

INTERNATIONAL COURT OF JUSTICE

YEAR 2013

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General List
Nos. 152 and 150**

13 December 2013

**CONSTRUCTION OF A ROAD IN COSTA RICA
ALONG THE SAN JUAN RIVER**

(NICARAGUA *v.* COSTA RICA)

**CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA
IN THE BORDER AREA**

(COSTA RICA *v.* NICARAGUA)

**REQUEST PRESENTED BY NICARAGUA FOR THE INDICATION
OF PROVISIONAL MEASURES**

ORDER

Present: *President* TOMKA; *Vice-President* SEPÚLVEDA-AMOR; *Judges* OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI; *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 and 74 of the Rules of Court,

Makes the following Order:

Whereas:

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

2. By an Order of 23 January 2012, the Court fixed 19 December 2012 and 19 December 2013 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Costa Rica. Nicaragua’s Memorial was filed within the time-limit thus prescribed.

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

4. By two separate Orders dated 17 April 2013, the Court joined the proceedings in the *Nicaragua v. Costa Rica* case with those in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (hereinafter the “*Costa Rica v. Nicaragua* case”), which had been brought by Costa Rica against Nicaragua on 18 November 2010, accompanied by a Request for the indication of provisional measures. By an Order of 8 March 2011 in the latter case, the Court indicated certain provisional measures to both Parties. Following successive requests by Costa Rica and Nicaragua for the modification of that Order, the Court, by an Order of 16 July 2013, found that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power to modify the measures indicated in its Order of 8 March 2011. On 24 September 2013, Costa Rica filed with the Registry a Request for the indication of new provisional measures in the *Costa Rica v. Nicaragua* case. The full procedural history of the *Costa Rica v. Nicaragua* case is set out in the Court’s Order dated 22 November 2013 on Costa Rica’s Request for the indication of new provisional measures in that case.

5. On 11 October 2013, Nicaragua filed with the Registry a Request for the indication of provisional measures in the *Nicaragua v. Costa Rica* case. Nicaragua specified that it was not seeking the modification of the Order of 8 March 2011 in the *Costa Rica v. Nicaragua* case, but

rather “the adoption of new provisional measures linked with the *Nicaragua v. Costa Rica* case”. Nicaragua further suggested that its Request be heard concurrently with Costa Rica’s Request for the indication of new provisional measures at the same set of oral proceedings. By letter of 14 October 2013, Costa Rica objected to Nicaragua’s suggestion. By letters dated 14 October 2013, the Registrar informed the Parties that the Court had decided that it would consider the two Requests separately.

6. Nicaragua, in outlining the facts which led it to bring the present Request, stated that Costa Rica “has repeatedly refused to give Nicaragua appropriate information on the road works” and “has denied that it has any obligation to prepare an Environmental Impact Assessment or to provide such a document to Nicaragua”. Nicaragua contended that,

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

7. At the end of its Request, Nicaragua asked the Court:

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

- (1) that Costa Rica immediately and unconditionally provides Nicaragua with the Environmental Impact Assessment Study and all technical reports and assessments on the measures necessary to mitigate significant environmental harm to the River;
- (2) that Costa Rica immediately takes the following emergency measures:
 - (a) Reduce the rate and frequency of road fill failure slumps and landslides where the road crosses the steeper hill slopes, especially in locations where failed or eroded soil materials have been or could potentially be delivered to the Río San Juan.
 - (b) Eliminate or significantly reduce the risk of future erosion and sediment delivery at all stream crossings along Route 1856.
 - (c) Immediately reduce road surface erosion and sediment delivery by improving dispersion of concentrated road runoff and increasing the number and frequency of road drainage structures.
 - (d) Control surface erosion and resultant sediment delivery from bare soil areas that were exposed during clearing, grubbing and construction activities in the last several years.

- (3) Order Costa Rica not to renew any construction activities of the road while the Court is seized of the present case.”

Nicaragua added that it “reserve[d] its right to amend and modify the measures sought in light of any situation that might arise”.

8. The Registrar immediately communicated a copy of the said Request to the Government of Costa Rica. The Registrar also notified the Secretary-General of the United Nations of the filing of the Request by Nicaragua.

9. At the public hearings held on 5, 6, 7 and 8 November 2013, 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 Nicaragua: H.E. Mr. Carlos José Argüello Gómez, *Agent*,
Mr. Stephen C. McCaffrey,
Mr. Paul S. Reichler,
Mr. Alain Pellet.

On behalf of Costa Rica: H.E. Mr. Edgar Ugalde Álvarez, *Agent*,
Mr. Arnoldo Brenes,
Mr. Samuel Wordsworth,
Mr. Sergio Ugalde, *Co-Agent*,
Mr. Marcelo Kohen,
Ms Kate Parlett.

10. At the end of its second round of oral observations, Nicaragua asked the Court to indicate provisional measures in the same terms as included in its Request (see paragraph 7 above).

11. At the end of its second round of oral observations, Costa Rica stated the following:

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

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

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I. Prima facie jurisdiction

12. 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, but the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Order of 28 May 2009*, *I.C.J. Reports 2009*, p. 147, para. 40).

13. Nicaragua seeks to found the jurisdiction of the Court in this case on Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948. In addition, Nicaragua seeks to found the jurisdiction of the Court on the declaration made by Costa Rica on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 (as amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court.

14. The Court considers that these instruments appear, *prima facie*, to afford a basis on which it might have jurisdiction to rule on the merits of the case (see *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, p. 18, para. 52). The Court further notes that, within the time-limit set out in Article 79, paragraph 1, of the Rules of Court, Costa Rica did not raise any preliminary objection to its jurisdiction. Moreover, Costa Rica did not contest the Court's jurisdiction in the present proceedings. In these circumstances, the Court finds that it may entertain the Request for the indication of provisional measures submitted to it by Nicaragua.

II. The rights whose protection is sought and the measures requested

15. 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 claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible (see, for example, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, p. 18, para. 53; *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).

16. 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 (*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, p. 18, para. 54); *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. 56).

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

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

19. The Court initially observes that, under the 1858 Treaty of Limits between Costa Rica and Nicaragua, the latter enjoys “dominion and sovereign jurisdiction over the waters of the San Juan River” and that thus the river “belongs to Nicaragua” (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, *Judgment*, *I.C.J. Reports 2009*, p. 229, para. 19 and p. 232, paras. 30-31). The Court notes that the claimed right to be free from transboundary harm is the principal right underpinning Nicaragua’s Request and is derived from the right of a State to sovereignty and territorial integrity. It recalls that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29). The Court therefore considers that a correlative right to be free from such transboundary harm is plausible. With respect to the claimed right to receive a transboundary environmental impact assessment from Costa Rica, the Court has had occasion to state in another context that

“in accordance with a practice, which in recent years has gained so much acceptance among States . . . it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context . . .” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010 (I)*, p. 83, para. 204).

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

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

21. The first provisional measure requested by Nicaragua is that Costa Rica “immediately and unconditionally” provide it with an Environmental Impact Assessment Study and all technical

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

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

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

III. Risk of irreparable prejudice and urgency

24. 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, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, I.C.J. Reports 2011 (I), p. 21, para. 63).

25. 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 will be caused to the rights in dispute before the Court has given its final decision (*ibid.*, pp. 21-22, para. 64). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

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26. Nicaragua maintains that the transboundary movement of sediment and other debris resulting from Costa Rica's road construction constitutes trespasses upon its territory and causes constant and irreparable prejudice to Nicaragua's rights of sovereignty and territorial integrity — prejudice which would be significantly increased should Costa Rica's road construction works resume. In particular, it refers in this regard to an expert report by Professor Mathias Kondolf (of

December 2012 annexed to the Memorial). It also refers to photographs showing landslides and the formation of deltas, as well as debris, such as a culvert and a piece of erosion control fabric, floating in the San Juan River. Nicaragua draws attention to Professor Kondolf's estimate that between 87,000 and 109,000 cubic metres of sediment are delivered into the San Juan River from the road project annually under "normal" meteorological conditions, and to his statement that, when intense rains occur, the effects would be "irreversible" in that there would be "no way to recover the prior environmental values and intact ecosystem, nor to reverse the massive transfers of sediment from uplands to the river and other wetlands".

27. Nicaragua asserts that it will be very difficult, if not impossible, for Nicaragua to remove, with the small dredgers at its disposal, the existing sedimentation of the San Juan River from the road project, and that more delay in taking protective measures would make it virtually impossible for Nicaragua to remedy the situation.

28. Nicaragua further submits that there is a serious risk of irreparable harm to local species and the ecosystem of the San Juan River from the delivery of coarse and fine sediment into the river from the road, due to the aggradation of the river channel, which results in burial of important aquatic habitats and consequent loss of native species. Nicaragua observes that, in 2001, the San Juan River Wildlife Refuge was designated a wetland of international importance under the Ramsar Convention, and that the river's wetlands support a great diversity of plant and animal life. Nicaragua maintains that many of the animal species are threatened with extinction and interim measures are necessary to protect these species from irreparable harm pending the Court's Judgment in the case.

29. Nicaragua argues that the need for provisional measures is urgent because irreparable harm to the river has already occurred, and additional and even greater irreparable harm is imminent, especially if Costa Rica resumes its construction activities. Nicaragua draws attention to a public announcement by the Costa Rican Minister for Public Works and Transportation, dated 14 March 2013, stating that Costa Rica would resume its construction activities on the road before the end of the year 2013 with a view to completing its construction between October and December 2014.

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30. Costa Rica, for its part, contends that the evidence necessary to confirm the risk of irreparable harm is wholly lacking. In particular, Costa Rica emphasizes that Nicaragua has not provided detailed data to demonstrate that increased sediment from the road adds materially to what is already a sediment-heavy river. Professor Thorne's expert report (of 4 November 2013), submitted by Costa Rica, concludes that, even accepting Professor Kondolf's estimate of increased sedimentation due to the road construction activities, such amount falls well within the range of

natural variability of sediment loads in the San Juan River, meaning that, even if such a change in load were to occur, it would be indiscernible and statistically undetectable. Costa Rica further submits that, even if there were a risk that sediment could be washed into the San Juan River, it would not have any adverse impact on the river and there would consequently be no irreparable prejudice.

31. With respect to the alleged risk of irreparable harm to local species and the ecosystem of the San Juan River, Costa Rica asserts that Nicaragua has not provided evidence on how individual species are being adversely affected, and why there would be a risk of irreparable prejudice in that respect.

32. Costa Rica argues that it has itself already taken remediation measures in order to minimize the risks of any adverse environmental impact of the construction of the road. These works include the stabilization of cut and fill slopes, building ditches, installing permanent culverts and sediment traps, as well as planting vegetation. Costa Rica considers that these remediation measures suffice to render the provisional measures requested by Nicaragua superfluous.

33. During the second round of the oral proceedings, Costa Rica pointed out that the schedule publicly announced on 14 March 2013 by its Minister for Public Works and Transportation regarding the resumption of construction activities had been superseded. It explained that, under the updated version of the schedule, the resumption of construction works on the section of the road along the south bank of the San Juan River would not begin “before late 2014 or early 2015”, thereby further underscoring, in its view, the lack of any basis to Nicaragua’s arguments concerning urgency. The Court regrets that Costa Rica did not make this information available at an earlier stage.

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

35. In view of the above, the Court finds that Nicaragua has not shown that there is any real and imminent risk of irreparable prejudice to the rights it invokes.

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

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

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

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39. For these reasons,

THE COURT,

Unanimously,

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

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this thirteenth day of December, two thousand and thirteen, 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 Nicaragua and the Government of the Republic of Costa Rica, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.
