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

[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.