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По просьбе Секретаря Международного Суда и в соответствии с пунктом 2 статьи 41 Статута Суда и статьей 77 Регламента Суда имею честь препроводить настоящим текст, на английском и французском языках, постановления Суда от 8 марта 2011 года (см. приложение). В постановлении Суда указаны временные меры по делу «Некоторые мероприятия, проведенные Никарагуа в приграничном районе (*Коста-Рика* против *Никарагуа*)». Вышеупомянутые тексты недавно поступили из Секретариата Суда.

(*Подпись*) **Пан** Ги Мун

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Annex

[Original: English and French]

8 MARCH 2011

ORDER

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

(COSTA RICA v. NICARAGUA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA DANS LA RÉGION FRONTALIÈRE

(COSTA RICA c. NICARAGUA)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

8 MARS 2011

ORDONNANCE

INTERNATIONAL COURT OF JUSTICE

YEAR 2011

2011
8 March
General List
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8 March 2011

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

(COSTA RICA *v.* NICARAGUA)

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, CANÇADO 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 (hereinafter "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

"By 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(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 November 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 three square kilometres of Costa Rican territory, located at the northeast 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" (paragraph 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 meters 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 damages 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 by:

On behalf of Costa Rica: H.E. Mr. Edgar Ugalde Álvarez, *Agent*,
Mr. Arnoldo 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;

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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 seised 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;

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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;

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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";

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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";

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* *

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, para. 40);

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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 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures*, Order of 28 May 2009, para. 54);

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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 (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures*, Order of 28 May 2009, 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, *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures*, Order of 28 May 2009, 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 three square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan river up to its mouth at the Caribbean Sea and the Harbor Head lagoon (hereinafter the "disputed territory"), and 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 prejudge 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), 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;

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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), 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, 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 irremediably" 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 periodically 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), 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 Noreste" 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:

> "The 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;

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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));

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85. Whereas the decision given in the present proceedings in no way prejudges 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;

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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* GUILLAUME appends a declaration to the Order of the Court; Judge *ad hoc* DUGARD appends a separate opinion to the Order of the Court.

(Initialled) H. O.

(Initialled) Ph. C.

Enclosure I

SEPARATE OPINION OF JUDGE KOROMA

Misgivings regarding plausibility as a criterion for indication provisional measures — Assertion introduced in Questions relating to the Obligation to Prosecute or Extradite (Belgium *v.* Senegal) — *Not part of settled jurisprudence — Meaning different in English and French — Introduction problematic — Vagueness regarding law or facts or both — Basis on which parties' claims evaluated —If new standard introduced must be transparent.*

1. Although I have voted in favour of the Order, I am constrained to make the following observations in the light of the reference in paragraphs 53 and 54 of the Order to "plausibility" as a criterion for indicating provisional measures. In my view, the introduction of the criterion of plausibility creates ambiguity and uncertainty; moreover, it remains unclear whether this standard refers to legal rights or facts or both.

2. The Court did apply such a standard in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, requiring the parties to demonstrate that their rights were "at least plausible"[1]. However, the criterion cannot be said to have become part of the settled jurisprudence of the Court on provisional measures. Indeed it should not, because the word "plausibility" is ambiguous in English and can refer to an assertion that has the outward appearance of truth, but is in fact specious or false. Moreover, it is unclear whether such a "standard" would require the Applicant to show that its legal claims are plausible, that it enjoys certain legal rights, or that its factual claims are plausible. Hitherto to justify the indication of provisional measures, Applicants have needed only to show that their existing rights were threatened.

3. The Court's ability to indicate provisional measures in cases brought before it pursuant to Article 41 of its Statute is vital to ensure that parties' legal rights are preserved pending the Court's decision on the merits[2]. In the absence of such power, the Court's efficacy could be diminished in many cases, since it would run the risk of facing a fait accompli or seeing an issue become moot by the time it issues a judgment. Historically, the Court has established four criteria to be met before it will indicate provisional measures in favour of one or both parties. First, the provisions invoked by the applicant must appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established. Second, and as stated in the Order, there must be a link between the alleged rights the Applicant seeks to protect and the subject of the proceedings before the Court on the merits of the case[3]. Third, the Court must be convinced that one or both parties will suffer irreparable prejudice or harm to the rights which are the subject of the dispute on the merits[4]. Fourth, there must be urgency in the sense that there is a real risk that action prejudicial or harmful to the right of either party might be taken before the Court has given its final decision[5].

4. The Court has judiciously decided to indicate provisional measures in the present case. I agree with both the outcome and the bulk of the reasoning in the present Order. Specifically, I agree that there is a link between the measures sought and the rights of sovereignty that the Applicant claims over the disputed territory (Order, paragraph 60). It is also possible that certain activity by the Respondent in the disputed area could lead to conflicts resulting in irremediable physical harm to individuals. Finally, the criterion of urgency could be seen in conjunction with

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[1] *Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57.

[2] *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003*, p. 107, para. 22.

[3] *Application of the International Convention on All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 389, para. 118.

[4] See, e.g., *ibid.*, p. 392, para. 128.

[5] *Ibid.*, p. 392, para. 129.

that of irremediable harm given the nature of the disputed area and the level of tension between the Parties.

5. The Order does however include the element of "plausibility", about which I have some misgivings. In its analysis of the Applicant's claims, the Court appears unwittingly to introduce this additional criterion to be met before the Court will indicate provisional measures. According to the Order, "the Court may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible" (Order, paragraph 53).

6. Though not a complete novelty, this criterion, the "plausibility standard" was first enunciated in the *Belgium* v. *Senegal* case[6]. The criterion seems to have appeared out of nowhere. The Court in that case cited no precedent supporting the existence of a "plausibility" standard, nor did it explain why it was establishing such a standard. Indeed, it did not even acknowledge that the "plausibility" standard was a new one[7]. The Court simply introduced the plausibility standard into the Order, presenting it as if it were a criterion so well-established that it needed no introduction, explanation or justification. This is inconsistent with the settled jurisprudence of the Court, according to which the applicant has to *demonstrate* that an existing right is threatened and needs to be protected.

7. In my view, the most problematic aspect of the plausibility standard is its vagueness, giving the impression that the threshold for the indication of provisional measures has been lowered. The word "plausible" in English has multiple meanings. According to the *Oxford English Dictionary*, "plausible" is defined as "[h]aving an *appearance* or show of truth, reasonableness, or worth; apparently acceptable or trustworthy (sometimes with implication of mere appearance) . . . [c]hiefly of arguments or statements)" "having a false appearance of reason or veracity; *specious*"[8]. The term "specious" is further defined in the context of arguments as "[p]lausible, apparently sound or convincing, but in reality sophistical or fallacious"[9].

Another definition of "plausibility" is "an argument, statement, etc. . . . seeming reasonable or probable . . . persuasive but deceptive"[10]. "Plausible" often contains a negative connotation: an implication that, although a plausible claim basically sounds truthful, it is in reality deceitful, only partially true, or completely false. Hence, "plausible" is also defined as "superficially fair, reasonable or valuable but often specious"[11].

8. Thus, the ambiguity or vagueness inherent in the English-language meaning of "plausible" makes it unreliable as a legal standard that parties must meet to obtain relief from this Court in the form of provisional measures, especially since the binding force of orders indicating provisional measures has been confirmed by the Court. The standard may even inadvertently offer parties an opportunity to submit specious claims which, at a superficial glance, may appear credible but could mislead the Court to indicate provisional measures.

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[6] *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. 151, para. 57.

[7] The paragraph establishing the new standard in the *Belgium* v. *Senegal* Order lies within a section entitled "Link between the right protected and the measures requested" and immediately follows a paragraph discussing the well-established "link" requirement, even though the standard is apparently quite distinct from this existing requirement. The present Order appears to tacitly acknowledge this criterion by creating a new subject heading: "Plausible character of the rights whose protection is being sought and link between these rights and the measures requested" (paragraph 53).

[8] *Oxford English Dictionary*, 1989, Vol. XI, p. 1011; and *On-line Oxford English Dictionary*; emphasis added.

[9] *Oxford English Dictionary*, 1989, Vol. XVI, p. 161.

[10] *The Concise Oxford Dictionary of Current English*, 1995, p. 1047.

[11] *Merriam Webster's On-line Dictionary*.

9. I am advised that the word "plausible" in French has a somewhat different meaning. As mentioned above, the word was first introduced as a standard in the *Belgium* v. *Senegal* case, in which the French text is authoritative. In French, I am also advised, the word appears to only have a positive connotation and may therefore better reflect the Court's intention when the term was used.

10. In my considered view, another concern raised by the Court's plausibility standard is that it is so far unclear whether the standard applies to legal rights or facts or both. In the *Belgium* v. *Senegal* case, it appears that the Court referred to the former. In that case, Belgium alleged, among other things, that the Convention against Torture gave it the right to bring criminal proceedings against Mr. Habré[12]. The Court, after articulating the plausibility standard, stated that "the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible"[13]. This implies that the Court engaged solely in a legal analysis, whether it was plausible that the Convention against Torture, as a matter of law, gave Belgium the right to bring criminal proceedings against an alleged torturer.

11. In the present Order, however, the Court evaluates the plausibility of Costa Rica's *factual claims*. The actual legal rights at issue in this case are, *inter alia*, Costa Rica's rights to sovereignty and territorial integrity (Order, paragraphs 1-3). The argument that Costa Rica enjoys these legal rights is certainly "plausible" as a matter of law, as these rights are enshrined in Article 2 of the United Nations Charter. The fact that Costa Rica is entitled to such rights is so self-evident that the Order need not evaluate their legitimacy or plausibility. What the Order examines instead is whether "the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible" (Order, paragraph 58).

12. The plausibility standard, therefore, suffers from vagueness and ambiguity. It is unclear from the Court's Order whether the Court requires an applicant seeking provisional measures to demonstrate the plausibility of its legal rights, the plausibility of its factual claims, or both.

13. In my view it would have been worth articulating a *clear* standard of some sort to evaluate, prima facie, the legitimacy of an applicant's claims at the provisional measures stage. Such a standard, which exists already in domestic courts in many common law jurisdictions, would help ensure that parties do not abuse the provisional measures process. Specifically, it would dissuade parties from bringing patently meritless claims with the goal of obtaining provisional measures that would prevent the other party from taking further action until the Court decides the merits of the case. In a sense, such a standard would be similar to the Court's existing prima facie jurisdiction requirement. Both the new standard and the prima facie jurisdiction standard would require a party to demonstrate that it has a reasonable chance of eventually obtaining a judgment on the merits in its favour before it could obtain provisional measures.

14. The Court has on occasion informally evaluated the legitimacy of a party's claim when deciding to indicate provisional measures. In the *Armed Activities* case, for example, the Court noted that the rights at issue were, *inter alia*, the Congo's "rights to sovereignty and territorial integrity and to the integrity of its assets and natural resources"[14]. The Court added that it was "not disputed that . . . Ugandan forces are present on the territory of the Congo, [and] that fighting has

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[12] *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. 142, para. 14.

[13] *Ibid.*, p. 152, para. 60.

[14] *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. 127, para. 40.

taken place on that territory between those forces and the forces of a neighbouring State"[15]. In other words, it was clear that the Congo's rights were involved.

15. In many orders on provisional measures, the Court's analysis of jurisdictional questions or irreparable prejudice also confirms the *credibility* of a party's claims. The language quoted above from the *Armed Activities* case, for example, was used by the Court to support its finding of irreparable prejudice.

16. The more difficult question is what the precise standard should be. One option would be for the Court to revert to an approach similar to its standard for evaluating jurisdiction at the provisional measures stage of proceedings, according to which it requires that a party establish a prima facie case. In other words, the party would have to present evidence that, standing alone, would establish its entitlement to certain rights. Yet another possibility would be to require that the rights asserted by a party be grounded in a *reasonable* interpretation of the law or of the facts.

17. On the other hand, if the Court does decide to adopt a new standard, it should do so in a transparent manner that explains the rationale behind it. It could, for example, state that the existence of such a standard is important to ensure that the Court does not grant provisional measures in cases that are frivolous or highly unlikely to succeed on the merits.

18. Adopting an order indicating provisional measures on the grounds of plausibility may prove a mistake. To paraphrase the 18th century philosopher Edmund Burke, very plausible schemes, with very pleasing commencements, have often shameful and mistaken consequences. It is worth bearing this in mind.

(Signed) Abdul G. KOROMA.

[15] *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. 128, para. 42.

Enclosure II

SEPARATE OPINION OF JUDGE SEPÚLVEDA-AMOR

Agreement to provide interim measures of protection — Need to clearly define "plausibility" for the purposes of interim protection under Article 41 of the Statute — Disagreement with the second provisional measure — Unsatisfactory treatment of the risk of irreparable prejudice to possible Costa Rican rights and to the "caño" *— The Court should have entrusted to both Parties the responsibility for any measures required to prevent irreparable prejudice to the environment in Isla Portillos.*

1. I agree that interim measures of protection should be afforded by the Court in the present case. Although it would appear rather obvious, it is worth recalling, as the Order does, that the Court has the power to indicate *any* provisional measure it may deem necessary in order to preserve the respective rights of either party, and that the measures indicated may be different, in whole or in part, from those originally requested. Additionally, I do not find it futile to reaffirm, as the Court does on this occasion, that an Order on the indication of provisional measures has a binding effect and that the Parties to the case must comply with any international obligation arising under the Order.

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

3. On a different note, I believe the Court should have seized the opportunity to elucidate further the "plausibility requirement" for the purposes of Article 41 of the Statute. The indeterminacy surrounding the concept of plausibility in the Order could prove problematic in future requests for the indication of provisional measures, as will be shown in this Opinion.

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

I. "Plausibility" as a pre-condition for the indication of provisional measures

5. In its jurisprudence, the Court has consistently underscored that decisions in incidental proceedings on interim protection in no way prejudge any questions relating to the merits of a dispute submitted to it for consideration. It has repeatedly recalled that, in the exercise of its powers under Article 41 of the Statute, it "cannot make definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments in respect of the merits,

must remain unaffected by the Court's decision" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 22, para. 44; *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 23, para. 43; *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*, pp. 127-128, para. 41).

6. A slightly different issue — and one which the Court has only recently started to address — is whether, when called upon to rule on a request for the indication of provisional measures, it is appropriate for the Court to make a preliminary assessment of the merits of the rights asserted by the party seeking interim protection (and, if so, to what extent).

7. It is widely held that, in the exercise of its powers under Article 41 of the Statute, the Court should proceed on the assumption that the claimed rights do in fact exist, and confine its inquiry to ascertaining whether those rights are liable to suffer irreparable injury pending the final judgment on the merits, in the absence of measures for their protection.

8. The Court has entertained numerous cases in which the respondent has objected to the request for interim protection filed by the applicant on the grounds that the rights asserted by the claimant do not exist, thus inviting the Court to look at the merits of the case, albeit provisionally, so as to establish whether to exercise its powers under Article 41 of the Statute[1].

9. Only in its recent decision in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* has the Court openly taken a position on this matter and ruled, for the first time, that "the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible"[2].

10. The present Order confirms the stance taken by the Court in *Belgium* v. *Senegal* and goes a step further by appearing to make the "plausibility" of rights a definite requirement for interim protection under Article 41 of the Statute.

11. Whereas I take no issue with the rationale underlying the Court's ruling, there is, in my view, an urgent need to define with greater precision the applicable legal standard for the present purposes. Firstly, "plausible" and "plausibility" are not terms of art, and their ordinary meaning is of limited assistance when it comes to explaining what is legally required by way of a prima facie demonstration of rights in the context of Article 41 of the Statute[3].

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[1] See, for instance, case concerning *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*; case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*; case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009*.

[2] *Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57.

[3] This is the case in English at least. According to the *Oxford English Dictionary Online*, "plausible" may have any of the following meanings: Acceptable, agreeable, pleasing, gratifying; winning public approval, popular (1.a.); Expressing applause or approbation; plausive, applausive (2); Deserving of applause or approval; praiseworthy, laudable, commendable (3); Of an argument, an idea, a statement, etc.: seeming reasonable, probable, or truthful; convincing, believable; (formerly) *spec.* having a false appearance of reason or veracity; specious (4.a.).

12. Are States which request the indication of provisional measures expected to show prima facie the validity of their claims on the merits, or is *fumus non mali juris* sufficient, i.e., is it enough to ascertain that the claimed rights are not patently non-existent according to the information available to the Court?[4] Does it suffice to demonstrate the *possibility* or *reasonableness* of the existence of a right[5], or is *probability* the relevant standard?

13. These are not academic subtleties. The answers are likely to have direct implications on how requests for provisional measures will be pleaded in the future and on the degree to which the Court considers the merits of the case in the course of the incidental proceedings on interim protection.

14. The Court should have seized the opportunity to clarify these matters, *inter alia*, by refining the language used to describe the "plausibility requirement". To this effect, it would have been preferable to avoid the perpetuation of indeterminate terminology which, arguably, only adds confusion to an already complex topic.

15. I fear that the imprecision surrounding the "plausibility requirement" and the unwarranted emphasis placed upon that in this Order might ultimately encourage States seeking interim protection to over-address the substance of the dispute at an early stage and, as a result, overburden proceedings under Article 41 of the Statute with matters that should actually be dealt with by the Court when adjudicating on the merits.

16. This Order should not be read as introducing a new requirement under Article 41 of the Statute, or interpreted as signalling a departure from the Court's jurisprudence on provisional measures. Rather, as I see it, it should be understood as an attempt on the part of the Court to "name" or "label" a requirement already implicit in the Court's case law. As already noted, greater definition is required in order to ensure that consideration of the merits remains within the strict limits called for in proceedings under Article 41 of the Statute.

II. Risk of irreparable prejudice in relation to the environmental consequences of the *caño*

17. Overall, the "irreparable prejudice" requirement should have been the object of closer examination and more thorough analysis on the part of the Court. Notwithstanding the importance of this issue in the oral proceedings, and in contrast to the prominence accorded to the question of "plausibility", this matter has been only cursorily addressed in this Order.

18. And yet the crucial question in this case is whether, as claimed by Costa Rica, the now navigable *caño* connecting the San Juan river to the Harbor Head lagoon poses a risk of irreparable prejudice to its rights by reason of the possible threat of irreparable environmental damage to a portion of territory which the Court may ultimately adjudge to belong to the Applicant in its decision on the merits.

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[4]Case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, separate opinion of Judge Abraham, p. 140, para. 10.

[5]Case concerning *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, separate opinion of Judge Shahabuddeen.

19. In its final submissions, Costa Rica requested the Court to indicate provisional measures ordering Nicaragua not to undertake, *inter alia*, any of the following activities in the area comprising the entirety of Isla Portillos (Order, paragraph 73):

(i) engage in the construction or enlargement of a canal;

(ii) fell trees or remove vegetation or soil;

(iii) dump sediment.

20. At the hearings, it became apparent that the "cleaning and clearing operations" conducted by Nicaragua in the disputed area were over and finished. Consequently, Nicaragua observed that the issue of the felling of trees and the dumping of sediment in certain areas along the *caño* "no longer arises" (Order, paragraph 71).

21. The fact that the very situation that Costa Rica had sought to avert with its request for interim protection has materialized prior to the Court's Order does not render the indication of provisional measures without object, if the Court considers that such measures are still required in order to preserve the rights at issue.

22. It is well established that the Court is not bound by the Parties' requests and "Article 75, paragraph 2, of the Rules of Court recognizes the power of the Court, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 347, para. 47; see also *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 43; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 397, para. 145).

23. Whether, as asserted by the Applicant, Nicaragua has constructed an artificial canal within Costa Rican territory or, as claimed by the Respondent, Nicaragua has limited itself to clearing a pre-existing canal connecting the San Juan river to the Harbor Head lagoon, is something to be decided in the merits phase, and has no bearing on the Court's ruling on Costa Rica's request at this stage of the proceedings.

24. The important question, and the one on which the Parties fundamentally disagree, is whether the mere existence of the *caño* as a navigable channel across Isla Portillos poses a risk of irreparable environmental damage, taking into consideration that the disputed territory is part of the "Humedal Caribe Noreste" wetland, which Costa Rica designated for inclusion on the List of Wetlands of International Importance in 1996, in accordance with Article 2 of the Convention on Wetlands of 1971 ("Ramsar Convention"), to which Nicaragua is also a Contracting Party.

25. In my view, the evidence before the Court supports the conclusion that even in its current state — i.e., even if Nicaragua does not pursue any further "clearing activities" or other works in the area — the *caño* poses an imminent risk of irreparable damage to the ecological characteristics of Isla Portillos and, therefore, provisional measures are required in order to prevent the materialization of such a risk.

26. This is not tantamount to saying that the clearing or construction of the *caño* has *already* caused irreparable environmental damage to Isla Portillos. For the purposes of interim protection under Article 41 of the Statute, irreparable prejudice does not have to be established, just the risk thereof.

27. Of particular importance in this regard are the findings of the report prepared by the Ramsar Advisory Mission on the basis of Article 3 (2) of the Ramsar Convention (hereinafter the "Ramsar Report"), and submitted to the Court in the course of the proceedings.

28. Firstly, the report identifies a threat of damage to the ecology of the wetland in the medium and long term, including through a loss of habitat for terrestrial fauna, progressive erosion and changes in the groundwater aquifer recharge beneath the wetland.

29. Moreover, it points out that the ecology of the Harbor Head lagoon, which is not part of the disputed territory and is located in another Ramsar wetland of international importance, namely the Refugio Vida Silvestre Río San Juan in Nicaragua, is most at risk as a result of the hydraulic connection made between the San Juan river and the lagoon by the clearing or construction of the *caño*. In particular, it is estimated that "the sandbank currently separating [the Harbor Head lagoon] from the Caribbean Sea is in danger of being breached due to the change in hydrodynamic balance that maintains it between the flow of the San Juan River and the tidal limit" (Ramsar Report, at para. 32). As a result, the Harbor Head lagoon could be partially or completely lost within six to twelve months.

30. The foregoing underscores the interconnectedness between the protection of the environment in Isla Portillos, on the one hand, and the protection of the adjacent wetland located in what is indisputably Nicaraguan territory, on the other.

31. According to the report, "[d]ue to its geographical location and dynamics closely linked to the Refugio de Vida Silvestre Corredor Fronterizo and to the Refugio de Vida Silvestre Río San Juan Ramsar site, the preservation of Humedal Caribe Noreste calls for substantial cooperation and collaboration between the two bordering countries of both Ramsar sites" (Ramsar Report at p. 35).

32. Significantly, the Court falls short of declaring the existence of an imminent risk of irreparable prejudice to Costa Rica's rights in connection with the clearing or construction of the *caño*. And yet the Applicant alone is allowed to dispatch civilian personnel to "avoid irreparable prejudice being caused to" the wetland in the disputed area, without the Court having first established that there is indeed a risk that such a prejudice may actually occur.

33. In the light of the first provisional measure, designed to exclude the presence of both Parties in the disputed territory, it is difficult to discern the rationale behind the second measure indicated by the Court. One is left to wonder whether the Court may not in fact have assessed the "plausibility" of the Parties' claims (*both* the Applicant's *and* the Respondent's) in far broader terms than those advanced in paragraphs 53 to 62 of the Order and, as a result, anticipated a decision on the merits in favour of Costa Rica. This, it is submitted, is not the proper role of "plausibility" in the context of Article 41 of the Statute.

34. To conclude, the Court should have acknowledged that there is indeed an imminent risk of irreparable prejudice to Costa Rica's possible rights by reason of the clearing or construction of the *caño*. However, given the interconnectedness between the Humedal Caribe Noreste and the Refugio de Vida Silvestre Río San Juan, the Court should have entrusted to both Parties, in consultation with the Ramsar Secretariat, the responsibility for taking the necessary measures to avoid irreparable prejudice being caused in the disputed territory.

(Signed) Bernardo SEPÚLVEDA-AMOR.

Enclosure III

DECLARATION OF JUDGE SKOTNIKOV

1. I fully support the Court's decision directing both parties to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security" (Order, operative clause (1)).

2. However, I am unable to concur in the second provisional measure indicated by the Court, which reads as follows:

> "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." (Order, operative clause (2).)

3. First of all, I think that two conditions, well established by the jurisprudence of the Court, namely the existence of a risk of irreparable harm to the rights in dispute and urgency, have not been met in this instance. The Court has come to the conclusion that those conditions have been fulfilled in respect of the first provisional measure (see Order, paragraphs 75-77). However, the Order contains no assessment whatsoever as to whether those conditions have been met in respect of the second provisional measure. The Order refers only to hypothetical prejudice to the environment (see Order, paragraph 80).

4. I am also of the view that the majority voting in favour of the second provisional measure has treated the Court's duty not to prejudge the outcome of the merits of the case rather lightly.

Moreover, this provisional measure may contribute to aggravating or extending the dispute.

5. The following reason is given for allowing Costa Rica to dispatch civilian personnel charged with protecting the environment to the disputed territory, including the *caño*:

> "the disputed territory is . . . situated in the 'Humedal Caribe Noreste' wetland, in respect of which Costa Rica bears obligations under the Ramsar Convention" (Order, paragraph 80)

and, therefore,

> "pending delivery of the Judgment on the merits, Costa Rica must be in a position to avoid irreparable prejudice being caused to the part of that wetland where that territory is situated" *(ibid.)*.

6. It is certainly true that Costa Rica bears obligations under the Ramsar Convention in respect of "Humedal Caribe Noreste". However, the question as to whether those obligations extend to the disputed territory, including the *caño*, can only be answered at the merits stage. The Court correctly states that "the rights at issue in these proceedings derive from the sovereignty" which both Parties claim in respect of the disputed area (Order, paragraph 56). The same is obviously true of the obligations of the Parties, including those under the Ramsar Convention.

7. The Court has decided that Nicaragua must cease the replanting of the trees in the disputed territory and must not send inspectors to periodically monitor the reforestation process and any changes which might occur in the region, including the Harbor Head lagoon, because "this situation creates an imminent risk of irreparable prejudice to Costa Rica's claimed title to sovereignty over the said territory and to the rights deriving therefrom" (Order, paragraph 75). However, the presence in the disputed territory of Costa Rica's personnel charged with protecting the environment can only be equally prejudicial to Nicaragua's claimed title to sovereignty over that territory.

8. The Court has stated that "the title to sovereignty claimed by Costa Rica over [the disputed territory] is plausible" (Order, paragraph 58), that "the Court is not called upon [for the purposes of considering a request for the indication of provisional measures] to rule on the plausibility of the title to sovereignty over the disputed territory advanced by Nicaragua" *(ibid.)*, and that "the provisional measures it may indicate would not prejudge any title" *(ibid.)*.

9. It follows that the plausibility of the rights claimed by Costa Rica cannot provide any basis for putting the Applicant in a more favourable position than Nicaragua. This, unfortunately, appears to be the result of the second provisional measure.

10. Costa Rica's activities which the Court is allowing in the disputed territory by indicating the second provisional measure are to be carried out by Costa Rica's civilian personnel "in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated" (Order, operative clause (2)). Actions which may be taken by Costa Rica under the above provision potentially go well beyond the reforestation and monitoring contemplated by Nicaragua. I well understand that this was not the majority's intention in voting in favour of operative clause (2) but, unfortunately, this does create a risk of aggravating and extending the dispute before the Court and making it more difficult to resolve. In giving its reasons for indicating the first provisional measure, the Court also notes that Nicaragua's activities in the disputed territory give rise "to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death" (Order, paragraph 75). The majority should have been aware that activities undertaken by Costa Rica in accordance with the second provisional measure may pose the same danger.

11. Let me note that it has not been shown, or even argued by the Parties, that any presence of either Costa Rica's or Nicaragua's personnel in the tiny disputed territory, including the *caño*, is necessary in order to avoid irreparable prejudice being caused to the part of the wetland where this territory is situated. It is clear from the case file that no personnel were present in the disputed territory before Nicaragua embarked on its *caño* operation in October 2010.

Costa Rica itself did not request the Court to indicate a provisional measure allowing it to send personnel to the disputed territory (see Order, paragraph 75). The second provisional measure is indicated purely on the Court's initiative (see Order, paragraph 76).

12. In my view, the Court should have dealt with the issue of protection of the environment in exactly the same way as it dealt with the issue concerning the prevention of criminal activity in the disputed territory. It noted in the reasoning in the Order that

> "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 . . . 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" (Order, paragraph 78).

13. A similar call by the Court on the Parties to co-operate in a spirit of good neighbourliness in protecting the environment of the area would have been well justified given that this is a shared and inseparable wetland comprising the "Humedal Caribe Noreste" and the "Refugio de Vida Silvestre Río San Juan" (see Order, paragraph 79). The Court indeed

"remind[ed] the Parties that, under Article 5 of the Ramsar Convention:

> 'The 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.'" (Order, paragraph 79.)

That is what the Parties are under an obligation to do irrespective of their competing claims to a small disputed territory situated in the area protected under the Ramsar Convention.

(Signed) Leonid SKOTNIKOV.

Enclosure IV

DECLARATION OF JUDGE GREENWOOD

Provisional measures of protection — Criteria — Requirement that there be a risk of irreparable prejudice to rights which might be adjudged to belong to one of the Parties — Requirement that rights for which protection sought must be plausible — Meaning of plausibility in this context — Application to the present case — Appropriate measure to guard against risk of environmental harm to wetland.

1. I have voted in favour of the operative paragraphs of the Order and agree with most of the reasoning but I have certain reservations regarding operative paragraph 2, where I think the Court should have gone further in calling upon the Parties to co-operate to address the risk of irreparable environmental harm in the period before the Court can give judgment on the merits.

The criteria for the indication of provisional measures of protection

2. Before turning to those reservations, it is necessary to say a little about the criteria for the indication of provisional measures of protection. Since the proceedings on a request for provisional measures are necessarily conducted as a matter of urgency, as required by Article 74 (1) of the Rules of Court, without written pleadings and on a short time-scale, these criteria cannot be as exacting as those which fall to be applied in the later phases of a case. The nature of proceedings on a request for provisional measures of protection is such that it is not possible for the parties to deploy, or the Court to consider, the detailed evidence or arguments on legal issues which are required at the stage of ruling on jurisdiction or the merits. Moreover, the Court's decision on a request for provisional measures is not an interim ruling on the merits; as Article 41 of the Statute of the Court makes clear, the purpose of the decision on provisional measures is solely to preserve the respective rights of the parties pending any judgment which might be given on the merits. The Court has now given 41 Orders in which it has considered requests for provisional measures and, whatever uncertainty there may once have been, the criteria which have to be satisfied before provisional measures are granted are now well established. As set out in the Court's most recent treatment of the subject (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures*, Order of 28 May 2009), there are three requirements which have to be satisfied:

(i) it must appear, prima facie, that the provisions relied upon by the Applicant afford a basis on which the jurisdiction of the Court could be founded;

(ii) the provisional measures must be designed to protect rights which might subsequently be adjudged to belong to one of the parties; and

(iii) the measures ordered must be necessary to protect those rights.

3. I agree with the Court that, in the present case, the first requirement is plainly satisfied. Where an applicant invokes provisions which are binding upon both parties and the respondent does not contest jurisdiction during the provisional measures proceedings, the conclusion that the prima facie test is satisfied is inescapable.

4. The second requirement calls for more comment. Since provisional measures are ordered for the purpose of protecting rights which might subsequently be adjudged to belong to one of the parties, it follows that it cannot be sufficient for a party simply to assert that it has a right; it must have some prospect of success. The question is how strong a prospect is required. Clearly it is not

necessary for the party concerned to show that it will succeed on the merits. To require it to go that far would convert proceedings on provisional measures into a form of summary trial of the merits — exceedingly summary, given the constraints to which I have referred in paragraph 2, above. On the other hand, mere assertion that such a right exists cannot be sufficient, since if that assertion is manifestly unfounded, it cannot be said that the right is one which might subsequently be adjudged to belong to the party making the assertion. What is required is something more than assertion but less than proof; in other words, the party must show that there is at least a reasonable possibility that the right which it claims exists as a matter of law and will be adjudged to apply to that party's case. I therefore agree with the views expressed on this subject by Judge Abraham in his separate opinion in *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006,* p. 141.

5. There are different words which can be used to describe a test of this kind. The Court has opted for "plausible" (*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. 151, para. 57), although it might equally well have chosen "arguable" (the term more widely used in common law jurisdictions). In my opinion, it makes little difference precisely what word is chosen to describe the test. What matters is the test itself and in its Orders in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures* and in the present case, the Court has, in my view, made clear that the test is one of reasonable possibility. In doing that it was not adding a new requirement but simply spelling out the implications of the general principle that provisional measures exist to protect rights which might be adjudged to belong to one of the parties. To say that something *might* happen is to say that there is a reasonable prospect that it *will* happen. Accordingly, unless there is a reasonable prospect that a party will succeed in establishing that it has the right which it claims and that that right is applicable to the case, then it cannot be said that that right *might* be adjudged to belong to it.

6. There is another aspect of the second requirement, namely that there must be a link between the provisional measures ordered and the right plausibly claimed. Again, this follows from the general principle that the measures must be for the purpose of protection of the right which might subsequently be adjudged to belong to one of the parties.

7. The third requirement also has two aspects. Provisional measures are necessary only if, first, there is a risk of irreparable prejudice to a right which might subsequently be adjudged to belong to one of the parties and, secondly, the case is urgent in the sense that the prejudice may occur before the Court is able to give judgment on the merits. Again, in keeping with the nature of provisional measures proceedings, it is not necessary to prove that irreparable prejudice *will* occur, only that it *might* do so.

8. A party which requests provisional measures must show that all three requirements are satisfied if it is to succeed in its request. It is, however, open to the Court to indicate measures different from those requested, or even to act *proprio motu* without a request having been made (see Article 75 of the Rules of Court) but, if it does so, it is still bound to satisfy itself that the measures which it proposes to order meet the requirements set out above, since those requirements follow from the provisions of Article 41 of the Statute. The only exception — and that only a partial one — is the indication of measures requiring the parties to refrain from action which might aggravate or extend the dispute. Such measures are not limited to the protection of rights which might be adjudged to belong to either party but serve a wider purpose.

Application of the criteria in the present case

9. In the present case, the tests set out above have to be applied to two distinct (though related) issues, one concerning the *caño* between the main channel of the San Juan river and Harbor Head lagoon and the other concerning the effects of the dredging works which Nicaragua is undertaking further upstream.

10. The second issue is comparatively straightforward. Costa Rica asserts that it has a right, derived from Article 3, paragraph 6, of the Cleveland Award (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 210), not to have its territory damaged, flooded or occupied, or its rights of navigation on the San Juan river (which is in Nicaragua) or the Colorado river (which is in Costa Rica) destroyed or seriously impaired by the dredging. Article 3, paragraph 6, of the Cleveland Award provided that

> "[t]he Republic of Costa Rica can not prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement[1], 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".

Nicaragua argues that this test fails both the second and third requirements for the indication of provisional measures of protection. So far as the second requirement is concerned, Nicaragua argues that, under Article 3, paragraph 6, Costa Rica is entitled only to financial indemnification if the dredging harms its territory or its navigation rights. Whether that interpretation of the Award is correct is a matter for the merits; at the present stage of proceedings, I agree with the view expressed in paragraph 59 of the Order that Costa Rica's contrary interpretation of the Award cannot be dismissed as implausible. Since the Court might, therefore, adjudge that Costa Rica has the rights which it claims and since there is an obvious connection between those rights and the measures sought, I agree that the second requirement is satisfied.

11. I also agree with the finding (at paragraph 82 of the Order) that the evidence before the Court does not show that the third requirement is satisfied. I think, however, that the Court should have given more of an explanation as to why it reached that conclusion. What is of central importance on this point is Nicaragua's statement to the Court that the scale of the dredging operation is, and will continue to be, strictly limited as regards the size and type of dredger used and the amount of sediment displaced, that it will not involve any operations (including the dumping of sediment) on the territory of Costa Rica, and that it will reduce the flow of water into the Colorado river by no more than 5 per cent. The Court must take seriously a statement of this kind made by a State appearing before it, especially when, as here, the evidence before the Court is not sufficient to contradict it. It is for this reason that I consider it has not been established that there is a risk of irreparable prejudice to rights which may be adjudged to belong to Costa Rica. Nevertheless, that conclusion holds good only if the dredging operations do not exceed the limits referred to above. Should Nicaragua expand the scope of the operation, it would of course be open to Costa Rica to renew its request for provisional measures.

12. The first issue is more complicated. The essence of Costa Rica's claim is that the first Alexander award dated 30 September 1897 (*RIAA*, Vol. XXVIII, pp. 215-222) placed the boundary

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[1]The reference to "such Works" is a reference back to Article 3, paragraph 4, of the Cleveland Award, which dealt with Works necessary "to keep the navigation of the River . . . free and unembarrassed, or to improve it for the common benefit".

on the right bank of what is shown on the maps as the principal channel of the San Juan river, leaving the whole of the Isla Portillos in Costa Rica, though placing Harbor Head lagoon in Nicaragua. Nicaragua, on the other hand, maintains that, whatever may have been the position at the date of the award, the *caño* must today be regarded as the first channel of the San Juan river which is encountered when proceeding along the shore of the lagoon from Punta Castilla (the starting point of the boundary). Accordingly, for Nicaragua it is the right bank of the *caño* which is the border and the disputed part of Isla Portillos falls within Nicaragua, not Costa Rica. It is plain, however, from Nicaragua's replies to questions put by Members of the Court, and from Costa Rica's observations on those replies, that Nicaragua had not notified Costa Rica that it considered the area as part of Nicaraguan territory prior to the events in October and November 2010, which led to the institution of the present proceedings.

13. In these circumstances, it is obvious that, as the Court has held, Costa Rica's claim to the disputed area satisfies the plausibility test. I was initially less sure that it satisfied the requirement that provisional measures were necessary to prevent a risk of irreparable prejudice. The report of the advisory mission established by the Ramsar Secretariat has, however, convinced me that there is a risk of irreparable environmental damage to the disputed area, which constitutes part of the wetland registered by Costa Rica under the Ramsar Convention. While Nicaragua disputed the conclusions in that report and put forward a report, which it had commissioned from other experts, suggesting quite different conclusions, the question at this stage is not whether environmental damage to the disputed area of wetland will occur but only whether it might do so. I consider that Costa Rica has shown that such damage might indeed occur. I agree, therefore, that provisional measures designed to prevent such damage are appropriate.

14. The question is what form those measures should take. The second operative paragraph of the Order effectively gives Costa Rica exclusive responsibility for taking action in the disputed area to prevent environmental damage to that area. Unlike those of my colleagues who have voted against this paragraph, I do not believe that it offends against the principle that the Court must not prejudge questions which fall to be decided on the merits. I consider that the Court is entitled to take account of the fact that the disputed area falls within the wetland notified by Costa Rica under the Ramsar Convention and that the *status quo ante* was that it was Costa Rica, and not Nicaragua, which had assumed responsibilities under the terms of the Convention for the protection of the environment in the disputed area.

15. My concern is, rather, a practical one. The report of the Ramsar mission highlights the very close environmental connection between the disputed area and the waters of Harbor Head lagoon. Indeed, the report suggests that the greatest risk arising from the increased volume of water which will flow through the *caño* into Harbor Head lagoon is to the eco-system of the lagoon itself. In practice, the waters of the lagoon and the wetland in the disputed area, though they may subsequently be adjudged to be situated in two different countries, are inseparable from the environmental point of view. In these circumstances, I would have preferred the Court to have gone further than it has done in requiring the Parties to co-operate with each other, and with the Ramsar Secretariat, to guard against the risk of irreparable environmental damage, recognizing that the disputed area cannot be entirely separated from the lagoon for these purposes. In my opinion, an appropriate measure would have been one which required both Parties to attempt, in co-operation with the Ramsar Secretariat and taking account both of the Convention and the guidelines on co-operation to which the Ramsar advisory mission refers in its report, to devise and implement a set of protective measures. I felt able to vote for the second operative paragraph because of the reference to co-operation which appears there and in paragraph 80 of the Order. Nevertheless, I would have preferred that that duty had been more clearly and explicitly set out in the operative paragraph. Both Parties have assured the Court of their concern for the protection of the wetlands in this area. In practice it seems likely that that goal can only effectively be achieved

by a co-operative approach and, pending the judgment on the merits in the present proceedings, the Parties need to look beyond their differences to co-operate in devising measures to guard against risk of environmental damage; the implementation of those measures being a matter for Costa Rica in the disputed area (including the *caño*) and for Nicaragua on the San Juan river and in the lagoon. Such an approach would be in keeping with the spirit of the measures ordered by the Court.

(Signed) Christopher GREENWOOD.

Enclosure V

DECLARATION OF JUDGE XUE

I regret that I could not find myself in full agreement with the majority of the Court on the second provisional measure rendered by the Court in its Order on the Request for the indication of provisional measures submitted by Costa Rica and would like to clarify my position on the vote.

At the outset, I wish to state that in reaching its decision the Court has taken full account of the situation as presented by the Parties and given careful consideration to each and every submission requested by them. I entirely agree with the general thrust and reasoning of the Court in the indication of the Order. My reservation to the second provisional measure primarily rests on one point, which I consider of substantial importance.

The second operative paragraph is based largely on the reasoning stated in paragraph 80 of the Order, in which Costa Rica's obligations under the Ramsar Convention are invoked. Although the Ramsar Convention is about environmental protection, it is an international treaty governed by the law of treaties. Unless otherwise provided in the treaty, the territorial application of a treaty is bound with territorial sovereignty of each contracting State. The fact that the disputed area is situated in the "Humedal Caribe Noreste" wetland and the same wetland is designated under the responsibility of Costa Rica for protection under the Ramsar Convention has direct bearing on the merits of the present case. The current wording of paragraph 80 and the indication of the second provisional measure are liable to be construed as a prejudgment on the merits of the case.

In accordance with Article 41 of the Statute of the Court and its case law, the interim procedure for provisional measures must not prejudge any question relating to the merits of the case before the Court, and must leave intact the rights of the Parties in that respect (see, for example, *Factory at Chorzów, Order of 21 November 1927, P.C.I.J., Series A, No. 12*, p. 10; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 182, para. 31; *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 11, para. 29).

The present case essentially relates to territorial dispute over the area in question. To allow one Party to dispatch to the disputed area personnel, even civilian and for environmental purpose, would very likely lead to undesired interpretation of the Order prejudging on the merits of the case and, more seriously, it may incline to aggravate the situation on the ground.

With the good intention to prevent irreparable prejudice to the wetland for the protection of the ecological environment, the Court could have, pending the final decision on the merits, in my view, indicated the measure to both Parties with the assistance of the Secretariat of the Ramsar Convention, which is fully in line with the object and purpose of the Convention and at the same time devoid of any possibility of involving the merits of the case.

My vote is only meant to draw the attention of both Parties that the second operative paragraph should in no way be construed as affecting the substance of the case, but a measure designed to encourage the Parties, pending the decision of the Court on the case, to engage in consultation and co-operation as required by the Ramsar Convention, if and when actions have to be taken in the disputed area in order to prevent irreparable harm to the environment. For both countries that have placed their full confidence and trust in the jurisdiction of the Court for peaceful settlement of international disputes, I hope that this vote will eventually be proven an unnecessary precaution.

(Signed) XUE Hanqin.

Enclosure VI

[Original: French]

DÉCLARATION DE M. LE JUGE *AD HOC* GUILLAUME

Dragage du fleuve San Juan — Interprétation de l'article 6 de la sentence du président Cleveland — Activités des deux Etats sur le territoire litigieux — Protection de l'environnement — Coopération nécessaire du Costa Rica et du Nicaragua.

1. Je souscris à nombre des conclusions auxquelles la Cour est parvenue. Je souhaiterais cependant présenter ici quelques observations et préciser en quoi je me sépare sur un point de l'ordonnance adoptée.

Le dragage du fleuve San Juan

2. Dans sa demande en indication de mesures conservatoires, le Costa Rica priait la Cour d'ordonner la suspension du programme de dragage du fleuve San Juan mis en œuvre par le Nicaragua. Dans ses conclusions finales, le Costa Rica se borne à solliciter la suspension de ce programme dans la zone adjacente à Isla Portillos. La Cour a estimé que les droits revendiqués par le Costa Rica en liaison avec les opérations de dragage du fleuve San Juan entreprises par le Nicaragua sont «plausibles» (ordonnance, par. 59). Mais elle a constaté que ces opérations ne faisaient pas «peser sur l'environnement du Costa Rica ou sur le débit du fleuve Colorado un risque de préjudice irréparable» (*ibid.*, par. 82). Elle a par voie de conséquence rejeté la demande présentée sur ce point par le Costa Rica.

3. J'approuve pleinement cette solution, mais pense utile d'en préciser la portée.

4. Le traité de limites du 15 avril 1858 fixe la frontière entre le Costa Rica et le Nicaragua depuis l'océan Pacifique jusqu'à la mer des Caraïbes. Entre un point situé à trois milles anglais en aval de Castillo Viejo et la mer, la frontière suit la rive droite du San Juan. Le traité donne autorité et juridiction souveraine *(«dominio y sumo imperio»)* au Nicaragua sur les eaux et le lit du fleuve, tout en reconnaissant au Costa Rica un droit de navigation dont la Cour a eu l'occasion de fixer les limites dans son arrêt du 13 juillet 2009.

5. Les droits et obligations des Parties en ce qui concerne l'entretien et l'amélioration du San Juan aux fins de navigation et notamment son dragage ont été précisés dans la sentence arbitrale du président Cleveland du 22 mars 1888. Selon l'article 6 de cette sentence :

> «6. La République du Costa Rica ne peut empêcher la République du Nicaragua d'exécuter à ses propres frais et sur son propre territoire de tels travaux d'amélioration, à condition que le territoire du Costa Rica ne soit pas occupé, inondé ou endommagé en conséquence de ces travaux et que ceux-ci n'arrêtent pas ou ne perturbent pas gravement la navigation sur ledit fleuve ou sur l'un quelconque de ses affluents en aucun endroit où le Costa Rica a le droit de naviguer. La République du Costa Rica aura le droit d'être indemnisée si des parties de la rive droite du fleuve San Juan qui lui appartiennent sont occupées sans son consentement ou si des terres situées sur cette même rive sont inondées ou endommagées de quelque manière que ce soit en conséquence de travaux d'amélioration.»

6. Il ressort de ces dispositions que, pour reprendre les termes de la Cour dans son arrêt du 13 juillet 2009 : «[le Nicaragua peut exécuter à ses frais] les travaux nécessaires pour améliorer la navigation sur le fleuve San Juan ... qu'il estime convenables, à condition que lesdits travaux ne perturbent pas gravement la navigation sur les affluents du San Juan appartenant au Costa Rica» (*Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 269, par. 155).

7. Par ailleurs, selon la sentence du président Cleveland, les opérations d'entretien et d'amélioration menées à des fins de navigation sur le San Juan doivent l'être sans qu'il y ait occupation du territoire costa-ricien, sans que celui-ci soit inondé et sans que d'autres dommages soient causés à ce territoire. La sentence ajoute que le Costa Rica a le droit d'être indemnisé de tout dommage de ce type.

8. Les Parties s'opposent sur l'interprétation à donner à cette dernière disposition. Le Nicaragua soutient qu'en cas de dommage résultant de travaux d'entretien ou d'amélioration du fleuve, le Costa Rica n'est pas en droit d'empêcher la poursuite de ces travaux, mais peut seulement demander indemnisation du préjudice subi. Le Costa Rica est d'une opinion contraire.

9. La Cour n'a pas à ce stade pris parti sur ce point. Saisie d'une demande en indication de mesures conservatoires présentée par le Costa Rica, elle s'est bornée à rechercher si la thèse de ce dernier a un caractère plausible. Elle n'avait pas à se demander si la thèse du Nicaragua était, elle aussi, plausible (ordonnance, par. 57).

10. Pour ma part, je reconnais volontiers que les deux thèses peuvent être soutenues et qu'elles sont toutes deux «plausibles». Je ne suis pas certain que la Cour sera nécessairement amenée à prendre parti sur ces thèses lorsqu'elle examinera l'affaire au fond. En effet, s'il apparaît qu'aucun dommage n'a été causé au territoire costa-ricien, il lui suffira de constater que l'Etat demandeur n'a en rien souffert des opérations de dragage menées par le Nicaragua. S'il en était autrement, la Cour pourrait en revanche être amenée à interpréter l'article 6 de la sentence du président Cleveland. A mon sentiment, elle ne pourrait alors que constater que la première et la seconde phrase de cet article n'ont pas la même portée. En effet, le droit à indemnisation du Costa Rica est reconnu dans la seconde phrase uniquement en cas de dommages causés à son territoire et non en cas de perturbation grave apportée à la navigation. On le comprend aisément : de telles perturbations seraient contraires à l'objet et au but même des travaux entrepris et il conviendrait d'y porter remède. En revanche, les dommages ponctuels résultant en territoire costa-ricien des travaux menés sur le San Juan impliquent seulement indemnisation du préjudice subi. Il s'agit là, me semble-t-il, de dommages transfrontaliers relevant d'un régime de responsabilité objective (pour un cas analogue, voir les sentences arbitrales des 16 avril 1938 et 11 mars 1941 dans l'affaire des *Fonderies du Trail*, Nations Unies, *Recueil des sentences arbitrales*, tome III, p. 1905).

Les activités sur le territoire litigieux

11. Le Costa Rica se plaint par ailleurs devant la Cour de la construction sur son territoire d'un canal par lequel le Nicaragua aurait relié le fleuve San Juan à la lagune de Harbor Head à travers Isla Portillos. Le Nicaragua, quant à lui, soutient qu'il s'est borné à nettoyer à cet endroit un chenal naturel dit *caño* dont la rive sud constituerait la frontière entre les deux Etats. Ainsi, dans cette zone, deux différends opposent les Parties. Le premier concerne la licéité des travaux menés par le Nicaragua ; le second porte sur la souveraineté sur un territoire d'environ

trois kilomètres carrés se trouvant au nord de la voie d'eau litigieuse (dénommé par la Cour «le territoire litigieux»). La Cour n'a bien entendu pris position ni sur la licéité des travaux, ni sur les revendications de souveraineté. Elle s'est bornée à relever que les droits revendiqués par le Costa Rica étaient plausibles et n'a pas eu à se prononcer sur les droits revendiqués par le Nicaragua qui, à mon opinion, étaient d'ailleurs, eux aussi, plausibles.

12. La Cour s'est en revanche prononcée sur les mesures conservatoires sollicitées dans ce secteur par le Costa Rica. Celui-ci, dans le dernier état de ses conclusions, demandait à la Cour d'inviter le Nicaragua à s'abstenir

«dans la zone comprenant l'entièreté de Isla Portillos … de :

1) stationner ses troupes armées et autres agents ;

2) construire et élargir un canal ;

3) procéder à l'abattage d'arbres ou à l'enlèvement de végétation ou de terre ;

4) déverser des sédiments».

13. Au cours des audiences et en réponse à des questions qui lui avaient été posées par un juge, le Nicaragua avait précisé qu'«aucune troupe nicaraguayenne ne stationne actuellement dans la zone en question» et qu'il n'avait «nullement l'intention d'envoyer des troupes ou d'autres agents dans la région». Ainsi les conclusions du Costa Rica tendant à ce que la Cour invite le Nicaragua à ne pas stationner ses troupes armées et autres agents sur Isla Portillos auraient pu être écartées, comme étant devenues sans objet (en ce sens, voir l'affaire relative à des *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires*, ordonnance du 28 mai 2009).

14. Le Nicaragua avait cependant ajouté que «le *caño* n'est plus obstrué. Il est possible de patrouiller dans la zone des eaux du fleuve comme cela a toujours été le cas afin de faire respecter la loi». Le Nicaragua avait ainsi marqué qu'il entendait exercer sa souveraineté sur le *caño* disputé. Le Costa Rica prétendant également à cette souveraineté, «un risque réel et actuel d'incidents» (ordonnance, par. 75) existait et, dans cette perspective, il appartenait à la Cour d'indiquer *proprio motu* les mesures conservatoires qu'elle pouvait estimer nécessaires.

15. Sur ce terrain, la Cour a décidé non pas d'interdire au Nicaragua d'envoyer des forces armées ou d'autres agents sur le territoire litigieux, mais de procéder à une interdiction générale. Elle a en effet indiqué au point 1) du dispositif de l'ordonnance que «[c]haque Partie s'abstiendra d'envoyer ou de maintenir sur le territoire litigieux, y compris le *caño*, des agents, qu'ils soient civils, de police ou de sécurité». J'ai souscrit à ce point, comme j'ai souscrit aux points 3 et 4 du dispositif en vue de la préservation des droits à la souveraineté avancés par chacune des Parties et de la sauvegarde de la paix dans la région.

16. Restaient les conclusions du Costa Rica tendant à ce que la Cour invite le Nicaragua à ne pas construire et élargir le *caño*. A cet égard, la Cour a tout d'abord constaté que le Nicaragua avait «affirmé à l'audience que les opérations de nettoyage et de dégagement du *caño* étaient achevées et avaient pris fin» (ordonnance, par. 71). La Cour a pris note de cette déclaration sans équivoque et en a déduit à juste titre qu'il n'y avait pas lieu d'inviter le Nicaragua à ne pas poursuivre des travaux auxquels il n'entendait pas procéder (*ibid.*, par. 74).

17. La Cour a cependant constaté que le territoire litigieux faisait partie d'une zone humide d'importance internationale déclarée telle par le Costa Rica en vertu de la convention de Ramsar du 2 février 1971. Elle s'est demandée, à la lumière d'un rapport établi par le Secrétariat de cette convention sur la base d'informations fournies par le Costa Rica, si l'existence même du *caño* ne risquait pas d'engendrer un préjudice irréparable à l'environnement ainsi protégé. Conformément à une jurisprudence constante, elle s'est placée pour en juger à la date même de l'ordonnance (voir l'affaire relative aux *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), mesures conservatoires, ordonnance du 1er juillet 2000, C.I.J. Recueil 2000*, p. 128, par. 43). Elle a constaté qu'à cette date il n'existait pas de risque imminent de préjudice irréparable et s'est donc abstenue d'indiquer des mesures conservatoires destinées à prévenir de tels risques.

18. Elle n'en a pas moins jugé qu'il pourrait être utile que des personnels civils en charge de la protection de l'environnement soient en mesure de se rendre dans le territoire litigieux, y compris le *caño*, dans la stricte mesure où un tel envoi serait nécessaire pour éviter qu'un tel préjudice apparaisse dans l'avenir. Il s'agit là d'une situation qui, à mon sentiment, a peu de chance de se produire et la Cour me semble avoir fait preuve sur ce point de craintes excessives. En vue de permettre de faire face à cet hypothétique danger, la Cour a cru devoir donner au Costa Rica, et au Costa Rica seul, la possibilité d'envoyer sur le territoire contesté des agents civils chargés de la protection de l'environnement capables d'apprécier la situation. Consciente cependant qu'une telle solution n'était pas sans inconvénients, la Cour a entouré cette venue de plusieurs garanties. Elle a prévu qu'avant d'agir, le Costa Rica devra consulter le Secrétariat de la convention de Ramsar, informer le Nicaragua et faire de son mieux pour rechercher avec ce dernier des solutions communes. Mais ce n'en est pas moins au Costa Rica, et au Costa Rica seul, que la Cour a confié en dernier ressort le soin de décider si des agents appartenant à l'administration chargée de la protection des zones humides doivent, au cas où apparaîtrait un risque imminent de préjudice irréparable, se rendre dans le territoire litigieux.

19. J'aurais pour ma part préféré que cette responsabilité soit confiée conjointement aux deux Parties.

a) D'une part, il existe dans la zone, ainsi que la Cour l'a relevé (ordonnance, par. 79), deux zones humides d'importance internationale couvertes par la convention de Ramsar. L'une, «Humedal Caribe Noreste», a été établie par le Costa Rica sur Isla Portillos. L'autre, «Refugio de Vida Silvestre Río San Juan», a été établie par le Nicaragua sur le fleuve et la lagune de Harbor Head. Compte tenu notamment du fait que le *caño* unit le fleuve et la lagune, il me paraît difficile de dissocier la protection de l'environnement sur le *caño* de celle de l'environnement en amont et en aval en ne confiant *in fine* la surveillance du territoire litigieux qu'à un seul Etat.

b) D'autre part, la solution retenue par la Cour me semble reposer sur le fait que ce territoire se trouve dans la zone humide «Humedal Caribe Noreste» établie par le Costa Rica. Elle paraît avoir pour but de permettre au Costa Rica de remplir certaines des obligations qui sont les siennes au titre de la convention de Ramsar. Mais, comme la Cour l'a relevé, les droits à la protection de l'environnement invoqués dans la présente affaire «découlent des prétentions des Parties à la souveraineté sur le même territoire» (ordonnance, par. 56). Dès lors la décision de la Cour confiant au seul Costa Rica le soin d'envoyer des agents sur le territoire contesté dans le cas où un préjudice irréparable deviendrait imminent pourrait être interprétée comme privilégiant le droit à la souveraineté du Costa Rica sur ce territoire.

20. Je reconnais qu'une telle interprétation serait erronée. En effet, la solution retenue par la Cour ne préjuge aucune question relative au fond de l'affaire (ordonnance, par. 85) et notamment pas la souveraineté sur le territoire litigieux (*ibid.*, par. 57). Elle n'implique pas que le titre du Costa Rica sur ce territoire soit meilleur que celui du Nicaragua. Elle suppose seulement que ce titre soit plausible.

21. Cette solution me paraît cependant d'une efficacité douteuse. A mon sentiment, il aurait mieux valu contraindre les deux Parties à négocier. L'ordonnance recommande certes vivement au Costa Rica d'engager en cas de besoin une telle négociation avec le Nicaragua. Cela m'a paru cependant insuffisant et, de ce fait, je n'ai pu voter en faveur du point 2) du dispositif. Il me reste à exprimer l'espoir que si, par extraordinaire, apparaissait un risque imminent de préjudice irréparable, un accord puisse être trouvé entre les deux Etats.

(Signé) Gilbert GUILLAUME.

Enclosure VII

SEPARATE OPINION OF JUDGE AD HOC DUGARD

Broad Agreement with dispositif *of the Order — Troubled by Court's order in paragraph 1 of* dispositif *that both Parties should vacate the disputed territory — Examination of concept of plausible right — Requirement of plausible right on part of Applicant involves some consideration of merits — Boundary treaty, arbitral award and maps provide evidence of Applicant's plausible right to sovereignty over disputed territory — Respect for territorial integrity of State by other States a norm of* jus cogens *— Principle of respect for stability of boundaries related to respect for territorial integrity — Provisional measures in case involving violation of territorial integrity should vindicate position of invaded State — Restoration of* status quo ante *appropriate — Nature of disputed territory does not warrant different conclusion — Even-handed order in paragraph 1 of* dispositif *requiring both Parties to refrain from maintaining civilian, police or security personnel in disputed territory unfair to Applicant — This order lends unwarranted legitimacy to Respondent's claim — Paragraph 2 of* dispositif *recognizes claim of Applicant to disputed territory — Allows Applicant to take measures to protect environment in disputed territory — Vote for Order in its entirety premised on acknowledgment of Applicant's stronger claim to the disputed territory in paragraph 2 of* dispositif.

1. I have voted in favour of the provisional measures ordered by the Court in this case. Although the Court has indicated that both Costa Rica and Nicaragua should refrain from sending their civilian, police or security personnel into the disputed territory of the Isla Portillos, it has recognized that Costa Rica has a stronger claim to the territory by indicating that it bears responsibility for the protection of the environment of the territory and that it may dispatch its civilian personnel to the territory for this purpose. In effect this restores the *status quo ante* as before Nicaragua dispatched military personnel and environmental workers into the territory in October 2010 Costa Rica mainly viewed the Isla Portillos as an important environmental site for which it bears responsibility under the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971. Its primary concern therefore was for the protection of the environment of the territory. That Costa Rica's main activities in the Isla Portillos relate to environmental protection should not obscure the fact that Costa Rica claims full territorial sovereignty over the territory. The issue of territorial title was not before the Court on account of the cardinal rule governing the award of provisional measures that the merits of the dispute — which in this instance relate to territorial title over the territory — are to be decided at the merits phase only. While I fully accept this important principle, a question which troubles me is whether in circumstances in which an applicant State for provisional measures demonstrates a strong prima facie case for territorial title, the Court should adopt an even-handed approach to the territorial claims by ordering both parties out of the disputed territory — as it has done in the present case — or whether it should give greater recognition to the applicant's claim by ordering a return to the *status quo ante*. This is the subject of the present Opinion.

A. Plausible right

2. The Court has indicated in its Order that the applicant in a request for provisional measures should satisfy the Court that the rights it asserts are "at least plausible" (Order, paragraph 53). The "plausibility test" is a new feature of the Court's jurisprudence on provisional measures and owes its origin to the case concerning *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. 151, para. 57). Prior to this decision the Court refrained from adopting a clear position on this subject as it was unwilling to do anything that might appear to prejudge the merits

of a case[1]. Nevertheless, a number of decisions of the Court indicate its support for the view that the applicant State was required to show that it had some prospect of success on the merits of the case or that it had established the existence of the right it sought to have protected on a prima facie basis[2]. Thus in the case concerning *Passage through the Great Belt (Finland* v. *Denmark)*, (*Provisional Measures*, *Order of 29 July 1991*, *I.C.J. Reports 1991*, p. 12), the Court replied to Denmark's argument that Finland had failed to show that "a prima facie case exists" that "the existence of a right of Finland of passage through the Great Belt is not challenged" and that the dispute between the Parties was over the "nature and extent of that right" (*ibid.*, p. 17, paras. 21-23). Lord Collins was right therefore to ask in his lectures before The Hague Academy of International Law in 1992 "Is there a case in which interim measures have been granted in which there was not at least a prima facie case on the merits?"[3]. In general, it seems that the Court preferred to give implicit rather than express approval to the need for the applicant State to establish the prima facie existence of the right that it sought to protect[4].

3. In practice it is impossible for the Court to avoid some consideration of the merits in a request for provisional measures. It is insufficient for the applicant State merely to assert its right[5]. It must, in addition, show, on a prima facie basis, that this right exists or that it is, in the new language of the Court, a "plausible right". Inevitably this requires some consideration of the merits of the case. As Judge Abraham declared in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*:

> "the Court must be satisfied that the arguments are sufficiently serious on the merits — failing which it cannot impede the exercise by the respondent to the request for provisional measures of its right to act as it sees fit, within the limits set by international law" (*Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 141, para. 10).

4. The need for the applicant State to prove, albeit only on a prima facie basis, that it has a right that has some prospect of being successfully asserted at the merits phase of the proceedings has become much clearer since the Judgment of 27 June 2001 in the case of *LaGrand (Germany* v. *United States of America)* (*Judgment, I.C.J. Reports 2001*, p. 466), in which the Court held that an order for provisional measures is legally binding. It would be unjust to subject a respondent State to a legally binding order for provisional measures if the applicant State had merely asserted a right, without showing on a prima facie basis that it had some prospect of succeeding on the merits.

5. Opinions will differ as to whether the test of "plausible right" is an appropriate and accurate formulation of what the applicant State must prove. In his separate opinion in the case concerning *Passage through the Great Belt*, Judge Shahabuddeen spoke of "a prima facie test, or of a test as to whether there is a serious issue to be tried, or of a test as to whether there is possible

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[1] J. G. Merrills "Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice", 44 *International and Comparative Law Quarterly*, 1995, p. 90 at p. 114; S. Rosenne, *Provisional Measures in International Law*, 2005, p. 72.

[2] See the cases cited in the separate opinion of Judge Shahabuddeen in *Passage through the Great Belt, Provisional Measures, Order of 29 July 1991. I.C.J. Reports 1991*, p. 30. See too A. Zimmermann, C. Tomuschat & K. Oellers-Frahm, *The Statute of the International Court of Justice*, 2006, p. 938.

[3] "Provisional and Protective Measures in International Litigation" *Recueil des cours, (1992 III)*, Vol. 234, p. 228.

[4] Separate opinion of Judge Bennouna in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 143, para. 5 and p. 146, para. 14.

[5] Separate opinion of Judge Shahabuddeen in the case concerning *Passage through the Great Belt, I.C.J. Reports 1991*, p. 30; separate opinion of Judge Abraham in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures. Order of 13 July 2006, I.C.J. Reports 2006*, p. 138, para. 6.

danger to a possible right", as formulations acceptable "for purposes of international litigation" (*Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 36). Another test suggested is that the case be at least arguable on the merits[6]. Any one of these formulations would probably have satisfactorily conveyed the standard of proof required. So does the test of "plausibility", provided that plausible is understood as meaning "reasonable or probable" (*New Oxford Dictionary* (1998)) or "believable and appearing likely to be true" (*Encarta World Dictionary* (1999)). (The word "plausible" does in English, but not in French, have a secondary meaning of an argument that is specious or intended to deceive.)

B. Plausibility of Costa Rica's right

6. Much of the evidence in the proceedings in the present case concerned Costa Rica's claim to sovereignty over the disputed territory and the infringement by Nicaragua of its environmental rights in the territory. Of course, this evidence was necessary to establish irreparable prejudice on the part of Costa Rica for the purpose of an order for provisional measures, but at the same time the evidence in support of Costa Rica's claim to territorial title was fully canvassed. Conversely, Nicaragua also led evidence of its claim to territorial title. In fact, most of the evidence related to the Parties' competing claims to sovereignty over the disputed territory, with the Applicant seeking to show that it had a strong case on the merits, if not a conclusive one, and the Respondent seeking to challenge this claim. In the course of its argument, Costa Rica asserted the plausibility of its right to territorial title and Nicaragua attempted to refute the existence of such right. Both Parties appeared to accept that this could not be done without an investigation of matters pertaining to the merits, although Nicaragua did caution the Court against trespassing on the merits of the case.

7. Costa Rica claimed that its rights to territorial integrity and the protection of its environment had been violated by Nicaragua's incursion into the Isla Portillos. These rights are inseparable as this is not a case in which the environment has been damaged by acts occurring outside Costa Rica's territory. Essentially therefore the right asserted by Costa Rica pertained to its territorial integrity.

8. The evidence established convincingly that Costa Rica's right to sovereignty and territorial integrity over the Isla Portillos was plausible.

9. The 1858 Treaty of Limits establishing the boundary between Costa Rica and Nicaragua provides that the boundary line shall commence "in the mouth of the River San Juan de Nicaragua; and shall continue, always following the right bank of the said river" (Article II). In 1897 the First Alexander Award interpreted this treaty to mean that the boundary follows the waters edge around Harbor Head lagoon until it reaches the San Juan river by "the first channel met" and continues "up this channel", and then up the San Juan river as directed in the Treaty of 1858. The First Alexander Award was accompanied by a hand-drawn sketch which indicates that the "first channel met" is the San Juan river proper and makes it clear that the boundary line described by the Treaty of 1858 and the First Alexander Award allocates the Isla Portillos to Costa Rica. Moreover when the First Alexander Award was published by John Basset Moore in *History and Digest of the International Arbitration to which the United States has been a Party*, Vol. V (1898), it included a map of the area which confirms that the Isla Portillos falls within the territory of Costa Rica. Maps may not provide conclusive evidence of a boundary but they do still stand "as a statement of geographical fact" especially when the State adversely affected has itself produced and disseminated such maps (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*

[6]M. Mendelson "Interim Measures of Protection in Cases of Contested Jurisdiction", 46 *British Year Book of International Law*, 1972-1973, p. 317.

(Malaysia/Singapore), *Judgment, I.C.J. Reports 2008*, p. 95, para. 271). It is therefore of significance that maps dating from the time of the Alexander Awards to the present time support Costa Rica's claim. These maps include Nicaraguan maps, maps produced by both Costa Rica and Nicaragua in their 2009 dispute before the Court (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*), and maps produced by the United States and international agencies. Finally, Nicaragua accepted the border as claimed by Costa Rica for over 100 years. It was only after Costa Rica initiated proceedings before the Court and complained about Nicaragua's incursion into the Isla Portillos to the Organization of American States that Nicaragua claimed sovereignty over the territory.

10. Nicaragua sought to substantiate its claim to sovereignty over the Isla Portillos by arguing that the "first channel met" in the Harbor Head lagoon, referred to in the First Alexander Award, was no longer the San Juan river but a small stream or *caño* which had opened up recently; and that Alexander had himself contemplated in his Second Award that the boundary would change as the terrain underwent physical changes. This argument is unsupported by the law or the facts. First, it is extremely difficult to reconcile the argument with the Treaty of 1858 or the First Alexander Award which clearly indicate the natural course of the San Juan river as the boundary. Secondly, there was no evidence that the terrain had changed substantially since the Alexander Awards. Thirdly, maps and satellite photographs failed to provide clear evidence of the existence of the *caño* before Nicaragua's environmental cleaning operation in October 2010 which had opened up the *caño*.

11. Both Parties claimed to have exercised some governmental authority over the inhabited wetland of the Isla Portillos. Competing *effectivités* over the territory is clearly a matter for determination on the merits.

12. In these circumstances, the Court finds that Costa Rica has a plausible right to sovereignty over the Isla Portillos and that it was not called upon to rule on the plausibility of Nicaragua's claim to sovereignty (Order, paragraph 58).

C. Territorial integrity and provisional measures

13. Before addressing the question of the appropriate order in the present case it is necessary to consider the question whether special considerations apply to such an order in cases involving the invasion of the territorial integrity of a State.

14. Respect for territorial integrity is a fundamental principle of the international legal order. It is a principle enshrined in Article 2 (4) of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (General Assembly, resolution 2625 (XXV) of 24 October 1970), and a host of international instruments and resolutions. As Judge Koroma stated in his dissenting opinion in the Advisory Opinion on *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* of 22 July 2010: "This principle entails an obligation to respect the definition, *delineation* and territorial integrity of an existing State." (Para. 21; emphasis added.)

15. The prohibition on the use of force in international relations is accepted as a peremptory norm, a norm of *jus cogens*[7]. This prohibition is directly related to the principle of respect for territorial integrity, as demonstrated by Article 2 (4) of the Charter of the United Nations which prohibits the "threat or use of force against the territorial integrity . . . of any State". In these circumstances, it is difficult to resist the conclusion that respect for the territorial integrity of a State *by other States*[8] is a norm of *jus cogens*.

16. Related to respect for territorial integrity is the principle of respect for boundaries, particularly boundaries demarcated by treaty and confirmed by arbitral award. As the Court stated in the case concerning *Temple of Preah Vihear (Cambodia* v. *Thailand)*: "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality." (*Merits, Judgment, I.C.J. Reports 1962*, p. 34.)

17. Incursions across borders, that is, violations of territorial integrity, bring with them not only a risk of irreparable prejudice to the State whose border has been violated, but also risk of loss of life arising from the likelihood of armed confrontations between the forces of the invader and the invaded[9]. This consideration led the Court in the present case to conclude that the likelihood that Nicaragua might send troops into the disputed territory created a risk of irreparable prejudice to Costa Rica (Order, paragraph 75).

18. For the above reasons, special considerations apply to a request for provisional measures in a case involving the violation of the territorial integrity of a State that has proved a "plausible right" to such territory. Such considerations should not only result in a finding of irreparable prejudice but also in an order that fully vindicates the position of the invaded State by directing that the invading State withdraw its military forces pending the hearing on the merits.

D. The nature of the territory and provisional measures

19. In its Order (paragraph 77), the Court finds that "given the nature of the disputed territory" both Parties should refrain from sending to, or maintaining, in the disputed territory, any personnel, whether civilian, police or security, until the Court has decided the dispute on the merits. Whether the "nature of the disputed territory" warrants an even-handed order that treats both parties alike, instead of one directing the invading State alone to withdraw, is questionable.

20. If, hypothetically, the State of Utopia invaded the State of Arcadia, a densely populated State, and sought to establish a military presence in an Arcadian city, and, if Arcadia could show that it had a highly plausible title to its territory, which had hitherto been unchallenged, it is surely unlikely that the Court would make an order for provisional measures calling on both parties to withdraw their forces from the disputed city. Instead, it is more likely that the Court would order Utopia, the invader and recent challenger or Arcadia's territorial title, to withdraw pending a decision on the merits of the dispute. Here a direction to both parties to withdraw their forces would result in an administrative vacuum and cause chaos in the disputed city.

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[7] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 100, para. 190.

[8] In its Advisory Opinion on *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* of 22 July 2010, the Court found that the principle of territorial integrity is "confined to the sphere of relations between States" (para. 80).

[9] See S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. III, *Procedure*, 2006, p. 1410.

21. It seems, according to the reasoning of the Court, that the situation is different when the disputed territory is an uninhabited wetland, where the absence of law enforcement officers from both applicant and respondent States will not have adverse consequences for the population of the applicant State. But is this necessarily a fair and just solution? Courts have held that a State may not be required to display the same degree of *effectivité* over an uninhabited and uninhabitable territory for the purpose of establishing title to territory[10], but there is no reason why such a territory, once it has been shown that a State has a plausible right to the territory, should not be administered by that State in the same way as an inhabited part of the State's territory. Considerations of respect for territorial integrity apply as much to uninhabited territory as they do to inhabited territory as a State's sovereignty extends over both the inhabited and uninhabited parts of its territory. There is no more justification for an order for the withdrawal of forces from both parties in such a case than there is in the hypothetical case depicted in paragraph 20.

E. Conclusion

22. The Court has adopted a highly even-handed approach in the first paragraph of its *dispositif* in an effort to avoid making any pre-judgment of the merits of the case. Both Parties are ordered to refrain from sending to, or maintaining in the disputed area any personnel, whether civilian, police or security. But even-handedness can be taken too far. In this case Costa Rica has shown convincingly that it has a plausible right to sovereignty over the disputed territory and that Nicaragua's conduct creates an imminent risk of irreparable prejudice to the territory (Order, paragraph 75). Moreover, without prejudging Nicaragua's claim to sovereignty over the disputed territory, it should be stressed that its claim was first raised only after the initiation of the present proceedings and Costa Rica's complaint to the Organization of American States. In these circumstances, justice requires that Nicaragua alone should have been ordered to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or military". In other words, the first paragraph of the *dispositif* should have sought to restore the *status quo ante*, the situation as it existed before Nicaragua's incursion into the Isla Portillos.

23. A serious objection to the even-handedness displayed by the Court in its Order is that by directing both Parties to keep out of the disputed territory it inevitably will be perceived as giving credibility or legitimacy to Nicaragua's claim, despite the weakness of the claim (on the evidence before the Court) and the late raising of the claim. There is a danger that the Court's Order may encourage a State with territorial ambitions to invade its neighbour, occupy coveted territory, raise a claim to territorial title in the face of the Court, and then hope to gain legitimacy for its claim by an even-handed order for provisional measures of the kind rendered by the Court in this case. In short, it is a dangerous precedent.

24. The second paragraph of the *dispositif* recognizes that Costa Rica has a stronger claim to the disputed territory as it permits Costa Rica to take measures to protect the environment of the disputed territory and to dispatch civilian personnel to the territory for this purpose. In discharging its responsibility for the protection of the environment of the disputed territory, including the *caño*, Costa Rica is required to consult with the Secretariat of the Ramsar Convention, give prior notice to Nicaragua of its actions and use its best endeavour to find common solutions with Nicaragua in respect of its actions. In the final resort, however, the responsibility for the protection of the environment of the Isla Portillos, including the *caño*, lies with Costa Rica which has demonstrated a plausible right to territorial sovereignty over the territory.

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[10] *Island of Palmas*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 840; *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 46; *Clipperton Island*, 26 *American Journal of International Law*, 1932, p. 394.

25. Despite my misgivings about the first paragraph of the *dispositif*, I have voted in favour of the Order in its entirety because the second paragraph of the *dispositif* recognizes Costa Rica's claim to the disputed territory and ensures that Costa Rica will be able to discharge its responsibility for the protection of the environment of the Isla Portillos.

26. Paragraph three of the *dispositif* is also important as it requires each Party to refrain from any action which might aggravate the dispute. It is my earnest hope that both Parties will scrupulously comply with this direction.

(Signed) John DUGARD.