(Initialed) Ph.C.
