



INTERNATIONAL COURT OF JUSTICE

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Summary

Not an official document

Summary 2013/4
13 December 2013

Construction of a Road in Costa Rica along the San Juan River **(Nicaragua v. Costa Rica)**

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

Request presented by Nicaragua for the indication of provisional measures

The Application and the Request for provisional measures (paras. 1-11 of the Order)

The Court begins by recalling that, by an Application filed with the Registry of the Court on 22 December 2011, the Republic of Nicaragua (hereinafter “Nicaragua”) instituted proceedings against the Republic of Costa Rica (hereinafter “Costa Rica”) for “violations of Nicaraguan sovereignty and major environmental damages on its territory”, contending, in particular, that Costa Rica was undertaking construction works near the border area between the two countries along the San Juan River, namely the construction of a road (Route 1856) (case concerning the Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), hereinafter the “Nicaragua v. Costa Rica case”). In its Application Nicaragua further claimed that the new road was causing ongoing damage to the river, on a large scale, “by the impetus it inevitably gives to agricultural and industrial activities”.

At the time of filing of its Memorial, Nicaragua had requested the Court, *inter alia*, to “decide proprio motu whether the circumstances of the case require[d] the indication of provisional measures”. By letters dated 11 March 2013, the Registrar informed the Parties that the Court was of the view that the circumstances of the case, as they presented themselves to it at that time, were not such as to require the exercise of its power under Article 75 of the Rules of Court to indicate provisional measures proprio motu.

The Court explains that, by two separate Orders dated 17 April 2013, the Court had joined the proceedings in the Nicaragua v. Costa Rica case with those in the case concerning Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (hereinafter the “Costa Rica v. Nicaragua case”), which had been brought by Costa Rica against Nicaragua on 18 November 2010, accompanied by a Request for the indication of provisional measures. By an Order of 8 March 2011 in the latter case, the Court had indicated certain provisional measures to both Parties. Following successive requests by Costa Rica and Nicaragua for the modification of that Order, the Court, by an Order of 16 July 2013, found that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power to modify the measures indicated in its Order of 8 March 2011. On 24 September 2013, Costa Rica filed with the Registry a Request for the indication of new provisional measures in the Costa Rica v. Nicaragua case. The full procedural history of the Costa Rica v. Nicaragua case is set out in the

Court's Order dated 22 November 2013 on Costa Rica's Request for the indication of new provisional measures in that case.

The Court states that, on 11 October 2013, Nicaragua filed with the Registry a Request for the indication of provisional measures in the Nicaragua v. Costa Rica case, specifying that it was not seeking the modification of the Order of 8 March 2011 in the Costa Rica v. Nicaragua case, but rather "the adoption of new provisional measures linked with the Nicaragua v. Costa Rica case". Nicaragua further suggested that its Request be heard concurrently with Costa Rica's Request for the indication of new provisional measures at the same set of oral proceedings. By letter of 14 October 2013, Costa Rica objected to Nicaragua's suggestion. By letters dated 14 October 2013, the Registrar informed the Parties that the Court had decided that it would consider the two Requests separately.

The Court recalls that Nicaragua, in outlining the facts which led it to bring the present Request, stated that Costa Rica "has repeatedly refused to give [it] appropriate information on the road works" and "has denied that it has any obligation to prepare an Environmental Impact Assessment or to provide such a document to Nicaragua". In its Request Nicaragua contended that,

"[a]s the rainy season enters into its heaviest stage washing even greater quantities of sediment and run-off into the river's waters, Costa Rica has still not provided the necessary information to Nicaragua, nor has it taken the necessary actions along the 160-km road to avoid or mitigate the irreparable damage that is being inflicted on the river and its surrounding environment, including on navigation and the health and wellbeing of the population living along its margins".

The Court adds that, at the end of its Request, Nicaragua asked the Court:

"as a matter of urgency to prevent further damage to the River and to avoid aggravation of the dispute, to order the following provisional measures:

- (1) that Costa Rica immediately and unconditionally provides Nicaragua with the Environmental Impact Assessment Study and all technical reports and assessments on the measures necessary to mitigate significant environmental harm to the River;
- (2) that Costa Rica immediately takes the following emergency measures:
 - (a) Reduce the rate and frequency of road fill failure slumps and landslides where the road crosses the steeper hill slopes, especially in locations where failed or eroded soil materials have been or could potentially be delivered to the Río San Juan.
 - (b) Eliminate or significantly reduce the risk of future erosion and sediment delivery at all stream crossings along Route 1856.
 - (c) Immediately reduce road surface erosion and sediment delivery by improving dispersion of concentrated road runoff and increasing the number and frequency of road drainage structures.
 - (d) Control surface erosion and resultant sediment delivery from bare soil areas that were exposed during clearing, grubbing and construction activities in the last several years.
- (3) Order Costa Rica not to renew any construction activities of the road while the Court is seized of the present case."

The Court recalls that, at the public hearings held on 5, 6, 7 and 8 November 2013, oral observations were presented by the Agents and counsel of the Governments of Nicaragua and Costa Rica.

The Court states that, at the end of its second round of oral observations, Nicaragua asked it to indicate provisional measures in the same terms as included in its Request, while, at the end of its second round of oral observations, Costa Rica stated the following:

“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 Nicaragua and its oral pleadings, the Republic of Costa Rica submits that,

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

The Court’s reasoning (paras. 12-38)

I. Prima facie jurisdiction (paras. 12-14)

The Court begins by observing that it 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, but that the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.

The Court notes that Nicaragua seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948, as well as on both Parties’ declarations of acceptance of the Court’s compulsory jurisdiction.

The Court considers that these instruments appear, prima facie, to afford a basis on which it might have jurisdiction to rule on the merits of the case (cf. Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 18, para. 52).

The Court further notes that, within the time-limit set out in Article 79, paragraph 1, of the Rules of Court, Costa Rica did not, moreover, contest the Court’s jurisdiction in the present proceedings. In these circumstances, the Court finds that it may entertain the Request for the indication of provisional measures submitted to it by Nicaragua.

II. The rights whose protection is sought and the measures requested (paras. 15-23)

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 claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible. 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.

The Court notes that, according to Nicaragua, the rights which it seeks to protect are its “rights of territorial sovereignty and integrity”, its “right to be free from transboundary harm” and its “right to receive a transboundary environmental impact assessment from Costa Rica”.

The Court further states that, at this stage of the proceedings, it is not called upon to determine definitively whether the rights which Nicaragua wishes to see protected exist; it need only decide whether the rights claimed by Nicaragua on the merits, and for which it is seeking protection, are plausible.

The Court initially observes that, under the 1858 Treaty of Limits between Costa Rica and Nicaragua, the latter enjoys “dominion and sovereign jurisdiction over the waters of the San Juan River” and that thus the river “belongs to Nicaragua”. The Court notes that the claimed right to be free from transboundary harm is the principal right underpinning Nicaragua’s Request and that it is derived from the right of a State to sovereignty and territorial integrity. The Court recalls in this regard that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”. The Court therefore considers that a correlative right to be free from such transboundary harm is plausible. With respect to Nicaragua’s claimed right to receive a transboundary environmental impact assessment from Costa Rica, the Court states that it has had occasion to state in another context that,

“in accordance with a practice, which in recent years has gained so much acceptance among States . . . it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context . . .”.

Accordingly, the Court considers that the rights for which Nicaragua seeks protection are plausible.

The Court then turns to the issue of whether the provisional measures requested are linked to the rights claimed and do not prejudice the merits of the case.

The Court recalls that the first provisional measure requested by Nicaragua is that Costa Rica “immediately and unconditionally” provide it with an Environmental Impact Assessment Study and all technical reports and assessments on the measures necessary to mitigate significant environmental harm to the San Juan River. The Court observes that this request is exactly the same as one of Nicaragua’s claims on the merits contained at the end of its Application and Memorial in the present case. A decision by the Court to order Costa Rica to provide Nicaragua with such an Environmental Impact Assessment Study as well as technical reports at this stage of the proceedings would therefore amount to prejudging the Court’s decision on the merits of the case.

The Court notes that the second provisional measure requested by Nicaragua is that Costa Rica immediately take a number of emergency measures in order to reduce or eliminate instances of erosion, landslides and sediment delivery into the San Juan River as a result of the construction of the road. The Court considers that any instance of this kind would be likely to affect Nicaragua’s claimed right to be free from transboundary harm. Therefore, a link exists between Nicaragua’s claimed rights and the second provisional measure sought.

Finally, the third provisional measure sought by Nicaragua is that Costa Rica be ordered not to renew any construction activities with respect to the road while the Court is seised of the present case. In this regard, the Court considers that, should Costa Rica’s construction activities continue, in particular on the 41-km stretch of road running along the San Juan River upstream from its intersection with the San Carlos River, there is a possibility that Nicaragua’s right to be free from transboundary harm, which it seeks to protect by the second provisional measure requested, may

also be affected. The Court thus concludes that a link exists between Nicaragua's claimed rights and the third provisional measure sought.

III. Risk of irreparable prejudice and urgency (paras. 24-38)

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings, 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 will be caused to the rights in dispute before the Court has given its final decision.

The Court considers that, on the basis of the evidence adduced, Nicaragua has not established in the current proceedings that the ongoing construction works have led to a substantial increase in the sediment load in the river. It notes that Nicaragua did not contest the statement of Costa Rica's expert, Professor Thorne, that, even according to the figures provided by Nicaragua's expert, Professor Kondolf, the construction activities are only contributing 1 to 2 per cent of the total sediment load in the San Juan River and 2 to 3 per cent in the lower San Juan River. The Court is of the view that this seems too small a proportion to have a significant impact on the river in the immediate future. It observes, moreover, that the photographic and video evidence submitted by Nicaragua does nothing to substantiate Nicaragua's allegations relating to increased sedimentation levels. Neither has the Court been presented, at this stage, with evidence as to any long-term effect on the river by aggradations of the river channel allegedly caused by additional sediment from the construction on the road. Finally, with respect to the alleged effect on the ecosystem including individual species in the river's wetlands, the Court finds that Nicaragua has not explained how the road works could endanger such species, and that it has not identified with precision which species are likely to be affected.

The Court accordingly finds that Nicaragua has not shown that there is any real and imminent risk of irreparable prejudice to the rights it invokes.

The Court concludes from the foregoing that the Request for the indication of provisional measures by Nicaragua cannot be upheld.

Having concluded that no provisional measures should be indicated, the Court observes nevertheless that Costa Rica acknowledged during the course of the oral proceedings that it has a duty not to cause any significant transboundary harm as a result of the construction works on its territory, and that it would take the measures that it deemed appropriate to prevent such harm. The Court further observes that Costa Rica has in any event recognized the necessity of remediation works, in order to mitigate damage caused by the effects of poor planning and execution of the road works in 2011, and has indicated that a number of measures to that end have already been undertaken. Finally, the Court notes that Costa Rica announced, during the same oral proceedings, that, with its Counter-Memorial, due to be filed by 19 December 2013, it would submit what it described as an "Environment Diagnostic" study covering the stretch of the road running along the south bank of the San Juan River.

The Court ends by stating that the decision given in the present proceedings in no way prejudices any questions relating to the merits or any other issues to be decided at that stage. It leaves unaffected the right of the Governments of Nicaragua and Costa Rica to submit arguments in respect of those questions.

Operative part (para. 39)

The full text of the final paragraph of the Order reads as follows:

“For these reasons,

THE COURT,

Unanimously,

Finds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.”
