

## THE 2013 JUDICIAL ACTIVITY OF THE INTERNATIONAL COURT OF JUSTICE

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The year 2013 was eventful at the International Court of Justice.<sup>1</sup> The Court rendered two judgments: on April 16, 2013, a ruling on the merits in *Frontier Dispute* (Burkina Faso/Niger),

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<sup>1</sup> For a list of the judicial work products issued in 2013 (thirteen in total) by the International Court of Justice (ICJ), see ICJ, Judgments, Advisory Opinions and Orders by Chronological Order (2013), at <http://www.icj-cij.org/docket/index.php?p1=3&p2=5&p3=-1&cy=2013>. Not included in this list were the presidential urgent communication to Australia on December 20, 2013, in *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia) and the Court's denial around March 11, 2013, of a request for *proprio motu* indication of provisional measures in *Certain Activities Carried Out by Nicaragua* (Costa Rica v. Nicar.).

determining the disputed border between Burkina Faso and Niger;<sup>2</sup> and on November 11, 2013, a ruling on the merits in *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand) (Cambodia v. Thailand), interpreting the former judgment as awarding sovereignty over the Preah Vihear promontory to Cambodia.<sup>3</sup> The Court also issued four case management orders: two orders relating to the joinder of proceedings—one each in *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) (*Certain Activities*) and *Construction of a Road in Costa Rica Along the San Juan River* (Nicaragua v. Costa Rica) (*Construction of a Road*)<sup>4</sup>—and, with the agreement of the parties involved, two orders fixing time limits.<sup>5</sup> In addition, the Court issued seven incidental proceedings decisions: one order on counterclaims in *Certain Activities*; three orders and another decision (not in the form of an order) on provisional measures in *Certain Activities* and *Construction of a Road*; one order on intervention in *Whaling in the Antarctic* (Australia v. Japan); and one order on discontinuance and removal from the General List in *Aerial Herbicide Spraying* (Ecuador v. Colombia).<sup>6</sup> The Court also issued an order on the nomination of experts in *Frontier Dispute* (Burkina Faso/Niger). Furthermore, the president of the Court issued an urgent communication to Australia under Article 74, paragraph 4, of the Rules of Court in *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia).<sup>7</sup> The president also made eleven speeches to various organizations, noting his optimism for the continued success of the Court, despite concerns raised by the Colombian government, which was dissatisfied with part of an ICJ judgment in 2012 concerning a maritime delimitation with Nicaragua. The president noted, too, the Court's continuing efforts and demanding workload; four new cases were added in 2013.

No grand rule or principle was divined by the Court in 2013. Indeed, for the Court, 2013 was by and large a year of technicalities. But they were not ordinary technicalities, and the Court's decisions tend to show crystallizations and entrenchments of previous practice as well as glimpses of innovations that are destined to have important effects on the law and practice of the Court in the future. This report aims to highlight the points having potential implications beyond the particular cases involved.

*But see* text accompanying *infra* notes 98–99. For general information about the Court in 2013, see ICJ, Press Releases (2013), at <http://www.icj-cij.org/presscom/index.php?p1=6&p2=1&p3=-1&pt=&y=2013> (listing forty-three press releases in 2013). All materials of the Court cited in this report are available on its website, <http://www.icj-cij.org>.

<sup>2</sup> *Frontier Dispute* (Burkina Faso/Niger), 2013 ICJ REP. 44 (Apr. 16) [hereinafter *Frontier Dispute*].

<sup>3</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand) (Cambodia v. Thai.), 2013 ICJ REP. 281 (Nov. 11) [hereinafter *Temple of Preah Vihear* (2013)].

<sup>4</sup> *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), Joinder of Proceedings, 2013 ICJ REP. 166, para. 1 (Apr. 17) [hereinafter *Certain Activities, Joinder*]; *Construction of a Road in Costa Rica Along the San Juan River* (Nicaragua v. Costa Rica), Joinder of Proceedings, 2013 ICJ REP. 184 (Apr. 17) [hereinafter *Construction of a Road, Joinder*].

<sup>5</sup> *Obligation to Negotiate Access to the Pacific Ocean* (Bol. v. Chile), Fixing of Time Limits, 2013 ICJ REP. 223 (June 18) (time limits for filing of a memorial by Bolivia and a counter memorial by Chile); *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicar. v. Colom.), Fixing of Time Limits, 2013 ICJ REP. 395 (Dec. 9) (time limits for filing of written pleadings by Nicaragua and Colombia).

<sup>6</sup> These orders were issued during phases of the proceedings labeled as “incidental proceedings” in accordance with Articles 73–89 of the Rules of Court.

<sup>7</sup> See ICJ Press Release 2013/42, Urgent Communication to Australia from the President Under Article 74, Paragraph 4, of the Rules of Court (Dec. 20, 2013).

## I. THE COURT'S JUDICIAL ACTIVITY

*Frontier Dispute* (Burkina Faso/Niger)

This dispute resulted from the murky boundary line between Burkina Faso and Niger.<sup>8</sup> Before declaring independence in 1960, Burkina Faso—formerly known as Upper Volta—and Niger were French colonies, forming part of French West Africa. In 1926, the French president issued a decree transferring some territories from Upper Volta and the former Military Territory of Niger to the colony of Niger and provided that an *arrêté* (order) of the governor-general of French West Africa was to determine the boundary between the two colonies. In August 1927, the governor-general issued the *arrêté* intended to “[fix] the boundaries of the Colonies of Upper Volta and Niger.”<sup>9</sup> The *arrêté* was also the subject of an erratum dated October 5, 1927. The terms of the *arrêté* and the erratum were to occupy an important place in this dispute. France first dissolved Upper Volta in September 1932, with some of its territory given to Niger, but reconstituted it by decree in 1947 within its 1932 boundaries, abrogating the 1932 decision. In 1960, Upper Volta and Niger separately gained independence, and in 1984, Upper Volta took the name Burkina Faso.

After independence, the two states tried to settle their common boundary, and in 1964, they concluded a “Protocol of Agreement” concerning its delimitation. They decided to take as the basic documents for this purpose the 1927 *arrêté*, as clarified by the erratum, and the 1:200,000-scale map produced in 1960 by the French *Institut géographique national* (IGN map). The Protocol also set up a joint commission to demarcate the frontier, but the commission was unsuccessful in this endeavor. More than twenty years later, on March 28, 1987, the two states managed to conclude an agreement, supplemented by a protocol on the same date. In the words of the Court,

According to Article 1 of the 1987 Protocol of Agreement, the frontier between the two States “shall run” as described in the *Arrêté*, as clarified by the Erratum. . . . Moreover, according to Article 2, common to both the Agreement and Protocol of Agreement, that frontier “shall be demarcated” following the course described in the *Arrêté*, as clarified by the Erratum. This second provision, relating to demarcation, also added that “[s]hould the *Arrêté* and Erratum not suffice, the course shall be that shown on the [IGN map], and/or any other relevant document accepted by joint agreement of the Parties.”<sup>10</sup>

The 1987 Protocol established the Joint Technical Commission on Demarcation of the Frontier. This Commission consequently held a meeting to plot a boundary line on a map based on its work, but the parties disagreed on the result from this meeting. The joint communiqué was never submitted for ratification as required. The parties inched closer towards agreement in 2001 when the Commission concluded that two sectors of the frontier—the starting and ending sectors—were “clearly defined,”<sup>11</sup> but different interpretations with respect to the middle sector of the frontier remained. The parties decided to appoint a field survey team to locate certain relevant sites.<sup>12</sup> That decision was never implemented, and disagreement continued about the frontier’s middle sector.

<sup>8</sup> Frontier Dispute, *supra* note 2.

<sup>9</sup> *Id.*, para. 19.

<sup>10</sup> *Id.*, para. 24.

<sup>11</sup> *Id.*, para. 28.

<sup>12</sup> *Id.*, para. 29.

In February 2009, Burkina Faso and Niger signed a Special Agreement to submit the dispute to the Court, asking it to determine the course of the frontier's middle sector and to "place on record the Parties' agreement [*leur entente*]" on the results of the work of the Joint Technical Commission" on the two other sectors.<sup>13</sup> From June to October 2009, the states conducted another joint survey mission to record the markers constructed on the common frontier. Burkina Faso then proposed in a letter to Niger that the mission's reports would represent the agreement ("*entente*") within the meaning of Article 2 of the Special Agreement. Niger agreed in a letter and stated that these two letters "constitute[d] an agreement (*accord*) placing on record the agreement (*entente*) between Burkina Faso and the Republic of Niger on the delimited sectors of the frontier between the two countries."<sup>14</sup> The remaining sector was to be decided by the Court.

In the judgment, the Court first dealt with an issue of critical importance to itself as a judicial body.<sup>15</sup> As just described, the parties had already agreed before instituting proceedings that the reports of the joint survey mission appointed by the two states in 2009 constituted an agreement settling two of the three sectors of the frontier as described in Article 2 of the Special Agreement. Still, in its final submissions, Burkina Faso requested that the Court "adjudge and declare" that these two sectors of the frontier follow certain coordinates corresponding to the results recorded in the 2009 joint survey mission reports.<sup>16</sup> Even though Burkina Faso did not contend that a dispute continued on these sectors, it wanted, with the help of a judgment by the Court, to endow the coordinates with the force of *res judicata*.

Niger did not join in this request, but it did not ask the Court to reject it. In Niger's view, given the existence of an agreement on the two sectors, there was no need for the Court to address them in the operative part of its judgment. Still, Niger took the view that the Court should note the agreement in the reasoning part of its judgment.

The Court pointed out that Burkina Faso had requested that the Court "adjudge and declare" the boundary line in the two sectors, while Article 2 of the Special Agreement asked the Court to "place on record" the parties' agreement on the line.<sup>17</sup> Thus, taken literally, Burkina Faso's request went beyond the scope of Article 2, as "adjudge and declare" is obviously different from "place on record" and thus could be rejected as exceeding the Court's jurisdiction defined by that article. However, the Court can normally exercise its power to interpret a submission so as to keep it, as far as possible, within the limits of the Court's jurisdiction. In this spirit, Burkina Faso's request could be read as asking the Court to "place on record" the agreement of the parties on the two sectors, which would be within the jurisdiction conferred on the Court under the Special Agreement. Couched in such terms, Burkina Faso's request would seem to have the blessing of both parties as expressed in Article 2 of the Special Agreement. Yet the Court took the view that such remolding would not necessarily be sufficient for the Court to entertain the request. The Court observed:

A special agreement allows the parties to define freely the limits of the jurisdiction, *stricto sensu*, which they intend to confer upon the Court. It cannot allow them to alter the limits

<sup>13</sup> *Id.*, para. 38 (analyzing Article 2 of the Special Agreement).

<sup>14</sup> *Id.*, para. 32.

<sup>15</sup> *Id.*, paras. 35–39.

<sup>16</sup> *Id.*, para. 35.

<sup>17</sup> *Id.*, paras. 35, 38.

of the Court's judicial function: those limits, because they are defined by the Statute, are not at the disposal of the parties, even by agreement between them, and are mandatory for the parties just as for the Court itself.<sup>18</sup>

Under Article 38, paragraph 1, of the ICJ Statute, the function of the Court in a contentious case is to “decide in accordance with international law such disputes as are submitted to it.”<sup>19</sup> The Court held that a party's request to the Court “must not only be linked to a valid basis of jurisdiction, but must also always relate to the function of deciding disputes,”<sup>20</sup> that “the existence of a dispute is the primary condition for the Court to exercise its judicial function,”<sup>21</sup> and that “[i]t is for the Court to determine objectively whether there is a dispute, without being bound in that respect by the assertions of the parties.”<sup>22</sup>

The Court then remarked that, in the present case, “neither of the two Parties claims, or has ever claimed, that a dispute continued to exist between them concerning the delimitation of the frontier in the two sectors in question on the date when the proceedings were instituted—nor that such a dispute has subsequently arisen.”<sup>23</sup> Noting that the only difference between the parties was about the binding nature of Article 2 given Burkina Faso's incomplete ratification procedure, the Court explained that “the decisive question is whether a dispute existed between the Parties concerning the two sectors on the date when the proceedings were instituted, and the answer to that question is indisputably negative.”<sup>24</sup> It added:

It matters little, from the point of view of the judicial function of the Court, whether or not the “*entente*” reached by the Parties has already been incorporated into a legally binding instrument. If such an instrument had already entered into force between the Parties, it would not be for the Court to record that fact in the operative part of a Judgment, since such a pronouncement would lie outside its judicial function, which is to decide disputes. And if the legal instrument embodying the “*entente*” had not yet entered into force, it would not be for the Court to substitute itself for the Parties: since they both recognize that they have found some common ground, it is for them, if need be, to take any step which remains necessary for that agreement to enter into force. A judicial decision may not be requested in this way as a substitute for the completion of the treaty-making process between States. Furthermore, since there is an obligation to comply both with international agreements and with Judgments of the Court, the “force of *res judicata*” with which, according to Burkina Faso, the delimitation effected in the two sectors in question would be endowed if the Court acceded to its request would not reinforce the binding character of that delimitation.<sup>25</sup>

<sup>18</sup> *Id.*, para. 46 (citing Northern Cameroons (Cameroon v. UK), Preliminary Objections, 1963 ICJ REP. 15 (Dec. 2)).

<sup>19</sup> ICJ Statute, Art. 38(1).

<sup>20</sup> Frontier Dispute, *supra* note 2, para. 48.

<sup>21</sup> *Id.* (quoting Nuclear Tests (Austl. v. Fr.), 1974 ICJ REP. 253, para. 55 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 ICJ REP. 457, para. 58 (Dec. 20)).

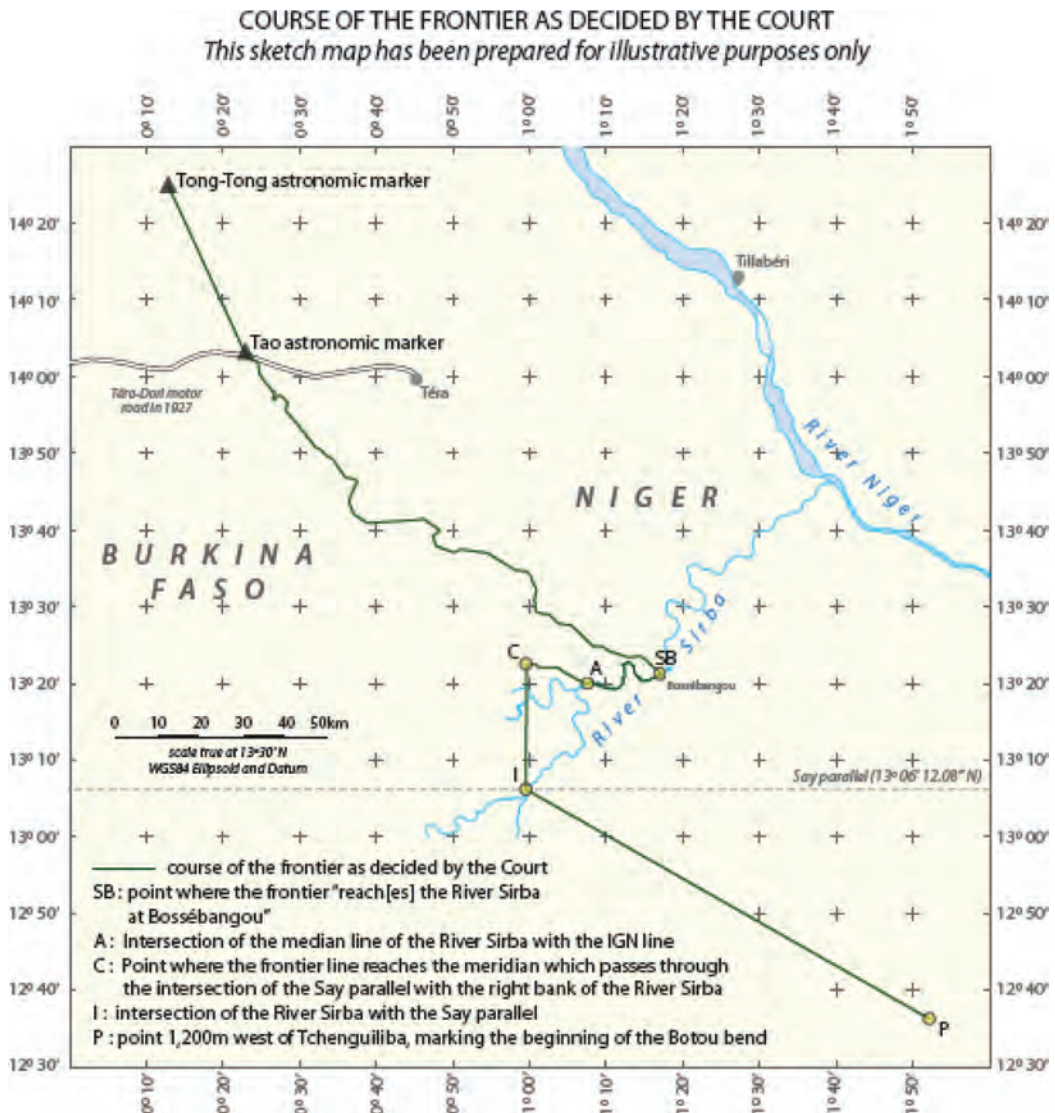
<sup>22</sup> *Id.*, para. 49 (citation omitted).

<sup>23</sup> *Id.*, para. 50. It may be of interest to note the use of the word *nor* (line 5, word 2, in the English version): the double negative might result in the opposite of what was intended.

<sup>24</sup> *Id.*, para. 52.

<sup>25</sup> *Id.*, para. 53. The Court also distinguished two cases from the Permanent Court of International Justice (PCIJ) on the ground that they implicated agreements reached by the parties during the proceedings. *Id.*, paras. 54–58 (analyzing Free Zones of Upper Savoy and the District of Gex (Fr./Switz.), 1930 PCIJ (ser. A) No. 24, at 14 (Dec. 6); Société Commerciale de Belgique (Belg. v. Greece), 1939 PCIJ (ser. A/B) No. 78, at 178 (June 15)).

FIGURE 1. BOUNDARY DISPUTE BETWEEN BURKINA FASO AND NIGER



Source: Sketch Map 4, Course of the Frontier as Decided by the Court, Frontier Dispute (Burkina Faso/Niger), 2013 ICJ REP. 44, 91 (Apr. 16).

For these reasons, the Court considered that Burkina Faso’s request to “adjudge and declare” was not compatible with the Court’s judicial function.

The Court moved on to address the only dispute remaining, the boundary line of the middle sector, from the Tong-Tong astronomical marker to the beginning of the Botou bend, as shown below in Figure 1. As far as the applicable law is concerned,<sup>26</sup> the Special Agreement integrated the rules and principles referred to in Article 38, paragraph 1, of the ICJ Statute, “including: the principle of the intangibility of boundaries inherited from colonization and the Agreement

<sup>26</sup> *Id.*, paras. 60–69.

of 28 March 1987.”<sup>27</sup> The Court commented that the Special Agreement provided “specific indications” on how to apply the principle, specifically in establishing the importance of the *arrêté*, erratum, maps, and other jointly accepted documents.<sup>28</sup> Quoting from an earlier case, the Court observed that “the *uti possidetis juris* principle requires not only that reliance be placed on existing legal titles, but also that account be taken of the manner in which those titles were interpreted and applied by the competent public authorities of the colonial Power,”<sup>29</sup> and that “[i]t follows from the 1987 Agreement that the *Arrêté* as clarified by its Erratum is the instrument to be applied for the delimitation of the boundary. It has to be interpreted in its context, taking into account the circumstances of its enactment and implementation by the colonial authorities.”<sup>30</sup>

The Court noted that, as the 1987 Protocol of Agreement made clear, the IGN map is designated for use on an alternative basis, should the *arrêté* and the erratum not suffice; that, while the IGN map was supposed to reflect the colonial *effectivités* at the critical date, under the 1987 Protocol of Agreement, the frontier line drawn on the IGN map must be referred to on a subsidiary basis, even if it does not correspond to those *effectivités*; and that, although by convention the frontier line is marked in the IGN map by discontinuous lines of crosses, there is no reason not to use straight-line segments to join these points, but “when the crosses follow a river or the ridge of a hill, the line must continue along that river or that ridge.”<sup>31</sup>

The Court proceeded to determine the still undelimited section of the boundary line, increment by increment, shown above in Figure 1. The first increment runs from the Tong-Tong astronomic marker to the Tao astronomic marker, and the parties disagreed on how to connect these two points. Burkina Faso argued for a straight line, while Niger identified a third marker between the two points and argued for two segments of straight lines connecting the two points via that marker. Although, according to the parties’ claims, the territory situated in the triangle delimited by the lines as proposed was not claimed by either Burkina Faso or Niger, the Court observed that the *non ultra petita* rule does not prevent it from attributing that territory to one of them because the Special Agreement asked the Court to fully determine the course of the frontier between the Tong-Tong marker and the beginning of the Botou bend. The Court then analyzed Niger’s argument based on the Record of Agreement of 1935 created by the relevant colonial administrators who also agreed that the Tong-Tong and Tao markers would be connected by a straight line and established a third marker on this line. But this marker was not on the straight line, even though Niger argued that the marker was a *de facto* marker of the boundary between the two colonies. The Court found that this boundary defined by the Record of Agreement of 1935, internal to one colony only because Upper Volta was dissolved, and the third marker did not assume any “intercolonial” boundary character. No evidence was produced to establish that as of the critical date of 1960 the marker was regarded in practice as marking the boundary.<sup>32</sup> More important was the fact that the establishment of the third marker was a clear topographical error because the authors of the Record of Agreement of 1935

<sup>27</sup> *Id.*, para. 61 (citing ICJ Statute, Art. 38(1)).

<sup>28</sup> *Id.*, para. 64.

<sup>29</sup> *Id.*, para. 66 (quoting *Frontier Dispute (Benin/Niger)*, 2005 ICJ REP. 90, para. 140 (July 12)).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, para. 69.

<sup>32</sup> *Id.*, para. 77.

settled on a straight line and mistakenly believed that marker was situated on that line. For the Court, “[w]hile an *effectivité* may enable an obscure or ambiguous legal title to be interpreted, it cannot contradict the applicable title.”<sup>33</sup> The Court therefore held that a straight line connecting the Tong-Tong and Tao astronomic markers, as asserted by Burkina Faso, is the boundary line.

Regarding the increment from the Tao astronomic marker to the River Sirba at Bossébangou, the *arrêté* was similarly laconic: it simply stated, without further details, that the line “turns [*s’infléchit*] towards the south-east, cutting the Téra-Dori motor road at the Tao astronomic marker . . . , and reaching the River Sirba at Bossébangou.”<sup>34</sup> Burkina Faso seized upon the lack of further detail to suggest that a straight line generally connects two points, while Niger claimed that this lack of detail proved that the 1927 *arrêté* and its erratum did not suffice, resulting in the use of the IGN map line, but with two points of deviation: the first being that the line is an adjustment to the IGN map so as to give two locations to Niger because of *effectivités*, and the second being that the line should not run to Bossébangou but to a point some thirty kilometers to the northwest of it and from there turn towards the southwest, to correct a mistake of the *arrêté* implementing the decree from 1926.

The Court first dealt with the endpoint issue. Without addressing whether, indeed, there was a mistake, the Court observed:

Whatever the merits of the above analysis, it must be observed that, on this point, what Niger is asking of the Court is not to interpret the *Arrêté* in order to apply it according to the meaning which must be attributed to it, but to disregard its clear terms on the grounds that it is vitiated by a material error, and that it is perhaps legally flawed.

As noted above . . . , the Court is obliged under the terms of the Special Agreement to apply the 1927 *Arrêté*, as amended by its Erratum, unless it is insufficient. The Court can and must interpret the *Arrêté*, in so far as it requires an interpretation, but it cannot disregard it, even on the grounds that it is allegedly contrary to the Decree which constituted the legal basis for its adoption. Consequently, the Court can only find that the *Arrêté*, both in its initial version and in that resulting from the Erratum—the latter being the only relevant one—, provides *expressis verbis* that the inter-colonial boundary continues as far as the River Sirba. If this reference had been the result of a material error, the Governor-General could have corrected the error thus made by publishing a new erratum; but the fact is that he did not do so. Whether or not the *Arrêté* contradicts the Decree because of that alleged mistake is a question which it is not for the Court to enter into, because, as noted above, it is bound by the terms of the *Arrêté* pursuant to the Special Agreement. In conclusion, the Court can only find that the frontier line necessarily reaches the River Sirba at Bossébangou. . . .<sup>35</sup>

The Court next examined how the Tao astronomic marker and the endpoint should be connected. Without ruling on Burkina Faso’s argument, the Court considered several reasons not to use a straight line in this instance. First, the Court pointed out that in two other instances the *arrêté* expressly connected the relevant points with a straight line and observed that if the use of a straight line were always true, the *arrêté* would not need to state so explicitly.<sup>36</sup> Second,

<sup>33</sup> *Id.*, para. 78.

<sup>34</sup> *Id.*, para. 80.

<sup>35</sup> *Id.*, para. 85.

<sup>36</sup> *Id.*, para. 88.



the *arrêté* had a double function: the transfer of some *cercles* and *cantons* from one colony to another, and the demarcation of the boundary by respecting the intercolonial boundary as much as possible. Finding that that “the Governor-General sought . . . to determine the intercolonial boundary by identifying those pre-existing boundaries of the *cercles* and *cantons* for which there is no indication that they followed a straight line in the sector in question,” the Court observed that, “in such a case, it would have been easy to plot this line on a map.”<sup>37</sup> Third, the practice in implementing the *arrêté* indicated that the village of Bangaré, located between the Tao astronomic marker and the River Sirba at Bossébangou, was regarded as belonging to Niger, but a straight line would give it to Burkina Faso. For these reasons, the *arrêté* and the erratum were insufficient, and the Court had to give effect to the IGN map line.<sup>38</sup>

Furthermore, the Court disagreed with Niger’s argument for adjustment of the IGN map line regarding two localities as a result of the *effectivités*. As the Court noted, “[O]nce it has been concluded that the *Arrêté* is insufficient, and in so far as it is insufficient, the *effectivités* can no longer play a role in the present case; in particular, they cannot justify a shifting of the line shown on the 1960 IGN map.”<sup>39</sup> Accordingly, the Court concluded that the frontier line from the Tao astronomic marker to the River Sirba at Bossébangou follows the line on the IGN map. In this connection, Judge *ad hoc* Yves Daudet expressed in his separate opinion some qualms about the *a contrario* reasoning in the Court’s decision. Still, he agreed with the Court on this point because, in his view, the straight line, though likely, could not be established with certainty.<sup>40</sup>

Next, the Court determined the precise endpoint of the section of the frontier line from the Tao astronomic marker when it “reaches” the River Sirba at Bossébangou, a village located a few hundred meters from the river at the right bank.<sup>41</sup> The Court observed that the description in the *arrêté* indicates that the endpoint must be on the river or on one of the banks, not the village itself. The Court further noted that no evidence was presented to show that the River Sirba in this area was attributed entirely to one of the two colonies and that “the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other.”<sup>42</sup> The Court concluded that the endpoint should be located on the median line of the river because “in a non-navigable river with the characteristics of the Sirba, that line best meets the requirements of legal security inherent in the determination of a boundary.”<sup>43</sup> The Court then proceeded to delimit the remaining course of the frontier in the Bossébangou area, and from that area to the beginning of the Botou bend.

Finally, the Court also acceded to a request stated in the Special Agreement that it should nominate three experts to assist the parties as necessary in the demarcation of their frontier in the area in dispute. The nomination of experts was subsequently implemented by an order on July 12, 2013.<sup>44</sup>

<sup>37</sup> *Id.*, para. 93.

<sup>38</sup> *Id.*, para. 96.

<sup>39</sup> *Id.*, para. 98.

<sup>40</sup> *Id.*, Sep. Op. Daudet, J. *ad hoc*, at 156.

<sup>41</sup> *Id.*, para. 100 (Judgment of the Court).

<sup>42</sup> *Id.*, para. 101.

<sup>43</sup> *Id.*

<sup>44</sup> Frontier Dispute (Burkina Faso/Niger), Nomination of Experts, 2013 ICJ REP. 226 (July 12).

Judge Antônio Augusto Cançado Trindade filed a long separate opinion stressing human factors in territorial boundary disputes. He seemed to be satisfied by the Court's decision on the endpoint in the river: "The ICJ has thus indicated . . . that the age of resolving territorial disputes in the abstract, not taking into account the needs of local populations, is fortunately over."<sup>45</sup> Regarding this part of the frontier, Judge *ad hoc* Daudet took the Court's decision as based on equity, while trying to stay within the framework of the Special Agreement. He noted that an endpoint at the right bank of the River Sirba was plausible and more consistent with the terms of the *arrêté* but stated that such a literal reading would have led to "an unduly formalistic result . . . demonstrat[ing] the limits of *uti possidetis*, the application of which is not always in keeping with present-day situations."<sup>46</sup> Judge *ad hoc* Ahmed Mahiou lamented in his separate opinion that the Court did not give sufficient weight to the *effectivités*.<sup>47</sup>

This technical judgment may have significant implications. First of all, the Court's refusal to accede to the request to give "judgment by consent"<sup>48</sup> no doubt sounds the death knell for similar requests in the future. Second, the judgment solidifies the Court's position on the *uti possidetis* principle and its relationship with the associated will of states. The question arises whether the use of *uti possidetis* is justified as a matter of customary international law or only as a result of the Special Agreement and the legal approaches explicitly justified thereby. Thus, there is merit to the concerns expressed by Judges Mohamed Bennouna<sup>49</sup> and Abdulqawi A. Yusuf<sup>50</sup> about the possible resort to colonial law and experience. The Court seems to be suggesting that, as far as the interpretation of the *arrêté* and the erratum is concerned in this particular case, what one can glean from the colonial record should be decisive.<sup>51</sup> Whether this approach received the specific blessings of the parties, or whether it simply functioned by operation of law (i.e., the *uti possidetis* principle), would seem to make all the difference in the debate. The Court's approach amounts to saying that, in circumstances similar to those in this case, when the directions of the parties or the instruments blessed by the parties are clear, the will of the parties prevails; when the instruments blessed by the parties are not clear but still sufficient, the *uti possidetis* principle supplies the general interpretive framework.

Finally, the Court's implementation of this approach was such that, in some instances, areas under the control of one party on the basis of the *effectivités* were given to the other, but, in other instances, human factors were given effect, and that the Court's choices were justified. One has a feeling that, at first sight, the aphorism of Judge Hardy Cross Dillard that "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people"<sup>52</sup>—as well as its converse—can find proof in this judgment. To the extent that the parties can be said to have themselves to credit or blame for the result, Judge Dillard would have likely been delighted by this recent judgment.

<sup>45</sup> Frontier Dispute, *supra* note 2, Sep. Op. Cançado Trindade, J., para. 101.

<sup>46</sup> *Id.*, Sep. Op. Daudet, J. *ad hoc*, at 164.

<sup>47</sup> *Id.*, Sep. Op. Mahiou, J. *ad hoc*, paras. 12–13, 16, 18–19.

<sup>48</sup> *Id.*, para. 56 (Judgment of the Court) (quoting Free Zones of Upper Savoy, *supra* note 25, at 14).

<sup>49</sup> *Id.*, Decl. Bennouna, J.

<sup>50</sup> *Id.*, Sep. Op. Yusuf, J.

<sup>51</sup> *See id.*, para. 66 (Judgment of the Court).

<sup>52</sup> Western Sahara, Advisory Opinion, 1975 ICJ REP. 12, 122 (Oct. 16) (Dillard, J., sep. op.).

*Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*

Yet another chapter in the temple saga between Cambodia and Thailand was concluded on November 11, 2013, when the Court delivered its judgment in *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*.<sup>53</sup> As this judgment was the subject of a recent, detailed case note in this *Journal*,<sup>54</sup> it is not discussed in this report.

*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*

In this set of related cases, in 2013, the parties presented many requests regarding procedural and incidental proceedings matters. These requests no doubt consumed a great deal of the Court's time and energy but also resulted in a large number of orders on joinder of proceedings, counterclaims, and provisional measures that are destined to have a significant impact on the law and procedure of the Court.

*Joinder of Proceedings.* On November 18, 2010, Costa Rica instituted proceedings against Nicaragua in *Certain Activities Carried Out by Nicaragua in the Border Area (Certain Activities)* for "the incursion into, occupation of and use by Nicaragua's army of Costa Rican territory," contending, in particular, that Nicaragua had "in two separate incidents, occupied the territory of Costa Rica in connection with the construction of a canal [*caño*]' across Costa Rican territory . . . and certain related works of dredging on the San Juan River."<sup>55</sup> On December 22, 2011, Nicaragua instituted proceedings against Costa Rica in *Construction of a Road in Costa Rica Along the San Juan River (Construction of a Road)* for "violations of Nicaraguan sovereignty and major environmental damages on its territory" in relation to Costa Rica's "construction of a road [along the San Juan River] with grave environmental consequences."<sup>56</sup> Several times, Nicaragua suggested that the proceedings in the two cases be joined, and, finally in its letter dated December 19, 2012, accompanying its memorial filed in *Construction of a Road*, it asked the Court to consider the issue.<sup>57</sup>

Having ascertained the views of the parties, the Court ordered the proceedings joined on April 17, 2013, despite Costa Rica's objections.<sup>58</sup> In the Court's view, Article 47 of the Rules of Court—which states that the Court "may at any time direct that the proceedings in two or

<sup>53</sup> Temple of Preah Vihear (2013), *supra* note 3.

<sup>54</sup> John D. Ciorciari, Case Report: Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, 108 AJIL 288 (2014). On the interpretation of judgments generally, see 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2005, at 1611 (4th ed. 2006); Andreas Zimmermann & Tobias Thienel, *Article 60*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1469 (Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm & Christian J. Tams eds., 2d ed. 2012) [hereinafter ICJ STATUTE COMMENTARY].

<sup>55</sup> *Certain Activities*, Joinder, *supra* note 4, para. 1 (quoting Application Instituting Proceedings (Costa Rica v. Nicar.), paras. 1, 4 (Int'l Ct. Justice Nov. 18, 2010)); see also *Construction of a Road*, Joinder, *supra* note 4.

<sup>56</sup> *Certain Activities*, Joinder, *supra* note 4, para. 9 (quoting Application Instituting Proceedings (Nicar. v. Costa Rica) (Int'l Ct. Justice Dec. 22, 2011)).

<sup>57</sup> *Id.*, para. 14.

<sup>58</sup> *Id.*, para. 24.

more cases be joined”—provides the Court with “a broad margin of discretion.”<sup>59</sup> The Court has joined cases “where joinder was consonant not only with the principle of the sound administration of justice but also with the need for judicial economy.”<sup>60</sup> In these two cases, the same parties were involved. Both cases related generally to the same area. Both cases addressed works being carried out in, along, or near the San Juan River, namely, the dredging of the river by Nicaragua and the construction of a road along its right bank by Costa Rica and their effects on the local environment and on the free navigation on, and access to, the San Juan River. Both parties referred to the risk of river sedimentation, the harmful effect on the fragile fluvial ecosystem, and violations of the 1858 Treaty of Limits, the Cleveland Award, the Alexander Awards, and the Ramsar Convention.<sup>61</sup> The Court explained that

[a] decision to join the proceedings will allow the Court to address simultaneously the totality of the various interrelated and contested issues raised by the Parties, including any questions of fact or law that are common to the disputes presented. In the view of the Court, hearing and deciding the two cases together will have significant advantages. The Court does not expect any undue delay in rendering its Judgment in the two cases.<sup>62</sup>

As a result, the Court concluded that, “in conformity with the principle of the sound administration of justice and with the need for judicial economy,” the proceedings should be joined.<sup>63</sup> Judge Cançado Trindade filed a separate opinion, exploring the foundations on which the order was based but that were not examined or developed.<sup>64</sup> He delved into the principles of *Kompetenz-Kompetenz/la compétence de la compétence* as an inherent judicial power, as well as issues relating to the idea of justice guiding its sound administration and the procedural equality of parties.<sup>65</sup>

Joinder of proceedings in cases does not transform the cases into one; they remain separate. However, a joinder of proceedings may entail various consequences such as the appointment of judges *ad hoc*.<sup>66</sup> Such a joinder does not, however, constitute a new situation in either case that would justify modification of a previous order on provisional measures.

Joinder of proceedings does not happen often. Shabtai Rosenne observed in 2006 that “[h]itherto joinder has only been done with the consent of the parties”<sup>67</sup> and that the Court’s practice “show[s] that in dealing with this type of problem the Court attached primary weight to the wishes of the parties rather than to its own convenience and the economy of judicial time.”<sup>68</sup> Of course, he also pointed out that “[n]o instances of multiple cases between the same parties have come before the present Court,”<sup>69</sup> although many cases have had one applicant

<sup>59</sup> *Id.*, para. 18 (citations omitted).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*, para. 23.

<sup>63</sup> *Id.*, para. 24.

<sup>64</sup> *Id.*, Sep. Op. Cançado Trindade, J.

<sup>65</sup> *Id.*, para. 2.

<sup>66</sup> For a thorough treatment of joinder of proceedings, see 3 ROSENNE, *supra* note 54, at 1209–19.

<sup>67</sup> *Id.* at 1209.

<sup>68</sup> *Id.* at 1219 (footnote omitted).

<sup>69</sup> *Id.* at 1210 & n.9. The “additional application” filed in Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Order, 1994 ICJ REP. 105, 106 (June 16), was explained as an amendment to the earlier application without objection and treated as such.

suing multiple respondents, such as the *Legality of Use of Force* cases,<sup>70</sup> where no joinder was ordered. As a result, it is not clear whether the Court's decision here in joining the proceedings in the two cases with identical parties, despite one party's objections, may reflect a new trend.

*Counterclaims.* After ordering joinder of the proceedings in *Certain Activities* and *Construction of a Road* on April 17, 2013, as discussed above, the Court ruled the very next day, on April 18, 2013, on the admissibility of the four counterclaims presented by Nicaragua in its counter-memorial in *Certain Activities*.<sup>71</sup>

Having first laid out the general framework on counterclaims, as provided for in Article 80 of the Rules of Court, the Court found that Nicaragua's claims were "counter-claims' within the meaning of Article 80 of the Rules of Court, since they are autonomous legal acts the object of which is to submit new claims to the Court which are, at the same time, linked to the principal claims, in so far as formulated as 'counter' claims that react to them."<sup>72</sup> The Court also found that the formal requirements set forth by Article 80 were met.<sup>73</sup> It then proceeded to examine whether the counterclaims met the admissibility conditions as stated in Article 80, paragraph 1, namely, that the counterclaim "comes within the jurisdiction of the Court" and that it "is directly connected with the subject-matter of the claim of the other party."<sup>74</sup>

Regarding Nicaragua's first counterclaim<sup>75</sup>—relating to Costa Rica's responsibility to Nicaragua for "the impairment and possible destruction of navigation on the San Juan River caused by the construction of a road next to its right bank"<sup>76</sup>—Costa Rica argued in *Construction of a Road* that Nicaragua had put forward principal claims, which in substance deal with the same subject matter as its first counterclaim in *Certain Activities*, and that this counterclaim violated Article IV of the Pact of Bogotá,<sup>77</sup> which states: "Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfilment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded."<sup>78</sup> As a result of the joinder of the proceedings in these two cases, the Court held:

Nicaragua's first counter-claim in the [*Certain Activities*] case is subsumed under its principal claim in the [*Construction of a Road*] case relating to Costa Rica's alleged responsibility for "the impairment and possible destruction of navigation on the San Juan River caused by the construction of a road next to its right bank." This claim is to be examined as a principal claim, within the context of the joined proceedings, thereby eliminating the need to examine it as a counter-claim. In these circumstances, the first counter-claim has become without object. . . . In view of the foregoing, the Court need not address the question

<sup>70</sup> See, e.g., *Legality of Use of Force (Serb. & Montenegro v. Belg.)*, Preliminary Objections, 2004 ICJ REP. 279 (Dec. 15); *Legality of Use of Force (Serb. & Montenegro v. Port.)*, Preliminary Objections, 2004 ICJ REP. 1160 (Dec. 15); *Legality of Use of Force (Yugo. v. U.S.)*, Provisional Measures, 1999 ICJ REP. 916 (June 2).

<sup>71</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*; *Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica)*, Counter-Claims, 2013 ICJ REP. 200, para. 9 (Apr. 18) [hereinafter *Certain Activities, Counter-Claims*].

<sup>72</sup> *Id.*, para. 19.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, para. 20.

<sup>75</sup> The order of the counterclaims followed was the order used by Costa Rica. *Id.*, paras. 16, 21.

<sup>76</sup> *Id.*, para. 22.

<sup>77</sup> *American Treaty on Pacific Settlement (Pact of Bogotá)*, Apr. 30, 1948, OASTS Nos. 17 & 61, 30 UNTS 55.

<sup>78</sup> *Certain Activities, Counter-Claims*, *supra* note 71, para. 23 (quoting *Pact of Bogotá*, *supra* note 77).

whether the consideration of the first counter-claim may be contrary to the rule stated in Article IV of the Pact of Bogotá.<sup>79</sup>

Regarding the second and third counterclaims, Nicaragua maintained that they were part of the same factual complex as Costa Rica's principal claims and had a direct legal connection with them. The Court disagreed. When assessing whether a connection exists between the principal claims and a counterclaim, the Court considers a variety of factors, such as "whether the facts relied upon by each party relate to the same geographical area or the same time period," "whether the facts relied upon by each party are of the same nature, in that they allege similar types of conduct," and "whether there is a direct connection between the counter-claim and the principal claims of the other party based on the legal principles or instruments relied upon, or where the Applicant and the Respondent were considered as pursuing the same legal aim by their respective claims."<sup>80</sup>

As to Nicaragua's second counterclaim, related to the Bay of San Juan del Norte, the Court held:

In geographical terms, Nicaragua's second counter-claim relates, in a general sense, to the same region that is the focus of Costa Rica's principal claims, an area that is near the mouth of the San Juan River. However, . . . the claim and the counter-claim do not relate to the same area. Moreover, a temporal connection is lacking. Nicaragua's counter-claim refers to physical changes to the Bay of San Juan del Norte that apparently date to the nineteenth century. By contrast, Costa Rica's claims relate to alleged Nicaraguan conduct dating to 2010. In addition, the facts underpinning Nicaragua's second counter-claim are not of the same nature as those underpinning Costa Rica's principal claims. While it may be said that both Parties invoke facts in connection with territorial sovereignty, Nicaragua's counter-claim does not relate to territorial sovereignty over Isla Portillos, nor does it relate to a question of territorial sovereignty based on the course of the river boundary as established by the 1858 Treaty of Limits, the Cleveland Award, or the subsequent Alexander Awards. In sum, the issues raised by Nicaragua with respect to the Bay of San Juan del Norte in its second counter-claim do not form part of the same factual complex from which Costa Rica's principal claims arise.<sup>81</sup>

Accordingly, the Court concluded that "Nicaragua had failed to demonstrate that its second counter-claim is directly connected, as a matter of fact, to the principal claims of Costa Rica in this case."<sup>82</sup> Furthermore, it found that "no direct legal connection exists between Costa Rica's principal claims and Nicaragua's second counter-claim."<sup>83</sup> While Costa Rica's claims relate to the application of principles of sovereignty, territorial integrity, and international environmental law to Nicaragua's activity on Isla Portillos, Nicaragua's claims relate to an evolution of the parties' legal situation as a result of physical changes to the Bay of San Juan del Norte. "Thus," concluded the Court, "the Parties do not pursue the same legal aims."<sup>84</sup>

Regarding Nicaragua's third counterclaim, which addressed the use of the Colorado River for navigation until access to the Caribbean Sea via the San Juan River could be restored, the

<sup>79</sup> *Id.*, para. 24.

<sup>80</sup> *Id.*, para. 32 (citations omitted).

<sup>81</sup> *Id.*, para. 34.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*, para. 35.

<sup>84</sup> *Id.*

Court noted that the two locations had a general geographical link and that “[a]n approximate temporal connection can also be made, in the sense that Nicaragua claims that its right to navigate the Colorado River has been revived by Costa Rica’s efforts to prevent Nicaragua from dredging the San Juan River in order to enhance its navigability.”<sup>85</sup> Still, the Court found that such a factual link was not sufficient for the purposes of admissibility under Article 80 of the Rules of Court because of the different nature of the facts underpinning the parties’ claims. Costa Rica’s facts set out to prove violations of its territorial sovereignty and its rights under international environmental law, while Nicaragua’s facts were related to damage allegedly caused by Costa Rica’s efforts to prevent Nicaragua from dredging the San Juan River. The Court further found no direct legal connection between this counterclaim and Costa Rica’s principal claims.<sup>86</sup> In light of the above, the Court concluded that no direct connection, either in fact or in law, existed between Nicaragua’s second and third counterclaims and Costa Rica’s principal claims and consequently that those counterclaims were inadmissible as such under Article 80, paragraph 1, of the Rules of Court.<sup>87</sup>

In its fourth counterclaim, Nicaragua alleged that Costa Rica did not implement provisional measures previously indicated by the Court. Recalling that where it “has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with,”<sup>88</sup> the Court consequently concluded that questions of compliance with provisional measures may be considered in the principal proceedings, “irrespective of whether or not the respondent State raised that issue by way of a counter-claim,”<sup>89</sup> and that the parties may take up this issue in the further proceedings. As a result, “there is no need to entertain Nicaragua’s fourth counter-claim, as such.”<sup>90</sup>

This order is significant for future counterclaim practice. The treatment of Nicaragua’s first and fourth counterclaims provides guidance on the types of claims that should be presented as counterclaims and may save judicial time in the future. First, the Court has clarified that the type of claims characterized by Nicaragua’s fourth counterclaim should not be presented as a counterclaim but should be presented in the principal proceedings. The special situation of joinder of proceedings in the cases causes the type of counterclaims typified by the first counterclaim to become without object and purpose, as such. But for the joinder, whether this type of counterclaim, which in substance forms the principal claims in another case between the same parties, may be presented as such is uncertain. The Court’s treatment of the second and third counterclaims seems to be no more than an application of Article 80 of the Rules of Court. Yet the Court’s assessment of the existence of direct factual or legal connections between the counterclaims and the principal claims seems to have become more rigorous, as noted by Judge *ad hoc* Gilbert Guillaume in his separate opinion,<sup>91</sup> or the Court seems to have departed somewhat from its previous less stringent practice. Though the departure did not prompt Judge *ad*

<sup>85</sup> *Id.*, para. 36.

<sup>86</sup> *Id.*, paras. 36–37.

<sup>87</sup> *Id.*, para. 38.

<sup>88</sup> *Id.*, para. 40 (quoting LaGrand (Ger. v. U.S.), 2001 ICJ REP. 466, para. 45 (June 27)).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*, Decl. Guillaume, J. *ad hoc*.

*hoc* Guillaume to “feel compelled to oppose that solution,”<sup>92</sup> a generalized factual or temporal connection may no longer suffice; the nature of the facts or specific points of reference come into play to help identify the direct connection required under Article 80. As a result, one may perhaps shorthand this exercise as a search for a concrete connection, not just general relatedness.

*Modification of Previous Order on Provisional Measures.* As noted, on November 18, 2010, Costa Rica initiated a case against Nicaragua, *Certain Activities*, briefly described above.<sup>93</sup> On the same day, Costa Rica requested provisional measures.<sup>94</sup> On March 8, 2011, the Court indicated provisional measures as follows:

- (1) Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security;
- (2) . . . Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, [under specified conditions];
- (3) 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) Each Party shall inform the Court as to its compliance with the above provisional measures.<sup>95</sup>

As noted, on December 22, 2011, Nicaragua brought a case against Costa Rica for “violations of Nicaraguan sovereignty and major environmental damages on its territory.”<sup>96</sup> Nicaragua claimed that Costa Rica’s construction of a road running parallel and in extreme proximity to the southern bank of the San Juan River for at least 120 kilometers posed an immediate threat to the river and its environment. When Nicaragua filed its memorial in *Construction of a Road*, it requested that the Court “examine *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures.”<sup>97</sup> Around March 11, 2013, the Court notified the parties of its 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*.”<sup>98</sup> No formal order was released by the Court.<sup>99</sup>

Article 75, paragraph 1, states that “[t]he Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.”<sup>100</sup> But the Court orders *proprio motu* provisional measures only in the most extreme circumstances. For example, in

<sup>92</sup> *Id.*, para. 1.

<sup>93</sup> See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Provisional Measures, 2013 ICJ REP. 230, para. 1 (July 16) [hereinafter *Certain Activities*, Provisional Measures (July 16)].

<sup>94</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Request for the Indication of Provisional Measures Submitted by the Republic of Costa Rica (Int’l Ct. Justice Nov. 18, 2010).

<sup>95</sup> *Certain Activities*, Provisional Measures (July 16), *supra* note 93, para. 3 (citations omitted).

<sup>96</sup> *Application Instituting Proceedings (Nicar. v. Costa Rica)*, para. 2 (Int’l Ct. Justice Dec. 22, 2011).

<sup>97</sup> *Certain Activities*, Provisional Measures (July 16), *supra* note 93, para. 7 (discussing Nicaragua’s filing of its memorial in *Construction of a Road*).

<sup>98</sup> *Id.*

<sup>99</sup> See list of orders in *Construction of a Road*, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=7f&case=152&code=ncr2&p3=3>.

<sup>100</sup> ICJ, Rules of Court, Art. 75(1).



*LaGrand*, Germany filed at 7.30 p.m. (The Hague time) on March 2, 1999, an application against the United States for violations of the Vienna Convention on Consular Relations of 1963 and requested provisional measures. Germany further asked that the Court indicate *proprio motu* measures calling for a stay of the execution of *LaGrand* scheduled for March 3, 1999. The Court unanimously acceded to this request, the first in its entire history.<sup>101</sup> Since a formal request had been made, whether this order should be considered “*proprio motu*” may be a matter of appreciation of the connotation of that phrase; it was no doubt an order made without an oral hearing. In an earlier instance where *proprio motu* indication of provisional measures seemed to be at issue, the Court declined to do so.<sup>102</sup>

On May 23, 2013, after proceedings were joined in the two cases, Costa Rica filed a request for the modification of the provisional measures of March 8, 2011, relying on Article 41 of the ICJ Statute and Article 76 of the Rules of Court.<sup>103</sup> Nicaragua asked the Court to reject Costa Rica’s request and to modify or adapt the order of March 8, 2011, on the basis of Article 76.<sup>104</sup> Apparently, the Court did not have the opportunity to apply this provision before it rendered this order on July 16, 2013.<sup>105</sup> Under Article 76, the Court may, before the final judgment is rendered, revoke or modify at the request of a party a decision concerning provisional measures “if, in its opinion, some change in the situation justifies such revocation or modification.”<sup>106</sup> Accordingly, modification of a provisional measures order requires “some change in the situation.”

In Costa Rica’s request for modification, it complained of the “continuous presence” in the disputed territory of organized groups of Nicaraguan nationals and essentially demanded the immediate and unconditional withdrawal of all Nicaraguan persons from the disputed area.<sup>107</sup> Nicaragua acknowledged the presence in that territory of members of the Guardabarranco Environmental Movement, which it described as a private group with mainly environmental objectives. Importantly, however, it insisted that the members were neither part of nor acting under the direction or control of the government. Nicaragua, in turn, requested the authorization of civilian persons for environmental protection from *both* parties to access the disputed area. In light of Costa Rica’s complaints and the evidence before it, the Court considered it established that, since its 2011 order, “organized groups of persons, whose presence was not contemplated when it made its decision to indicate provisional measures, are regularly staying in the disputed territory” and recognized this fact as constituting, in this case, “a change in the situation within the meaning of Article 76 of the Rules of Court” for supporting a request for modifying that order.<sup>108</sup>

<sup>101</sup> *LaGrand* (Ger. v. U.S.), Provisional Measures, 1999 ICJ REP. 9, paras. 8, 21, 24 (Mar. 3).

<sup>102</sup> *Right of Passage over Indian Territory* (Port. v. India), Preliminary Objections, 1957 ICJ REP. 125, 152 (Nov. 26) (in which the Court declined to accede to a request in the nature of a provisional measures request while disclaiming to invoke Article 41 of the ICJ Statute).

<sup>103</sup> *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), Request by Costa Rica for Modification of the Court’s Order Indicating Provisional Measures, para. 2 (Int’l Ct. Justice May 23, 2013) [hereinafter *Costa Rica Request for Modification*].

<sup>104</sup> *Certain Activities*, Provisional Measures (July 16), *supra* note 93, paras. 9–11.

<sup>105</sup> See 3 ROSENNE, *supra* note 54, at 1411–12; Karin Oellers-Frahm, *Article 41, in* ICJ STATUTE COMMENTARY, *supra* note 54, at 1060 (margin note 73).

<sup>106</sup> ICJ, Rules of Court, Art. 76.

<sup>107</sup> *Costa Rica Request for Modification*, *supra* note 103, para. 7.

<sup>108</sup> *Certain Activities*, Provisional Measures (July 16), *supra* note 93, para. 25.

Yet, for its request to succeed, beyond “some change in the situation,” the requesting party must also meet all the general conditions laid down in Article 41 of the ICJ Statute, that 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.”<sup>109</sup> In considering such a request, the Court must take account of both the circumstances as they stood when the order was issued and the changes thereto as of the time of consideration of the request for modification. This examination led the Court to the view that the facts provided by Costa Rica did not imply that “irreparable harm” would result to its territorial integrity and sovereignty or to its environmental rights.<sup>110</sup>

In any event, the Court did not see any evidence of “urgency” that justified the indication of further provisional measures. According to the Court, the evidence produced by Costa Rica related to events that took place quite some time ago, with one alleged obstruction of a visit by Costa Rica environmental personnel in 2011 and the more recent reported simple “presence” of Nicaraguan nationals. But the Court did appreciate that the presence of organized groups of Nicaraguan nationals in the disputed area posed the risk of aggravating the dispute. The Court expressed its concerns in this regard and considered it necessary to reaffirm the measures that it indicated in its 2011 order and, in particular, to require the parties to “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”<sup>111</sup>

Nicaragua’s request for modification,<sup>112</sup> however, did not meet the “change in situation” requirement. Nicaragua’s first argument was based on the construction of a road by Costa Rica, which did not have any bearing on the situation addressed in the 2011 order, and could therefore not constitute a “change.”<sup>113</sup> Nicaragua’s second argument was based on the joinder of proceedings. The Court responded that it

considers that the joinder of proceedings in the [*Certain Activities and Construction of a Road*] cases has also not brought about such a change. That joinder is a procedural step which does not have the effect of rendering applicable *ipso facto*, to the facts underlying the [*Construction of a Road*] case, the measures prescribed with respect to a specific and separate situation in the [*Certain Activities*] case.<sup>114</sup>

As a result, there was no change in the situation within the meaning of Article 76 on which Nicaragua could rely to request a modification.<sup>115</sup>

*Costa Rica’s Request for New Provisional Measures.* Claiming to rely on new facts discovered since the previous July 2013 order just described, including Nicaragua’s construction of two new artificial *caños* in the disputed area, on September 24, 2013, Costa Rica requested new provisional measures: suspension of Nicaragua’s work, immediate withdrawal of Nicaraguan personnel and equipment, remediation work by Costa Rica, and compliance

<sup>109</sup> *Id.*, para. 30 (citations omitted).

<sup>110</sup> *Id.*, para. 35.

<sup>111</sup> *Id.*, paras. 37, 38.

<sup>112</sup> *Certain Activities*, Written Observations of Nicaragua and Request by Nicaragua for the Modification of the Order in Light of the Joinder of the Proceedings in the Two Cases (Int’l Ct. Justice June 14, 2013).

<sup>113</sup> *Certain Activities*, Provisional Measures (July 16), *supra* note 93, para. 27.

<sup>114</sup> *Id.*, para. 28.

<sup>115</sup> *Id.*, para. 29.

reporting by both parties.<sup>116</sup> Costa Rica sought these measures to protect its claimed rights to sovereignty over the disputed territory, its territorial integrity, and its right to protect the environment in its territory.<sup>117</sup> The Court ultimately ruled in favor of Costa Rica on November 22, 2013.

Several features of the Court's ruling are notable. The first is the Court's reaching beyond the Pact of Bogotá and declarations made under Article 36, paragraph 2, by the parties, which were relied upon by Costa Rica to ground the Court's jurisdiction in order to support its finding that it may entertain the request and which were already found to be the basis of its March 2011 order:

The Court recalls that, in its Order of 8 March 2011, it found 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" (*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). Moreover, the Court notes that, within the time-limit set out in Article 79, paragraph 1, of the Rules of Court, Nicaragua did not raise any objection to the jurisdiction of the Court. In these circumstances, the Court considers that it may entertain the present request. . . .<sup>118</sup>

Here, the first part of the Court's analysis appears to rely on its previous decision on *prima facie* jurisdiction, while the second part suggests reliance on the implicit acceptance of jurisdiction or possibly the doctrine of *forum prorogatum*,<sup>119</sup> seemingly to sanitize any problems that might exist in the other factors considered.

The second notable feature is the Court's resort to its March 2011 order in assessing the plausibility of Costa Rica's rights:

As the Court stated in its Order of 8 March 2011, while "the provisional measures it may indicate would not prejudice any title," it appears "that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible." The Court sees no reason to depart from this conclusion in the context of Costa Rica's present request. Moreover, to the extent that Costa Rica's claimed title is plausible, the Court considers that any future environmental harm caused in the disputed territory would infringe Costa Rica's alleged territorial rights. The Court therefore finds that the rights for which Costa Rica seeks protection are plausible.<sup>120</sup>

The third notable feature is the Court's rigorous analysis of the risk of irreparable prejudice to Costa Rica's rights and urgency. The Court summarized the parties' claims, noting Costa Rica's assertion that a trench was dug out on the beach to the north of the eastern *caño*, showing Nicaragua's intent to connect the eastern *caño* to the Caribbean Sea in an attempt to create a new course for the San Juan River, and Nicaragua's recognition of the existence of the two new

<sup>116</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*; *Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica)*, *Provisional Measures*, 2013 ICJ REP. 354, para. 15 (Nov. 22) [hereinafter *Certain Activities, Provisional Measures (Nov. 22)*].

<sup>117</sup> *Id.*, para. 26.

<sup>118</sup> *Id.*, para. 23.

<sup>119</sup> On *forum prorogatum*, see SIENHO YEE, *TOWARDS AN INTERNATIONAL LAW OF CO-PROGRESSIVENESS* 85 (2004) (discussing *forum prorogatum* in ICJ jurisprudence); 2 ROSENNE, *supra* note 54, at 672.

<sup>120</sup> *Certain Activities, Provisional Measures (Nov. 22)*, *supra* note 116, para. 28 (citation omitted).

*caños* and a trench and its statement that all related work stopped following the head of state's instructions on September 21, 2013.<sup>121</sup> The Court proceeded to find both a risk of irreparable prejudice to Costa Rica's rights and urgency:

[The Court] observes that, while the two expert reports provided by Costa Rica and prepared in October 2013 concluded that the course of the San Juan River could be altered only if the digging of the trench next to the eastern *caño* were to continue, that assessment was made on the basis of information regarding the trench as shown on the satellite images taken . . . [in] September 2013. However, in view of the length, breadth and position of that trench, as visible on the satellite image of 5 October 2013, the Court considers that there is a real risk that the trench could reach the sea either as a result of natural elements or by human actions, or a combination of both. . . . Given the evidence before it, the Court is satisfied that an alteration of the course of the San Juan River could ensue, with serious consequences for the rights claimed by Costa Rica. The Court is therefore of the opinion that the situation in the disputed territory reveals the existence of a real risk of irreparable prejudice. . . .

The Court moreover considers that there is urgency. . . . First, during the rainy season, the increased flow of water in the San Juan River and consequently in the eastern *caño* could extend the trench and connect it with the sea, thereby potentially creating a new course for the San Juan River. Secondly, the trench could also easily be connected to the sea, with minimum effort and equipment, by persons accessing this area from Nicaraguan territory. Thirdly, a Nicaraguan military encampment is located only metres away from the trench, in an area that Nicaragua regards as lying outside the disputed territory. Fourthly, . . . Nicaragua . . . did not rule out the presence in the disputed territory of other equipment that could be used to extend the trench. In this regard, the Court takes note of the instructions given on 21 September 2013 by the President of Nicaragua to the Executive President of the National Port Authority to "immediately cease the cleansing works in the Delta area" and to "withdraw the personnel and machinery" in the disputed territory. The Court further takes note of the assurances of Nicaragua, as formulated by its Agent at the hearings in response to a question put by a Member of the Court, that it considers itself bound not to undertake activities likely to connect any of the two *caños* with the sea and to prevent any person or group of persons from doing so. However, the Court is not convinced that these instructions and assurances remove the imminent risk of irreparable prejudice, since, as Nicaragua recognized, persons under its jurisdiction have engaged in activities in the disputed territory, namely the construction of the two new *caños*, which are inconsistent with the Court's Order of 8 March 2011.<sup>122</sup>

In the above assessment, the Court's rigorous treatment of Costa Rica's expert evidence and its discounting of Nicaragua's presidential instructions and assurances made during the oral proceedings stand out. With new evidence in hand, the Court reached a conclusion more favorable to Costa Rica than even Costa Rica's own experts. Given that Nicaragua's conduct was inconsistent with the earlier 2011 order on provisional measures, the Court no longer seemed to trust Nicaragua's assurances.

The fourth notable feature is the Court's decision to go beyond the measures requested by Costa Rica. The Court ruled that Nicaragua "shall" not only refrain from work in the disputed

<sup>121</sup> *Id.*, paras. 36, 44.

<sup>122</sup> *Id.*, paras. 49, 50.

territory, especially that on the new *caños*, as requested by Costa Rica, but also fill the trench next to the eastern *caño* within two weeks.<sup>123</sup> In addition, while indicating that Costa Rica may take remediation measures related to the new *caños*, the Court also imposed a duty on Costa Rica to consult with the secretariat of the Ramsar Convention, relating to wetlands protection.<sup>124</sup>

Judge Cançado Trindade filed a separate opinion, stressing the importance of an autonomous legal regime of provisional measures of protection.<sup>125</sup> Judges *ad hoc* Guillaume,<sup>126</sup> who dissented from the Court's decision regarding Costa Rica's right to take remediation measures, and John Dugard<sup>127</sup> each filed a declaration, agreeing in great part with the Court but pointing out areas warranting further attention.

*Nicaragua's Request for New Provisional Measures.* On October 11, 2013, Nicaragua filed a request for the indication of provisional measures in *Construction of a Road*.<sup>128</sup> Nicaragua sought an environmental impact assessment and similar reports from Costa Rica, demanded that Costa Rica take measures to reduce the road's erosion, and requested that Costa Rica cease the road's construction while the proceedings were pending. The Court issued its ruling on this request on December 13, 2013.<sup>129</sup>

Two points in the Court's analysis are particularly notable. The first is the Court's reaching beyond the Pact of Bogotá and the declarations made under Article 36, paragraph 2, of the ICJ Statute by the parties upon which Nicaragua relied to ground the Court's jurisdiction in order to support its finding that it may entertain the request, as it did in the November 22 order just discussed:

The Court . . . 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.<sup>130</sup>

The second notable point is its assessment of the first provisional measure requested by Nicaragua, "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."<sup>131</sup> The Court observed 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

<sup>123</sup> *Id.*, para. 59.

<sup>124</sup> *Id.* (reaffirming the provisional measures of March 8, 2011); *see also id.*, paras. 51–56; *cf. id.*, para. 15. The Court cited Article 75, paragraph 2, of the Rules of Court and its case law. *Id.*, para. 52.

<sup>125</sup> *Id.*, Sep. Op. Cançado Trindade, J.

<sup>126</sup> *Id.*, Decl. Guillaume, J. *ad hoc*.

<sup>127</sup> *Id.*, Decl. Dugard, J. *ad hoc*.

<sup>128</sup> *See Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Provisional Measures, 2013 ICJ REP. 398, para. 5 (Dec. 13).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*, para. 14.

<sup>131</sup> *Id.*, para. 21.

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.<sup>132</sup>

This defect was fatal to the first provisional measure as requested. Regarding the other provisional measures, the Court found that "Nicaragua had not established that the construction [of a road] posed any real and imminent risk of irreparable prejudice to the rights it invokes."<sup>133</sup> No provisional measures were thus indicated by the Court in its order.<sup>134</sup>

Within the short span of one year, the Court issued three orders and another decision, not in the form of an order, relating to requests for provisional measures in just these two related and now joined cases. This succession may indicate the importance of the facility of requesting provisional measures as well as the possible abuse of that facility. This issue is worth flagging, although assessments based on just this one-year record alone may not be advisable.<sup>135</sup>

#### *Whaling in the Antarctic* (Australia v. Japan)

On February 6, 2013, the Court issued an order on the declaration of intervention<sup>136</sup> filed by New Zealand in *Whaling in the Antarctic* (Australia v. Japan), unanimously deciding that the declaration was admissible pursuant to Article 63 of the ICJ Statute.<sup>137</sup> In contrast to Article 62 of the ICJ Statute permitting intervention at the discretion of the Court, Article 63 allows intervention as a matter of right:

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.<sup>138</sup>

In the case at hand, Australia had already initiated proceedings against Japan, alleging violations of the International Convention for the Regulation of Whaling (ICRW)<sup>139</sup> as well as its other international obligations for the preservation of marine mammals and the marine environment by allowing a large-scale whaling program.<sup>140</sup> Seeking to intervene in the case as a nonparty on the basis of Article 63, paragraph 2, New Zealand filed a declaration of intervention after the memorials and counter-memorials were filed by the parties. It relied on its status as a party to the ICRW and contended that, as a party to the ICRW, it has

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*, para. 34.

<sup>134</sup> *Id.*, paras. 35–37.

<sup>135</sup> For further commentary, see 3 ROSENNE, *supra* note 54, at 1416–17 (§III.347A).

<sup>136</sup> For general treatment of intervention, see *id.* at 1439–505; Christine Chinkin, *Article 62, in ICJ STATUTE COMMENTARY*, *supra* note 54, at 1529; Christine Chinkin, *Article 63, in id.* at 1573.

<sup>137</sup> *Whaling in the Antarctic* (Austl. v. Japan), Declaration of Intervention of New Zealand, 2013 ICJ REP. 3 (Feb. 6).

<sup>138</sup> ICJ Statute, Art. 63.

<sup>139</sup> International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 UNTS 74.

<sup>140</sup> *Whaling in the Antarctic*, *supra* note 137, para. 10.

a direct interest in the construction that might be placed upon the Convention by the Court in its decision.<sup>141</sup>

Both Australia and Japan were given the opportunity to submit their observations on New Zealand's declaration. Australia considered the declaration admissible. Japan did not object to the admissibility but drew the Court's attention to "certain serious anomalies that would arise from the admission of New Zealand as an intervenor," emphasized "the need to ensure the equality of the Parties before the Court in light of the Joint Media Release . . . of the Foreign Ministers of Australia and New Zealand," and expressed its concern that Australia and New Zealand could

"avoid some of the safeguards of procedural equality under the Statute and Rules of the Court," including Article 31, paragraph 5, of the Statute of the Court and Article 36, paragraph 1, of the Rules of Court, which exclude the possibility of appointing a judge *ad hoc* when two or more parties are in the same interest and there is a Member of the Court of the nationality of any one of those parties.<sup>142</sup>

The Court ruled that "the concerns expressed by Japan relate to certain procedural issues regarding the equality of the Parties to the dispute, rather than to the conditions for admissibility of the Declaration of Intervention"; that "intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court"; and that "such an intervention cannot affect the equality of the Parties to the dispute."<sup>143</sup> The Court further found that New Zealand's declaration met all applicable requirements and was admissible.<sup>144</sup> The Court also made clear that "since the intervention of New Zealand does not confer upon it the status of party to the proceedings, Australia and New Zealand cannot be regarded as being 'parties in the same interest' within the meaning of Article 31, paragraph 5, of the Statute," and "consequently, the presence on the Bench of a judge of the nationality of the intervening State has no effect on the right of the judge *ad hoc* chosen by the Applicant to sit in the case pursuant to Article 31, paragraph 2, of the Statute."<sup>145</sup>

Judge Owada filed a declaration and seemed to be of the view, even with intervention as of right under Article 63 of the ICJ Statute—in contrast to intervention by discretion of the Court under Article 62—that the Court could exercise inherent power to hold the declaration inadmissible, despite its meeting all the requirements under the ICJ Statute and the Rules of Court because of certain "anomalies" pointed out by Japan and despite the fact that Japan did not raise a formal objection because of the nature of the judicial function and the need for fair administration of justice. He ultimately concurred in the order because he did not think Japan made out "its claim that the admission of New Zealand as a third-party intervenor under Article 63 could create a situation in which the principle of the fair administration of justice, including the equality of the Parties, would most likely be compromised."<sup>146</sup> Judge Giorgio Gaja also

<sup>141</sup> *Id.*, para. 14.

<sup>142</sup> *Id.*, para. 17 (quoting written observations of Japan).

<sup>143</sup> *Id.*, para. 18.

<sup>144</sup> *Id.*, para. 19.

<sup>145</sup> *Id.*, para. 21.

<sup>146</sup> *Id.*, Decl. Owada, J.

filed a declaration. He would have hoped that the Court, considering the first declaration of intervention in several decades, would clarify certain aspects of the relevant procedure. He thought that the Court should have noted that one of the conditions for such intervention is the relevance of the suggested construction of the Convention for a decision in the case on a prima facie basis at this early stage and that the term *equally binding* in Article 63, paragraph 2, of the ICJ Statute applies to the intervenor and the parties, not just the intervenor.<sup>147</sup> Judge Cañado Trindade filed a lengthy separate opinion, reviewing the case law of the Court (including the PCIJ) in a relatively detailed manner and applauding the Court on its decisions on intervention as the “gradual *resurrectio* of intervention in contemporary judicial proceedings before the World Court.”<sup>148</sup>

### *Aerial Herbicide Spraying* (Ecuador v. Colombia)

On September 12, 2013, just two weeks before oral proceedings were to start in *Aerial Herbicide Spraying* (Ecuador v. Colombia),<sup>149</sup> a case pending since March 2008, Ecuador’s agent reported that the parties had reached an agreement “that fully and finally resolves all of Ecuador’s claims against Colombia” in the case and notified the Court that his government wished to discontinue the proceedings in the case.<sup>150</sup> Colombia did not object. On September 13, 2013, the Court placed the discontinuance by Ecuador on the record and removed the case from the General List. As discussed below, this out-of-court settlement was mentioned several times in the speeches of the Court’s president and in the remarks of Colombia’s president that criticized the Court’s judgment in *Territorial and Maritime Dispute* (Nicaragua v. Colombia).<sup>151</sup>

### *Presidential Urgent Communication in Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia)

On December 17, 2013, Timor-Leste filed an application instituting proceedings against Australia in *Questions Relating to the Seizure and Detention of Certain Documents and Data* and a request for the indication of provisional measures.<sup>152</sup> Under Article 74 of the Rules of Court, such a request shall be treated as a matter of urgency, but a hearing on such a request shall be scheduled in such a way to “afford the parties an opportunity of being represented at it.”<sup>153</sup> As to the resulting time gap between the filing of the request and the hearing, the question arises as to what action the Court may take during this interim period. Article 74, paragraph 4, of the Rules of Court provides: “Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for

<sup>147</sup> *Id.*, Decl. Gaja, J.

<sup>148</sup> *Id.*, Sep. Op. Cañado Trindade, J., para. 76.

<sup>149</sup> Report of the International Court of Justice Aug. 1, 2012–July 31, 2013, UN GAOR, 68th Sess., Supp. No. 4, para. 149, UN Doc. A/68/4 (2013) [hereinafter ICJ Report].

<sup>150</sup> *Aerial Herbicide Spraying* (Ecuador v. Colom.), Removal from List, 2013 ICJ REP. 278, 279 (Sept. 13) (quoting letter from agent of Ecuador filed in the case).

<sup>151</sup> *Territorial and Maritime Dispute* (Nicar. v. Colom.), 2012 ICJ REP. 624 (Nov. 19).

<sup>152</sup> Application Instituting Proceedings (Timor-Leste v. Austl.) (Int’l Ct. Justice Dec. 17, 2013).

<sup>153</sup> ICJ, Rules of Court, Art. 74(3).



provisional measures to have its appropriate effects.”<sup>154</sup> In this instance, the president scheduled the oral hearings for late January 2014 and on December 20, 2013, issued a statement entitled “Urgent communication to Australia”:

As President of the International Court of Justice, acting in conformity with Article 74, paragraph 4, of the Rules of Court, I hereby draw the attention of Your Government to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects, in particular to refrain from any act which might cause prejudice to the rights claimed by the Democratic Republic of Timor-Leste in the present proceedings.<sup>155</sup>

While such a communication on its face may only attract the attention of a government or in some cases is a direct appeal to the parties to take a certain course of action, its issuance is an exercise of a special presidential power, reflecting the unique and important position and prestige of the presidency. According to Rosenne, the rich practice in issuing as well as refusing to issue such communications illustrates “the delicate nature of this power given to the President.”<sup>156</sup>

## II. PROCEDURAL AND ADMINISTRATIVE MATTERS

In 2013, the Court made no changes to the Rules of Court. However, the Court amended the Practice Directions on March 21, 2013, adopting Practice Direction IX<sup>quater</sup>, which stipulates in part that

any party wishing to present audio-visual or photographic material at the hearings which was not previously included in the case file of the written proceedings shall submit a request to that effect sufficiently in advance of the date on which that party wishes to present that material to permit the Court to take its decision after having obtained the views of the other party.<sup>157</sup>

## III. RELATIONS WITH OTHER UN ORGANS AND THE WORLD AT LARGE

The year 2013 saw Judge Peter Tomka, the president of the Court, making eleven speeches (including one via video link) to the meetings of other United Nations organs, including the General Assembly, and other gatherings.<sup>158</sup> In these speeches, President Tomka discussed various aspects of the work of the Court, the system of its jurisdiction and the efforts and need to enhance this system, and the role of the Court in the international community.

In his speech to the General Assembly, President Tomka provided a general overview of the Court’s work. He also noted that “the recent contributions of the Court are not to be measured

<sup>154</sup> *Id.*, Art. 74(4).

<sup>155</sup> ICJ Press Release 2013/42, *supra* note 7.

<sup>156</sup> 3 ROSENNE, *supra* note 54, at 1392.

<sup>157</sup> See ICJ Practice Directions, *as amended* Mar. 21, 2013; ICJ Press Release 2013/6, The Court Adopts Practice Direction IX<sup>quater</sup> for Use by States (Apr. 11, 2013).

<sup>158</sup> ICJ, Statements by the President (2013).

in terms of its financial resources, but against the great progress made by it in the advancement of international justice and the peaceful settlement of disputes between States.”<sup>159</sup>

In his speech to the Sixth Committee, President Tomka discussed the jurisdiction of the Court and the efforts to enhance its compulsory jurisdiction.<sup>160</sup> He observed that “it is high time to issue a call for greater recognition of the Court’s jurisdiction so as to further strengthen its role in vindicating the ideals enshrined in the UN Charter, which echoes the UN Secretary-General’s own invitation to States to do so.”<sup>161</sup> Commenting on the important role of the Court in the international community, President Tomka observed with some satisfaction that the delimitation methodology consolidated in *Maritime Delimitation in the Black Sea* (Romania v. Ukraine),<sup>162</sup> which he described as “the only judgment in the Court’s history to have been adopted without any individual opinions or declarations by specific judges being appended to the decision,” was subsequently followed by the International Tribunal for the Law of the Sea.<sup>163</sup>

At the meeting of the Asian-African Legal Consultative Organization (AALCO), President Tomka reviewed the general record of the Court, cases from the two regions represented by AALCO, and their judges. He observed that the Court’s

vast and diverse membership since its inception in 1946—to which Asian-Pacific and African States have contributed greatly—has not only served to enrich the Court’s jurisprudence with a plurality of worldviews, but it has also consecrated the Court as an inclusive, multicultural and representative permanent standing international court for States. A true World Court.<sup>164</sup>

He concluded his remarks with a plea: “It is to be hoped that more States from the two regional groups represented in your distinguished Organization will consider recognizing the jurisdiction of the Court in the future, be it through compromissory clauses, case-specific special agreements, or via the more general formulation of an Article 36(2) declaration.”<sup>165</sup>

President Tomka highlighted the *Aerial Herbicide Spraying* case in his speeches. He mentioned in his speech to the General Assembly that Ecuador and Colombia had settled this case, which, as noted, had been pending before the Court since 2008, and he reported that “both Parties expressed their gratitude to the Court for its efforts and praised the role it had played in enabling them to achieve a settlement.”<sup>166</sup> He returned to this theme in further detail in his speeches to the Sixth Committee and to AALCO. In his speech to the Sixth Committee, he observed that “the prospect of the Court adjudicating the case may

<sup>159</sup> Peter Tomka, President of the International Court of Justice, Address to the Sixty-Eighth Session of the General Assembly of the United Nations 8 (Oct. 31, 2013), available at <http://www.icj-cij.org/presscom/files/2/17672.pdf> [hereinafter Tomka, General Assembly Address].

<sup>160</sup> Peter Tomka, President of the International Court of Justice, Address to the Sixth Committee of the General Assembly (Nov. 1, 2013), available at <http://www.icj-cij.org/presscom/files/4/17684.pdf> [hereinafter Tomka, Sixth Committee Address].

<sup>161</sup> *Id.* at 6.

<sup>162</sup> *Maritime Delimitation in the Black Sea* (Rom. v. Ukr.), 2009 ICJ REP. 61 (Feb. 3).

<sup>163</sup> Tomka, Sixth Committee Address, *supra* note 160, at 5.

<sup>164</sup> Peter Tomka, President of the International Court of Justice, Address to the Asian-African Legal Consultative Organization 6 (Oct. 30, 2013), available at <http://www.icj-cij.org/presscom/files/8/17718.pdf> [hereinafter Tomka, AALCO Address].

<sup>165</sup> *Id.*

<sup>166</sup> Tomka, General Assembly Address, *supra* note 159, at 7.

positively encourage the disputing States to come to a friendly settlement, as demonstrated most recently by Ecuador and Colombia in the [*Aerial Herbicide Spraying*] case,<sup>167</sup> and that the parties “both praised the Court for the time, resources and energy it devoted to the case, and acknowledged that reaching a settlement would have been difficult, if not impossible, but for the involvement of the Court.”<sup>168</sup> In the speech to AALCO, he commented that “there is no question that negotiation between disputing States remains the most effective and direct means to resolve international disagreements, provided that such an avenue ultimately leads to an agreement between the parties.”<sup>169</sup> These observations are worthy of careful consideration, together with the possibility that the “prospect of the Court adjudicating [a] case,” which may cut both ways, can refocus the parties’ minds and affect the calculus of national interests.

Also notable is Colombia’s continuing anger following the Court’s 2012 judgment in *Territorial and Maritime Dispute* (Nicaragua v. Colombia).<sup>170</sup> That judgment awarded sovereignty to Colombia over the islands in dispute, which form part of the San Andrés Archipelago, but then proceeded to give, in the delimitation of the maritime boundaries, the archipelago and related features an effect that Colombia claimed to be surprising and inequitable.<sup>171</sup> Immediately upon the announcement of the judgment, the Colombian president publicly rejected the maritime delimitation:

Inexplicablemente—después de reconocer la soberanía de Colombia sobre todo el Archipiélago y de sostener que éste, como una unidad, generaba derechos de plataforma continental y zona económica exclusiva—la Corte ajustó la línea de delimitación, dejando los cayos de Serrana, Serranilla, Quitasueño y Bajo Nuevo separados del resto del archipiélago.

Esto es inconsistente con lo que la propia Corte había reconocido y no es compatible con la concepción geográfica de lo que es un archipiélago.

Todo esto realmente son omisiones, errores, excesos, inconsistencias, que no podemos aceptar.<sup>172</sup>

He further argued that his country’s acceptance of the Pact of Bogotá, which grants the Court jurisdiction over this case and others—as far as boundaries are concerned—was

<sup>167</sup> Tomka, Sixth Committee Address, *supra* note 160, at 6.

<sup>168</sup> *Id.* at 1.

<sup>169</sup> Tomka, AALCO Address, *supra* note 164, at 4.

<sup>170</sup> *Territorial and Maritime Dispute*, *supra* note 151.

<sup>171</sup> According to one account, the Court “granted Nicaragua a maritime economic exclusion zone extending 200 nautical miles (370 km) from its Caribbean coast, with the exception of the waters immediately surrounding the [disputed] islands,” which “constituted a transfer of about 30,000 square miles (75,000 square km) of sea previously controlled by Colombia.” *Colombia and Nicaragua: Hot Waters*, *ECONOMIST*, Nov. 29, 2012, at <http://www.economist.com/blogs/americasview/2012/11/colombia-and-nicaragua>.

<sup>172</sup> Press Release, Gobierno de Colombia Ministerio de Relaciones Exteriores [Government of Colombia Ministry of Foreign Affairs], *Alocución del Presidente Juan Manuel Santos sobre el fallo de la Corte Internacional de Justicia* [Address by President Juan Manuel Santos on the ruling of the International Court of Justice] (Nov. 19, 2012), at <http://www.cancilleria.gov.co/newsroom/news/2012-11-19/4661> (“Inexplicably, after recognizing the sovereignty of Colombia over all the archipelago and after affirming that this, as a unit, generates rights to the continental shelf and to the exclusive economic zone, the Court adjusted the delimitation line, leaving the keys of Serrana, Serranilla, Quitasueno and Bajo Nuevo separate from the rest of the archipelago. This is inconsistent with what the Court itself had recognized and is not compatible with the geographic conception of what an archipelago is. All of these are in reality omissions, errors, excesses, inconsistencies, that we cannot accept” (translation by José E. Alvarez)).

void: it violated the Constitution of Colombia, which provides that any change in boundaries can only be effected by a treaty properly ratified, not by a decision of an international court or tribunal such as the Court.<sup>173</sup> As a result, the Constitution of Colombia did not permit the applicability of the Court's decision to Colombia.<sup>174</sup> Then, in late November 2012, Colombia withdrew from the Pact of Bogotá.<sup>175</sup> The media reported that Nicaragua soon sent ships, while Colombia ordered its navy to remain in the disputed area.<sup>176</sup> In 2013, Colombia continued its protestations and solicited the support of Costa Rica, Jamaica, and Panama.<sup>177</sup> The Colombian government also instituted proceedings at its Constitutional Court for a decision on the nonapplicability of the ICJ judgment to Colombia,<sup>178</sup> and subsequently that court agreed.<sup>179</sup> It is rare that a maritime delimitation decision from any court or tribunal, which has a duty to reach an equitable result, evokes such a dramatic reaction from a party to a case.<sup>180</sup>

How this saga has unfolded—and continues to unfold—may be of great interest to the international community and may provide cause for reflection on the ascertainment of the applicable law as well as the delimitation, including why an archipelago should be dismantled in

<sup>173</sup> *Id.*

<sup>174</sup> Santiago Wills, *Colombia Will Challenge Maritime Border with Nicaragua*, ABC NEWS (Sept. 10, 2013), at [http://abcnews.go.com/ABC\\_Univision/colombia-challenge-maritime-border-nicaragua/story?id=20217370](http://abcnews.go.com/ABC_Univision/colombia-challenge-maritime-border-nicaragua/story?id=20217370) (“At no time are we disregarding the jurisdiction of the court at The Hague,” Foreign Minister María Ángela Holguín told Caracol Radio on Tuesday. “We’re not disregarding the ruling either. We’re saying that our constitution does not permit its applicability.”).

<sup>175</sup> Press Release, Gobierno de Colombia Ministerio de Relaciones Exteriores, Declaración de la Canciller Holguín frente al fallo proferido por la Corte Internacional de Justicia [Foreign Minister Holguín statement against the ruling handed down by the International Court of Justice] (Nov. 28, 2012), at <http://www.cancilleria.gov.co/newsroom/news/2012-11-28/4641>.

<sup>176</sup> *Colombia Rejects Court of Justice Ruling on Caribbean Islands Disputed with Nicaragua*, MERCOPRESS, Nov. 21, 2012, at <http://en.mercopress.com/2012/11/21/colombia-rejects-court-of-justice-ruling-on-caribbean-islands-disputed-with-nicaragua>; *Colombia Withdraws from UN Justice Court Angry at Latest Ruling on Caribbean Islands*, MERCOPRESS, Nov. 28, 2012, at <http://en.mercopress.com/2012/11/28/colombia-withdraws-from-un-justice-court-angry-at-latest-ruling-on-caribbean-islands>.

<sup>177</sup> Press Release, Gobierno de Colombia Ministerio de Relaciones Exteriores, Colombia manifestó ante el Secretario General de la ONU su preocupación por las pretensiones expansionistas de Nicaragua en el Caribe [Colombia expressed to the UN Secretary General concern about the expansionist ambitions of Nicaragua in the Caribbean] (Sept. 23, 2013), at <http://www.cancilleria.gov.co/newsroom/news/2013-09-23/7299>.

<sup>178</sup> Press Release, Gobierno de Colombia Ministerio de Relaciones Exteriores, En compañía de la Canciller Holguín, Presidente Santos firmó la demanda de inconstitucionalidad del Pacto de Bogotá y confirmó que Ecuador desistió de demanda contra Colombia [Accompanied by Foreign Minister Holguín, President Santos signed the unconstitutionality claim regarding the Bogotá Pact and confirmed that Ecuador withdrew suit against Colombia] (Sept. 12, 2013), at <http://www.cancilleria.gov.co/newsroom/news/2013-09-12/7221> [hereinafter September 12 Press Release].

<sup>179</sup> See Colombia Constitutional Court, Expediente D-9852 AC, Sentencia C-269/14 (May 2, 2014), available at <http://www.corteconstitucional.gov.co/comunicados/No.%2015%20comunicado%2002%20de%20mayo%20de%202014.pdf>; *Colombia Court Backs Santos in Sea Boundary Dispute with Nicaragua*, REUTERS, May 3, 2014, at <http://www.reuters.com/article/2014/05/03/colombia-nicaragua-dispute-idUSL2N0NP03L20140503>.

<sup>180</sup> The arbitral award in *Beagle Channel* (Arg./Chile), 52 ILR 93 (1979), comes to mind, but the territorial (land) component of that award appeared to have played a greater role in that controversy. See Julio Barboza, *The Beagle Channel Dispute: Reflections of the Agent of Argentina*, 13 CHINESE J. INT'L L. 147, 147 (2014) (“The crisis after the award brought the States to the brink of war.”). Usually the reception of judicial or arbitral decisions is calmer, despite misgivings. For example, in the maritime boundary dispute between Peru and Chile, although Chile appeared to have lost the case not insignificantly, both parties expressly stated that they would implement the judgment. See María Teresa Infante Caffi, Peru v. Chile: *The International Court of Justice Decides on the Status of the Maritime Boundary*, 13 CHINESE J. INT'L L. 741, 761 (2014).

delimitation (or, to use the words of the Colombian president, “ajustó la línea de delimitación, dejando los cayos de Serrana, Serranilla, Quitasueño y Bajo Nuevo separados del resto del archipiélago”<sup>181</sup>), and how to choose a certain effect for the base points, which can have some structural implications on the whole process but which does not appear to have been adequately explained in the judgment.<sup>182</sup> In addition to Colombia’s withdrawal from the Pact of Bogotá, the pendency of the *Aerial Herbicide Spraying* case, discussed above, seems to have already fallen victim to this saga: the out-of-court settlement appears to be more of a function of Colombia’s angry reaction to the Court’s judgment in *Territorial and Maritime Dispute* because, when announcing the settlement in *Aerial Herbicide Spraying*, the Colombian president seemed eager not to have any further connection to the Court. The news release said: “Creo que con el acto de hoy no tenemos ningún pleito ante la Corte y esperamos no tener más pleitos ante la Corte Internacional de Justicia en el futuro,” puntualizó el mandatario.<sup>183</sup> On display before us is thus some kind of dynamic interplay between the Court and an affected state, a situation deserving further attention,<sup>184</sup> as it may well have ramifications beyond that particular case and that particular region.<sup>185</sup>

#### IV. THE COURT’S DOCKET AND FUTURE WORK

In its annual report on Judicial Year 2012–13, the Court noted with satisfaction the “[c]ontinuation of the sustained level of activity.”<sup>186</sup> As the Court itself has observed, this achievement was possible because of the significant steps that it had previously taken to increase efficiency and because

the Court sets itself a particularly demanding schedule of hearings and deliberations, in order that it may consider several cases at the same time and deal as promptly as possible with incidental proceedings, which are tending to grow in number (requests for the indication of provisional measures, preliminary measures, counterclaims, applications for permission to intervene and declarations of intervention).<sup>187</sup>

<sup>181</sup> See *supra* text accompanying note 172.

<sup>182</sup> See *Territorial and Maritime Dispute*, *supra* note 151, para. 234 (applying a 3:1 ratio between Nicaraguan and Colombian base points).

<sup>183</sup> September 12 Press Release, *supra* note 178 (“I believe that with today’s act, we have no complaint before the Court and expect not to have any such complaints before the International Court of Justice in the future,” the head of state emphasized” (translation by José E. Alvarez).).

<sup>184</sup> For an analysis of the “interplay” effect triggered by *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 ICJ REP. 14 (June 27), see 1 ROSENNE, *supra* note 54, at 22–23. The Court’s interpretation of Security Council resolutions in the *Kosovo* advisory opinion may also trigger a similar kind of interplay, but with wider implications. See Sienho Yee, *The Dynamic Interplay Between the Interpreters of Security Council Resolutions*, 11 CHINESE J. INT’L L. 613 (2012).

<sup>185</sup> For example, the recent judgment of the Court in *Territorial and Maritime Dispute* was criticized by the Chinese government. Ministry of Foreign Affairs of the People’s Republic of China, Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, para. 25 (Dec. 7, 2014), available at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml) (English), [http://www.fmprc.gov.cn/mfa\\_chn/zyxw\\_602251/t1217143.shtml](http://www.fmprc.gov.cn/mfa_chn/zyxw_602251/t1217143.shtml) (Chinese); Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, 13 CHINESE J. INT’L L. 663 (2014).

<sup>186</sup> ICJ Report, *supra* note 149, at 3.

<sup>187</sup> *Id.*; see also ICJ Press Release 2013/6, *supra* note 157.

Four cases were initiated during 2013, bringing the number of pending cases to eleven at the end of the year. The new cases entered on the General List are *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia), *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua v. Colombia), and *Obligation to Negotiate Access to the Pacific Ocean* (Bolivia v. Chile). Because of the high importance of the matters that states bring to the Court, this record reflects the confidence that the Court continues to command from states and bodes well for the future of the Court.