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Nicaragua v. United States: The Power of the International Court of Justice to Indicate Interim Measures in Political Disputes

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I. Background

In 1979 the revolutionary Government of National Reconstruction overthrew the freely elected administration of President General Anastasio Somoza Debayle to assume power as the new government of the Republic of Nicaragua. The "Sandinistas," as the new regime is known,[1] represent a coalition of the National Liberation Front and other leftist guerilla groups which together were responsible for ousting the former Somoza regime. This change in the control of the Nicaraguan government has caused tremendous concern among United States foreign policy makers.[2] The suspicion of strong Soviet involvement in the new Sandinista government is perceived as a threat to the close diplomatic and economic ties the United States has traditionally had with Central American countries.[3]

To counter this perceived Soviet influence, the United States, under the Carter Administration, tendered economic assistance to Nicaragua in the hope that American aid could help transform the Nicaraguan revolution into a free democratic society and thereby prevent the country from adopting a Communist system.[4] Despite the efforts made during the Carter Administration, relations between the United States and Nicaragua have become increasingly antagonistic during the Presidency of Ronald Reagan. Possessing inculpa-

1. The Sandinistas, originally a leftist guerilla organization dedicated to the overthrow of the feudalistic Somoza dynasty, takes its name from popular hero Augusto César Sandino, a guerilla leader assassinated on the order of Anastasio Somoza Garcia in 1934. Somoza Garcia was the predecessor and father of Anastasio Somoza Debayle, the U.S. supported dictator who resigned his presidency in July 1979 after weeks of attempting to repel Sandinista armed attacks.

2. A detailed discussion of these facts can be found in *U.S. Policy Toward Nicaragua*, CONG. DIG., Nov. 1984, at 259 [hereinafter cited as *U.S. Policy Toward Nicaragua*].

3. See generally L.P. LANGLEY, CENTRAL AMERICA: THE REAL STAKES 3-16 (1985); TROUBLE IN OUR BACKYARD (M. Diskin ed. 1983); D.G. MUNRO, THE FIVE REPUBLICS OF CENTRAL AMERICA: THEIR POLITICAL AND ECONOMIC DEVELOPMENT AND THEIR RELATIONS WITH THE UNITED STATES (1918) for detailed information concerning United States presence and interest in Central America.

4. During the years 1976-80, the Carter Administration adopted a policy of "friendly cooperation" toward Nicaragua which included the "provision of effective and timely assistance." *U.S. Policy Toward Nicaragua*, *supra* note 2, at 261.

tory evidence of Nicaraguan aid to leftist guerillas in El Salvador, President Reagan has insisted that the government of Nicaragua discontinue the stream of arms to Salvadoran resistance fighters.[5] In addition, the United States has provided covert assistance to anti-Sandinista guerillas since 1981.

Despite these facts, the Reagan Administration has publicly announced support[6] for the Contadora regional negotiation efforts.[7] In 1984 Secretary of State George Schultz announced United States interest in reaching an agreement with Nicaragua to reduce Nicaraguan military forces, end Nicaraguan support for Salvadoran guerillas, remove Cuban and Soviet military advisors and reaffirm the Nicaraguan government's commitment to human rights.[8]

In juxtaposition with these moves toward a negotiated settlement between the differing United States and Nicaraguan ideologies, national press releases in early 1984 indicated that the United States had been involved in the mining of Nicaraguan harbors.[9] Several ships were hit in February and March and although anti-Sandinista Nicaraguan guerillas had carried out the actual maneuvers, they reportedly were supervised by Central Intelligence agency (CIA) personnel.[10] It was these mining activities that were the primary focus of several charges alleged against the United States in Nicaragua's recent lawsuit before the United nations International Court of Justice, *Nicaragua v. United States*.[11]

On May 10, 1984 the International Court of Justice[12] (ICJ), in response to these charges, granted the request of the Republic of Nicaragua that the Court indicate interim measures of protection

5. *Id. See also End of a "Secret War"?*, U.S. NEWS & WORLD REP., Apr. 23, 1984, at 22.

6. *The Diplomatic Alternative*, TIME, May 28, 1984, at 61. *See also generally U.S. Effort to Achieve Peace in Central America*, DEP'T ST. BULL., June 1984, at 67 [hereinafter cited as *U.S. Effort*].

7. At a conference in October 1982 in San Jose, Costa Rica, a final act was adopted that formulated proposals for dealing on a comprehensive basis with the problems of instability in the Central American region. In January 1983, representatives of Mexico, Panama, Colombia and Venezuela met on the island of Contadora in Panama. In May 1983 these states, known as the "Contadora Group," succeeded in bringing together for negotiation five troubled Central American States including Nicaragua. *See generally* 23 INT'L LEGAL MAT. 836-63 (1984). *See also infra* text accompanying note 47; *U.S. Effort*, *supra* note 6, at 68-70.

8. *U.S. Effort*, *supra* note 6, at 68, 71.

9. *See, e.g.*, N.Y. Times, Apr. 18, 1984, at A1, col. 3; Wall St. J., Apr. 18, 1984, at 1, col. 3.

10. N.Y. Times, Apr. 13, 1984, at 1, col. 5.

11. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (Interim Protection Order of May 10), *reprinted in* 23 INT'L LEGAL MAT. 468 (1984) [hereinafter cited as Nicaragua v. United States].

12. The International Court of Justice (ICJ) is the principle judicial organ of the United Nations. It succeeded the League of Nation's Permanent Court of International Justice in 1945, and, like the earlier court, is often referred to as the World Court. (For purposes of this comment, the term "World Court" is used to refer to that body of jurisprudence which is shared by both courts.) The U.N. Charter deals with the ICJ in Article 7, paragraph 1; Article 36, paragraph 3 and Articles 92-96.

enjoining the United States from continuing military and paramilitary activities in the Central American region.[13] The Court's indication of provisional measures in the *Nicaragua v. United States* case[14] raises several controversial issues including: 1) the extent of the Court's power to grant a party's request for indication when substantive jurisdiction[15] is questioned or contested, and 2) whether the Court can or should[16] take cognizance of disputes that are essentially political in character.

This comment will examine international case history on the question of the Court's power to indicate interim measures of protection when substantive jurisdiction is contested by a party to the proceedings. The discussion will also address what role, if any, the political realities of international legal disputes should play in the Court's decision to adjudicate matters brought before it.

II. International Law and the Indication of Interim Measures of Protection

A. Introduction

The institution of interim measures of protection is much like the common law technique of preliminary injunctive relief. It is a judicial device utilized by the International Court of Justice to enjoin an "interested" party from engaging in certain types of behavior.[17] "Interested" parties include all who have a stake in the outcome of the proceedings before the Court.[18] Because hostile parties may be considered "interested," a controversy will naturally arise when interim measures of protection are imposed against parties that have been haled into Court under protest.

When the Court indicates provisional measures, its goal is to

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13. "Interim measures of protection" and "provisional measures" are usually used interchangeably and refer to suggestions made by the International Court of Justice for the purpose of preserving the rights of a party pending the outcome of legal proceedings. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 41 (*published in I.C.J. Acts and Documents No. 4* at 60-89) [hereinafter cited as STATUTE OF THE COURT].

The exact meaning of the term "to indicate" has been a source of some controversy but it is usually regarded as being synonymous with "to suggest" rather than "to order" or "to prescribe." *See* Crockett, *The Effects of Interim Measures of Protection in the International Court of Justice*, 7 CAL. U. INT'L L.J. 348, at 353 (1977) [hereinafter cited as Crockett].

14. Nicaragua v. United States, *supra* note 11.

15. Substantive jurisdiction denotes jurisdiction over the merits of a case. For a discussion on how this differs from the Court's jurisdiction to indicate provisional measures, see *infra* note 24.

16. A court *can* take cognizance of a dispute if it has the jurisdiction to do so. However, a court *should* take cognizance of a dispute only when the issues involved are justiciable. For a discussion on how United States federal courts have dealt with this issue in the context of political questions and American foreign affairs see H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 132-40 (2d ed. 1976).

17. STATUTE OF THE COURT, *supra* note 13, at art. 41, para. 1.

18. A state that has an interest of a legal nature which may be affected by the decision in the case may be allowed to intervene. *See id.* at art. 62, para. 1.

preserve the respective rights of either party pending outcome of the proceedings.[19] The Court's power to indicate interim measures emanates from Article 41 of the Statute of the International Court of Justice,[20] which states:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
>
> 2. Pending the final decision, notice of the measure suggested shall forthwith be given to the parties and to the Security Council.[21]

According to the Rules of the International Court of Justice,[22] a party may request at anytime during the proceedings that the Court indicate provisional measures.[23]

If the request for interim measures follows a determination by the court that it has jurisdiction over the substantive issues of the case, the dilemma of incidental jurisdiction[24] will not arise. The controversies stemming from questionable jurisdiction only present themselves when an applicant's request for interim measures is made prior to the Court's ruling on its own jurisdiction over the merits.[25] If the Court delays the indication of provisional measures and later rules that it has substantive jurisdiction, the applicant's rights may be irreparably harmed in the interim. On the other hand, if the Court exercises its authority to indicate provisional measures, only to subsequently rule that it is without substantive jurisdiction, irrepara-

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19. *See, e.g.*, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 16-17 (Interim Protection Order of Dec. 15) (United States requested, among other things, that the Court indicate to Iran that it release all American hostages, return the Embassy, Chancery and Consulate to United States control, and refrain from instituting any proceeding against an American citizen in its own courts) [hereinafter cited as U.S. v. Iran (Interim Protection)].

20. STATUTE OF THE COURT, *supra* note 13. *See also id.* at art. 30; U.N. CHARTER at Chapter XIV.

21. *Id.* at art. 41.

22. RULES OF THE INTERNATIONAL COURT OF JUSTICE [hereinafter cited as RULES OF COURT]. The Rules are based on the latest text of the Rules of the Permanent Court of International Justice (that of March 11, 1936) and are published in *I.C.J. Acts and Documents No. 4* at 92-161. *See also* STATUTE OF THE COURT, *supra* note 13, at art. 30; 1977-1978 I.C.J.Y.B. 111-19 (1978).

23. Rule 66(1) of the Rules of Court states: "A request for the indication of interim measures may be filed at anytime during the proceedings in the case in connection with which it is made." *Id.* at art. 61, para. 1.

24. The power of the Court to indicate provisional measures does not come from the same source as its power to determine the merits. The power to adjudicate on the merits (substantive jurisdiction) is founded on the consent of the parties, whereas the power to indicate interim measures of protection is part of the Court's *incidental* jurisdiction which is derived from Article 41 of the Statute of the Court. Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction*, 46 BRIT. Y.B. INT'L L. 259, 308 (1975) [hereinafter cited as Mendelson].

25. *Id.*

ble harm may be done to the rights of the respondent.[26]

Once the Court has made a final positive decision on its substantive jurisdiction, incidental jurisdiction is assumed.[27] Nevertheless, the power of the Court to investigate the activities of a state depends upon an instrument conferring jurisdiction to do so.[28] Due to the fact that only forty-four members of the United Nations and three non-members have accepted the jurisdiction of the Court,[29] litigation on the issue of jurisdiction has not been uncommon.[30]

Much of the dispute surrounding the indication of interim measures of protection has concerned the question of to what degree of certainty the Court should ascertain its own substantive jurisdiction[31] before exercising its powers under Article 41.[32] The World Court cases that have dealt with this issue have not always provided clear cut guidelines by which to evaluate the needs for a nexus between these two concepts.[33] The very recent case of *Nicaragua v. United States*[34] provides a superior background against which to base an in-depth analysis of the Court's treatment of this issue. Furthermore, due to the political circumstances surrounding the factual allegations of the dispute, the case also easily lends itself to a discussion of whether political, economic, or other "real world" considerations play a role in the Court's deliberations.

B. Nicaragua v. United States — *Procedural Development*

On April 9, 1984 the Republic of Nicaragua filed an Application with the International Court of Justice to institute legal proceedings against the United States of America. According to the pleadings, Nicaragua sought damages allegedly caused by United States covert military activities in the Central American region as

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26. *Id.*

27. *Id.* at 262.

28. Merrills, *Interim Measures of Protection and the Substantive Jurisdiction of the International Court*, 36 CAMBRIDGE L.J. 86, 90 (1977). *See infra* notes 36-37.

29. 1983-1984 I.C.J.Y.B. 57-91 (1984).

30. This issue was litigated before the Permanent Court of International Justice on six occasions and before the International Court of Justice on ten. *See infra* notes 57-59 and accompanying text.

31. The degrees of probability of the Court's possession of substantive jurisdiction range from the proposition that jurisdiction is absolutely certain to the proposition that there is definitely no jurisdiction. Of course, neither of these propositions occurs until the Court has finally ruled on the question. At the stage interim measures are requested the Court is faced with the infinite range of possibilities between the two extremes. Mendelson, *supra* note 24, at 262-63.

32. *See supra* note 24 and accompanying text.

33. *See infra* notes 57-110 and accompanying text.

34. Nicaragua v. United States, *supra* note 11. The International Court heard Nicaragua's oral argument on the merits of the case in mid-September 1985. The government of the United States boycotted the proceeding; nevertheless, the Court was expected to deliver its opinion before the end of 1985. R. Lacayo, *U.S. Policy Goes on Trial*, TIME, Sept. 30, 1985, at 85 [hereinafter cited as *U.S. Policy Goes on Trial*].

well as permanent injunctive relief.[35]

In requesting adjudication of the dispute, Nicaragua invoked Declarations of Acceptance to the jurisdiction of the Court which both the United States and Nicaragua had deposited with the Secretary General of the United Nations[36] as per Article 36 of the Statute of the International Court of Justice.[37] As factual basis for its suit, Nicaragua claimed to have suffered grievous injury as a direct result of illegal military activities that had been carried out since 1981 under American direction and supervision.[38]

In order to invoke subject matter jurisdiction of the Court,[39] Nicaragua alleged United States violations of: customary international law,[40] Article 2(4) of the United Nations Charter,[41] Articles 18 and 20 of the Charter of the Organization of American States,[42] and various other treaties and agreements between the parties.[43] At the same time that Nicaragua filed its application to initiate pro-

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35. Specifically, Nicaragua asked that the United States cease from all use of force against Nicaragua, that the United States be enjoined from supporting military and paramilitary activities in and against Nicaragua and that all efforts to restrict or endanger access to or from Nicaraguan ports be prohibited. Nicaragua also sought reparation for damages to persons, property and the Nicaraguan economy caused by the alleged United States violations of international law. Nicaragua v. United States, *supra* note 11, at 469.

36. United States Declaration of Acceptance to the Jurisdiction of The International Court, Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. 1598 [hereinafter cited as U.S. Declaration of Acceptance]; Nicaraguan Declaration of Acceptance to the Jurisdiction of The International Court, Sept. 24, 1929, 88 L.N.T.S. 272.

37. Article 36(2) of the Statute of the Court states:

> The states parties to the present Statute may at anytime declare that they recognize as compulsory *ipso facto*, and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. the interpretation of a treaty;
>
> b. any question of international law;
>
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

STATUTE OF THE COURT, *supra* note 13, at art. 36, para. 2.

38. More specifically, Nicaragua claimed that the United States was "using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally-accepted principles of international law." Nicaragua v. United States, *supra* note 11, at 468.

39. *See supra* note 37.

40. Nicaragua v. United States, *supra* note 11, at 469.

41. Article 2, paragraph 4 of the U.N. Charter states,

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United nations.

U.N. CHARTER, art. 2, para. 4.

42. Article 18 of the Charter of the Organization of American States prohibits the use of force except in cases of self-defense. Article 20 imposes upon states a duty to settle their disputes pacifically. Charter of the Organization of American States, Apr. 30, 1948, 59 Stat. 1031, T.I.A.S. No. 2361, 789 U.N.T.S. 287.

43. *See* Nicaragua v. United States, *supra* note 11, at 468-69.

ceedings, it also requested the indication of interim measures of protection.

Immediately upon filing of the Nicaraguan Application with the ICJ, question as to the jurisdiction of the International Court arose. As of April 6, 1984, a mere three days before Nicaragua's Application was filed, the United States had already deposited a controversial declaration with the Secretary General of the United Nations[44] purporting to modify the conditions under which the United States would accept the compulsory jurisdiction of the International Court.[45] In the declaration the United States asserted that it would no longer accept the jurisdiction of the Court regarding "disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them agree."[46] The United States claimed its purpose in submitting the modification was "to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central American."[47]

Although the original United States acceptance of World Court jurisdiction provided for a six-month notice period prior to termination,[48] the United States justified its non-compliance with this notice period on several grounds which it claimed were unique to this case. First, the United States invoked the international law principle of "reprocity," *i.e.*, because the Nicaraguan Declaration of Acceptance is immediately terminable, the United States is also entitled to introduce a temporal qualification into its declaration with immediate effect.[49]

As a second argument against the Court's jurisdiction, the United States asserted that the Republic of Nicaragua never officially acceded to the compulsory jurisdiction of the World Court. The United States noted that Nicaragua never deposited an instrument of ratification of acceptance with the Secretary of League of

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44. Letter to U.N. Secretary-General Concerning Non-Applicability of Compulsory Jurisdiction of the International Court of Justice with Regard to Disputes with Central American States (April 6, 1984), *reprinted in* 23 INT'L LEGAL MAT. 670 (1984) [hereinafter cited as U.S. Letter of April 6, 1984].

45. *See* U.S. Declaration of Acceptance, *supra* note 36.

46. U.S. Letter of April 6, 1984, *supra* note 44.

47. *Id.* The Letter was referring to the Contadora Process. *See supra* note 7. *See also infra* note 137 and accompanying text.

48. *See* U.S. Declaration of Acceptance, *supra* note 36.

49. Article 36(3) of the Statute of the Court provides that states' declarations of acceptance may be made on condition of reciprocity on the part of other states. STATUTE OF THE COURT, *supra* note 13, at art. 36, para. 3. The U.S. Declaration of Acceptance, *supra* note 36, states, "the United States of America recognizes as compulsory *ipso facto* and without special agreement, *in relation to any other State accepting the same obligation*, the jurisdiction of the International Court of Justice." *Id.* (emphasis added).

Nations.[50] The United States Agent therefore argued that,

> [T]he declaration which Nicaragua made on 24 September 1929 . . . never entered into force. As a result, Nicaragua never accepted the compulsory jurisdiction of the Permanent Court. Consequently, Article 36, paragraph 5, of the Statute of International Court of Justice [which renders declarations made under Article 36 of the statute of the Permanent Court acceptances of the Compulsory jurisdiction of the ICJ] is inapplicable, and cannot serve as the basis of jurisdiction over the Application and the claims contained therein or over the Request.[51]

In addition to its arguments against jurisdiction of the Court, the United States also contended that the Court should deny the request for the indication of provisional measures for a number of "compelling reasons." The United States argued that the rights and interests of other Central American States would be directly affected by an indication and, in the absence of these indispensable parties, the Court could not properly proceed.[52]

Furthermore, the United States informed the Court that the Central American States, other States in the region, the Organization of American States and the United Nations had initiated a region-wide negotiation process known as the Contadora Process which could be adversely affected by formal legal proceedings between participating States.[53] On this basis, the United States claimed that the indication of provisional measures would be particularly inappropriate: "In the present situation in Central America, the indication of such measures could irreparably prejudice the interests of a number of States and seriously interfere with the negotiations being conducted pursuant to the Contadora Process."[54]

Although the Court did not conclusively decide the question of substantive jurisdiction in its Order of Interim Protection, it did rule that the Nicaraguan Declaration of 24 September 1929 (whether

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50. Article 36(5) of the Statute of the Court states,

> Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

STATUTE OF THE COURT, *supra* note 13, at art. 36, para. 5.

On November 29, 1939, The Republic of Nicaragua sent a telegram to the League of Nations notifying the Secretary-General that it had ratified the Statute of the Court on September 24, 1929 and that the deposit of the instrument of ratification was to follow. Nevertheless, no such deposit ever materialized.

51. Letter from Government of United States to the Secretary-General of the United Nations (April 24, 1984).

52. Nicaragua v. United States, *supra* note 11, at 476.

53. *See supra* notes 7 and 47.

54. Letter from United States Ambassador to the Secretary-General of the United Nations (April 13, 1984) [hereinafter cited as U.S. Letter of April 13, 1984].

valid or invalid) and the United States Declaration of 26 August 1946 "appear to afford a basis on which the jurisdiction of the Court might be founded."[55] Accordingly, the International Court voted to grant Nicaragua's request for interim measures of protection.[56]

C. *Prior Case Law*

During its entire history, the Permanent Court of International Justice indicated interim measures of protection only twice — in the case of the *Denunciation of the Treaty of 2 November 1865 Between China and Belgium*[57] and in the case of the *Electricity Company of Sofia and Bulgaria*.[58] In four other instances, the Permanent Court refused applicants' request for the indication of provisional measures.[59] Nonetheless, the Permanent Court never found it necessary to consider what guidelines should be followed when a request for interim measures of protection is made in cases in which substantive jurisdiction is contested. The Court therefore never provided any true guidance on the issue.[60] In recent years, however, under the auspices of the International Court of Justice, interim measures of protection are gaining increased favor.

Upon the receipt of its very first request for provisional mea-

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55. Nicaragua v. United States, *supra* note 11, at 476.

56. By its interim protection order, the Court ruled that the United States should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and in particular should discontinue the laying of mines. Also, the United States was warned not to jeopardize the sovereignty or political independence of Nicaragua by any military or paramilitary activities in the region. *Id.* at 477.

57. (China v. Belg.), 1927 P.C.I.J. ser. A, No. 8 (Interim Protection Order of Jan. 8) (question as to whether China could unilaterally denunciate the Treaty between Belgium and China of Nov. 2, 1865; Belgium requested that provisional measures be indicated to preserve those rights which might subsequently be recognized as belonging to Belgium or her nationals).

58. (Belg. v. Bulg.), 1939 P.C.I.J., ser. A/B, No. 79 (Interim Protection Order of Dec. 5) (Belgian Government requested that court indicate suspension of any judicial proceedings in Bulgarian courts until the Permanent Court delivered its judgment on the merits of the controversy).

59. Polish Agrarian Reform and German Minority (Ger. v. Pol.), 1933 P.C.I.J., ser. A/B, No. 58 (Interim Protection Order of July 29) (German Government asked court to indicate to the Polish Government that it not expropriate members of the German minority nor their estates nor establish settlers upon such estates until the Court determined whether certain treaty violations had occurred); Prince von Pless Administration (Ger. v. Pol.), 1933 P.C.I.J., ser. A/B, No. 54 (Interim Protection Order of May 11) (German Government requested Court to indicate to the Polish Government that it should abstain from any measure of constraint in respect of the property of the Prince von Pless, on account of income tax complications); Legal Status of the South-Eastern Territory of Greenland (Nor. v. Den.), 1932 P.C.I.J., ser. A/B, No. 48 (Interim Protection Order of Aug. 3) (Norwegian Government requested that Court indicate to the Danish Government that it abstain from any coercive measures directed against Norwegian nationals in certain territory over which sovereignty was disputed); Factory at Chorzów (Ger. v. Pol.), 1927 P.C.I.J., ser. A, No. 12 (Interim Protection Order of Nov. 21) (Request by German Government that Court indicate to Polish Government that it immediately pay a certain sum of money due as a result of its expropriation of a German owned factory).

60. Mendelson, *supra* note 24, at 268.

sures,[61] the International Court of Justice was forced to determine to what extent the ICJ was entitled to indicate interim measures of protection when substantive jurisdiction was contested.[62] In the *Anglo-Iranian Oil Co.* case the defendant, Iran, asserted that the petitioner, the United Kingdom, lacked competence to refer the dispute to the Court. Iran argued that because the conflict had arisen between the State of Iran and a private company, the case fell exclusively within the domestic jurisdiction of Iranian courts. The International Court of Justice rejected Iran's claims, however, and ruled that because the complaint in the case did not, a priori, fall completely outside the scope of international jurisdiction, the Court could entertain the request for interim measures.[63]

Unfortunately, the brevity of the Court's order does not provide a clear guideline by which to evaluate the scope of the Court's incidental jurisdiction. One scholar has stated, however, that the *Anglo-Iranian Oil Co.* case does decide "that the Court is not prevented from indicating interim measures merely because it has not yet decided on its jurisdiction, and it also decides that objections to the admissibility of the claim which seem very unlikely to succeed are no impediment either."[64]

Two judges dissented from the majority's decision to grant provisional measures in the *Anglo-Iranian Oil Co.* case. Writing separately, Judges Winiarski and Badawi asserted that the International Court of Justice should not indicate interim measures unless its competence appears to the Court to be "reasonably probable."[65] The dissenters clarified this "reasonably probable" test with the following language: "[I]f there exists weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction, such measures cannot be indicated."[66]

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61. Anglo-Iranian Oil Co. (U.K. v. Iran), 1951 I.C.J. 89 (Interim Protection Order of July 5) [hereinafter cited as Anglo-Iranian Oil Co.].

62. *Id.* at 93.

63. *Id.* The Court later held by a nine to five vote that it lacked jurisdiction to address the merits of the case. The Court reasoned that, although Iran and the United Kingdom had each submitted Declarations of Acceptance to the Court's jurisdiction, the Iranian declaration excluded all disputes resulting from treaties entered into by Iran prior to its ratification. Because the Court may adjudicate over matters only when both parties have conferred jurisdiction, the Court declined to take cognizance of the dispute. This was based on a finding that the treaty in issue preceded the ratification of the Iranian declaration. Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93 (Judgment of July 22).

64. Mendelson, *supra* note 13, at 271-72.

65. Anglo-Iranian Oil Co., *supra* note 61, at 97.

66. *Id.* at 98. Although "weighty arguments" is an ambiguous phrase, the judges' use of this disjunctive connector seems to imply a connotation different from that of "serious doubts." Assuming the validity of this argument, it would appear that even when serious doubts as to the jurisdiction of the Court are absent, other factors may counsel against the indication of provisional measures. The "weighty arguments" test is discussed further at *infra* notes 91-99 and accompanying text.

Six years later in the *Interhandel* case,[67] an applicant again petitioned the International Court of Justice to grant a request for provisional measures in a situation which involved contested jurisdiction. Both the United States and Switzerland, the parties involved in the proceedings, had made declarations accepting the Court's jurisdiction under Article 36 of the Statute of the Court.[68] Nonetheless, as part of its defense the United States claimed that the dispute fell outside the Court's jurisdiction because it was governed by the domestic jurisdiction of the United States.[69] The United States argued that once it determined that the matter was one of domestic jurisdiction, the International Court of Justice was precluded from making a judgment as to the extent of the Court's own jurisdiction.[70]

A change in the circumstances of the *Interhandel* dispute led the Court to believe that a final determination on the jurisdiction issues was unnecessary.[71] However, despite the fact that the Court never conclusively decided the issue, the majority did set forth its position regarding one guideline that should be followed in future determinations. The Court stated that merely raising an objection to its jurisdiction would not by itself be enough to prevent the indication of interim measures. That is, an inquiry about the Court's competence does not, ipso facto, preclude the indication of provisional measures.[72]

In a separate opinion to the *Interhandel* case, Judge Sir Hersch Lauterpacht concluded that the Court should not indicate interim measures. Lauterpacht stated that governments that are party to the Statute of the Court have a right to expect that the Court will not act under Article 41 in cases "in which absence of jurisdiction on the merits is manifest."[73] Yet, Lauterpacht did not imply that jurisdiction is automatically inferred when no manifestation to the contrary is present. He went on to state that,

> [t]he Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the parties to the dispute, which *prima facie* confers jurisdiction

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67. Interhandel (Switz. v. U.S.), 1957 I.C.J. 105 (Interim Protection Order of Oct. 24) [hereinafter cited as Interhandel].

68. Swiss Declaration of Acceptance to the Jurisdiction of the International Court, *reprinted in* 1979-1980 I.C.J.Y.B. 80 (1980); U.S. Declaration of Acceptance, *supra* note 36.

69. *See* U.S. Declaration of Acceptance, *supra* note 36, at para. (b).

70. Interhandel, *supra* note 67, at 107.

71. As basis for its request for provisional measures, Switzerland contended that certain shares of stock were in danger of being sold before the final court decision. Because the United States Government had not fixed a time schedule for the sale of the stock and was in fact prevented from such sale until it obtained a favorable verdict in a pending American judicial proceeding, the Court found no danger to exist. *Id.* at 112.

72. Mendelson, *supra* note 24, at 275. *See* Interhandel, *supra* note 67, at 111.

73. Interhandel, supra note 67, at 118.

> upon the Court and which incorporates no reservations obviously excluding its jurisdiction.[74]

In other words, for a valid assertion of jurisdiction to be made, the absence of any reservations that could be regarded as expressly excluding jurisdiction must be buttressed by something positive on which jurisdiction of the Court may be based. Lauterpacht suggests that some type of instrument of express consent, such as a treaty or agreement is necessary to accomplish this.

More than fifteen years later the perplexing issue of incidental jurisdiction again surfaced before the International Court of Justice. In the *Fisheries Jurisdiction (Interim Measures)* cases,[75] both the majority opinion and a lone dissenter relied on tests that members of the Court had set forth previously in *Anglo-Iranian Oil Co.*[76] and *Interhandel.*[77] The controversy at issue arose over a proposed extension of exclusive fisheries jurisdiction around the State of Iceland. The Applicants, Great Britain and West Germany, contended that a special agreement[78] between the parties to the proceedings conferred jurisdiction upon the Court.[79] Respondent Iceland protested that the agreement invoked by the Applicants had terminated prior to the institution of the proceedings and therefore did not operate to bestow substantive jurisdiction on the International Court.

By a fourteen to one vote, the Court decided to grant Applicants' request for provisional measures. The majority opinion reiterated the principle, which was by then fairly well settled, that the Court need not absolutely satisfy itself that it has jurisdiction over the merits of the case before indicating interim measures of protection. The Court did, however, limit this broad statement by applying the Lauterpacht test elucidated in *Interhandel*[80]: "[The Court] ought not to act under Article 41 of the Statute if the absence of jurisdic-

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74. *Id.*

75. (Ger. v. Ice.), 1972 I.C.J. 30 (Interim Protection Order of Aug. 17); (U.K. v. Ice.), 1972 I.C.J. 12 (Interim Protection Order of Aug. 17). For purposes of this comment, the facts and rulings of these two cases are the same.

76. *See supra* note 61 and accompanying text.

77. *See supra* note 67 and accompanying text.

78. This special agreement was set forth in the Exchange of Notes (March 11, 1961). It stated,

> The Icelandic Government will continue to work for the implementation of the Altering Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the [Applicants] six months notice of such extension, and, *in case of a dispute in relation to such extensions, the matter shall, at the request of either party, be referred to the International Court of Justice.*

Quoted in Mendelson, *supra* note 24, at 279 (emphasis added).

79. Article 36(1) of the Statute of the Court states, "the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided in the charter of the United Nations or in treaties or conventions in force." STATUTE OF THE COURT, *supra* note 13, at art. 36, para. 1.

80. *See supra* text accompanying note 73.

tion is manifest."[81]

The Court therefore concluded in the *Fisheries Jurisdiction* cases that the applicable provision in the agreement between the parties[82] appeared, prima facie, to afford a possible basis on which the jurisdiction of the Court might be found. This was sufficient to warrant an indication of provisional measures. Thus, from this opinion it appears that as long as the possibility of substantive jurisdiction has not been completely ruled out, the ICJ's incidental jurisdiction attaches.

Only one member of the Court dissented from the conclusions of the majority. Judge Padilla Nervo voted against the indication of interim measures after concluding that "serious doubts or weighty arguments" against the Court's jurisdiction were present.[83] This was of course, the very same test endorsed by Judges Winiarski and Badawi in the *Anglo-Iranian Oil Co.* case.[84]

The Court modified the incidental jurisdiction test it had set forth in the *Fisheries Jurisdiction* cases barely one year later in the *Nuclear Tests* cases.[85] The controversy in these cases concerned the legality of certain atmospheric nuclear weapons tests then being conducted by France in the South Pacific. The factual arguments concerning the Court's substantive jurisdiction were strikingly similar to the arguments in the *Fisheries Jurisdiction* cases. The Applicants, New Zealand and Australia, asserted that jurisdiction vested in the International Court of Justice by means of a special agreement wherein the parties had agreed to settle their disputes by submitting them to the Court.[86] Furthermore, New Zealand and Australia contended that the parties were bound by their declarations of acceptance to the Court's jurisdiction.[87] In its defense, France protested that the agreement in question was no longer in effect.[88] In response to the Applicants' second argument, France countered that the French declaration excluded from the ICJ's jurisdiction any disputes relating to national defense.[89]

Unlike the *Fisheries Jurisdiction* case, the Court decided that it

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81. (U.K. v. Ice.), 1972 I.C.J. 12, 15-16 (Interim Protection Order of Aug. 17). Thus, although the Lauterpacht test had been mere dicta after the Interhandel case, the Fisheries Jurisdiction cases elevated its status to that of a bona fide rule of law.

82. *See supra* note 78.

83. (U.K. v. Ice.), 1972 I.C.J. 12, 22; (Ger. v. Ice.), 1972 I.C.J. 30, 39.

84. *See supra* note 66 and accompanying text.

85. (Austl. v. Fr.), 1973 I.C.J. 99 (Interim Protection Order of June 22); (N.Z. v. Fr.), 1973 I.C.J. 135 (Interim Protection Order of June 22).

86. General Act for the Settlement of Pacific Disputes, *opened for signature* Sept. 26, 1928, 93 L.N.T.S. 343. Australia, New Zealand and France are all parties to the Act.

87. Memorial of Australia (Austl. v. Fr.), 1978 I.C.J. Pleadings (1 Nuclear Test) 305-15; Memorial of New Zealand (N.Z. v. Fr.), 1978 I.C.J. Pleadings (2 Nuclear Test) 187-98.

88. (Austl. v. Fr.), 1973 I.C.J. 99, 102; (N.Z. v. Fr.), 1973 I.C.J. 135, 138.

89. (Austl. v. Fr.), 1973 I.C.J. 99, 102; (N.Z. v. Fr.), 1973 I.C.J. 135, 138.

should not exercise any power it might have had under the agreement between the parties in the *Nuclear Test* cases until it reached the stage of the proceedings when it would become necessary to decide whether the agreement was still in force.[90] The Court would not examine any power conferred upon it by express agreement of the parties because to do so would require an examination of the merits of the case. Specifically, the Court stated: "[T]he Court is not in a position to reach a final conclusion on this point at the present stage of the proceedings, and will therefore examine the request for the indication of interim measures only in the context of Article 41 of the Statute".[91] The Court then proceeded to determine the extent of its Article 41 power by applying a test similar to that utilized by the majority in the *Anglo-Iranian Oil Co.* case.[92] The Court restated that doctrine in the following language:

> Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.[93]

The Court ultimately voted eight to six in favor of indicating interim measures of protection.[94] Judge Forester dissented, stating his belief that the Court should have examined the question of substantive jurisdiction more thoroughly before finding in favor of its own incidental jurisdiction. In particular, Forester believed that the majority should have scrutinized the validity of the special agreement more carefully.[95]

It appears that Judge Forester preferred a "weighty arguments" type of test. The alleged facts of the case seemed to make clear that the absence of the Court's jurisdiction was not "manifest." Nonetheless Forester believed that the Court should have employed a stricter

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90. Presumably, the Court was referring to that stage of the proceedings in which it would conclusively decide the question of substantive jurisdiction.

91. (Austl. v. Fr.), 1973 I.C.J. 99, 103; (N.Z. v. Fr.), 1973 I.C.J. 135, 139. *See also supra* text accompanying note 21. The Court decided that it was not necessary to estimate the probability of its substantive jurisdiction. Instead, the Court looked only to whether a prima facie possibility of incidental jurisdiction existed.

92. *See supra* notes 61-64 and accompanying text.

93. (Austl. v. Fr.), 1973 I.C.J. 99, 101; (N.Z. v. Fr.), 1973 I.C.J. 135, 137.

94. The decision of the Court was made without any final ruling on the issue of substantive jurisdiction. The year following the Court's Interim Protection Order, France publicly declared that it would change from atmospheric testing to underground testing. The Court decided that because this declaration constituted a legal undertaking by France to make the change, any consideration of the jurisdiction issue had been rendered moot. *Nuclear Test* cases (Austl. v. Fr.), 1974 I.C. 253 (Judgment of Dec. 20); (N.Z. v. Fr.), 1974 I.C.J. 457 (Judgment of Dec. 20).

95. (Austl. v. Fr.), 1973 I.C.J. 99, 112. *See also* (N.Z. v. Fr.), 1973 I.C.J. 135, 178.

test, *i.e.*, a test that provided for more careful consideration of the purported basis for substantive jurisdiction. Judge Forester would have been more pleased had the Court been less liberal in finding incidental jurisdiction because where the issues in dispute appeared, prima facie, to fall within the Court's jurisdiction, weighty arguments against the Court's competence may nevertheless have existed.[96]

Later in 1973, in the *Trial of Pakistani Prisoners of War*,[97] the International Court of Justice was forced to consider another request for provisional measures in the face of a disagreement between Pakistan and India as to the Court's competence. Deliberations were not lengthy because before the Court could decide the question of incidental jurisdiction a change in the relationship between the parties led the Court to believe that the urgency of the request had substantially decreased.[98] As a result, the Court removed the case from its docket without benefit of an opinion concerning interim measures.[99]

The next case to deal with the Article 41 powers of the Court was *Aegean Sea Continental Shelf*.[100] The dispute in the case concerned certain activities of Turkey that were alleged to infringe the sovereign and exclusive rights of Greece to explore and exploit its own continental shelf. Despite Greece's arguments to the contrary, the Court ruled that the circumstances of the case did not warrant an exercise of the Court's power to indicate interim measures. The Court reasoned that the alleged facts failed to demonstrate a substantial risk of irreparable damage to the rights in issue. The Court therefore denied the Applicant's request for provisional measures.[101] The court ruled in addition that a denial of a request for provisional measures precluded a decision regarding incidental jurisdiction. The Court thus narrowed the application of its test for incidental jurisdiction by ruling that the test would be utilized only when absolutely necessary to the resolution of a claim.

Six years later, on November 4, 1979, the United States compound in Tehran, Iran was overrun by a heavily armed group of several hundred hostile people who seized as hostages all diplomatic and

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96. *See supra* note 95.

97. (Pak. v. India), 1973 I.C.J. 328 (Interim Protection Order of July 13) [hereinafter cited as Trial of Pakistani Prisoners of War].

98. The dispute in this case primarily concerned the status of Pakistani nationals who had been accused of committing acts of genocide in Pakistani territory. The request for interim measures sought to prevent India from trying the prisoners before the final outcome of the proceedings before the International Court. Prior to a finalized decision on the request, Pakistan petitioned the Court to postpone its rulings in order to facilitate negotiations between the parties. *Id.*

99. Trial of Pakistani Prisoners of War (Pak. v. India), 1973 I.C.J. 347 (Order of Dec. 15).

100. (Greece v. Turk.), 1976 I.C.J. 2 (Interim Protection Order of Sept. 11).

101. *Id.* at 40.

consular personnel present on the premises. Despite repeated efforts to obtain assistance from the authorities, the Iranian Government failed to dispatch its security forces in time to protect the Embassy. The next morning, November 5, 1979, additional groups seized United States consulates in Tabiz and Shiraz. The Iranian Government again failed to take protective action.[102]

On November 29, 1979, a representative of the United States Department of State filed Application with the Registrar of Court of the International Court to institute legal proceedings against the Islamic Republic of Iran.[103] On the same day, the United States filed a request for the indication of provisional measures.[104] This request demanded that the Iranian Government immediately release all American hostages and restore the United States Embassy, Chancery, and Consulate in Tehran to American control.

On December 9, 1979, the Minister of Foreign Affairs of Iran transmitted a letter to the International Court that contested the Court's competence to adjudicate the dispute.[105] This letter stated Iran's belief that the Court could not and should not take cognizance of the dispute because,

> this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately . . . the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the past twenty-five years.[106]

The Iranian letter also claimed that to grant the American request for interim measures would be to pass judgment in favor of the United States.[107] In essence, although Iran did not formally contest the validity of those treaties and conventions invoked by the United States to confer jurisdiction on the Court, by arguing the historical political circumstances surrounding the dispute, Iran did in fact set forth a "weighty argument" against the Court's competence.[108]

The International Court rejected the Iranian contention that it would not entertain the United States' request and instead unanimously voted to indicate provisional measures.[109] The Court opined

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102. *See generally* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24).

103. Memorial of United States (U.S. v. Iran), 1982 I.C.J. Pleadings (U.S. Diplomatic and Consular Staff in Tehran) 3-8.

104. *Id.* at 11-12.

105. *Id.* at 18-19.

106. The full text of the letter is reproduced in United States v. Iran (Interim Protection), *supra* note 19, at 7-10.

107. *Id.*

108. *See supra* note 66.

109. *Id.*

that a dispute concerning diplomatic and consular premises and the detention of internationally protected persons by its very nature falls within international jurisdiction. Thus, the Court ruled that the case at issue met its test for incidental jurisdiction. That test, as articulated by the Court, required that provisional measures be indicated "only if the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded."[110] This test substantially conforms with the "prima facie possibility" test previously endorsed by the Court in *Anglo-Iranian Oil Co.*, *Fisheries Jurisdiction* and *Nuclear Tests* cases.

D. Analysis of the Legal Tests Developed through Case Law

A review of the case law of the International Court of Justice reveals that the Court has employed three basic tests to evaluate the extent of its Article 41 powers to indicate provisional measures. For the sake of clarity, they are discussed in order of their relative difficulty of satisfaction rather than in order of their importance or frequency of use by the Court.

The first test is the easiest of the three to satisfy. It requires that an applicant's complaint before the Court fall within the scope of international justice.[111] While this is of course an important criterion, it does not by itself clearly define the standard upon which the Court may evaluate its incidental jurisdiction. Presumably, nearly any issue raised by an applicant that does not clearly fall outside the realm of international law would meet this test.[112]

The second test that the Court has utilized in its deliberations on the issue of its jurisdiction to indicate provisional measures is termed the "prima facie possibility" test.[113] The Court has most commonly expressed this test in two ways: first, the Court may indicate interim measures when "the absence of jurisdiction is not manifest,"[114] *i.e.*, the so-called Lauterpacht test.[115] The second way in which the Court has set forth this test is by stating that jurisdictional grounds invoked by a party must demonstrate a "*prima facie* appearance of a possible basis on which the jurisdiction of the Court might be founded."[116] These two formulas articulate one standard. The former merely states the test in the negative, whereas the latter takes a positive approach. Consolidated, these two formulas stand for

110. *Id.* at 13.
111. Anglo-Iranian Oil Co., *supra* note 61, at 93.
112. An example of an issue that would clearly fall outside the realm of international law is an issue that unequivocally falls within a State's domestic jurisdiction.
113. *See, e.g.*, Anglo-Iranian Oil Co. *supra* note 61; cases cited *supra* notes 75, 85.
114. *See* Interhandel, *supra* note 67, at 118.
115. *Id.*
116. *See supra* note 106 and text accompanying note 110.

the proposition that when an applicant shows a prima facie appearance of a possible basis on which the jurisdiction of the Court might be founded, the absence of jurisdiction is not manifest.

The prima facie possibility test has never been precisely explained by the International Court despite the fact that of the three tests it is used most frequently.[117] Nonetheless, a fair reading of the cases applying the prima facie test suggests that unless the Court's lack of jurisdiction is obvious, the Court will deem itself to have incidental jurisdiction.

The requirements set forth under the third test in the set are the most ambiguous, perhaps due to the fact that this test has not gained much favor with the Court and indeed has never been endorsed by a majority opinion. This "weighty arguments" test was first articulated by Judges Winiarski and Badawi in their separate opinion in the *Anglo-Iranian Oil Co.* case.[118] There are two possible interpretations of this method of evaluation. First, the weighty arguments test can be viewed as nothing more than a balancing technique, *i.e.*, a weighing of the pros and cons of jurisdictional arguments in a given case. Of course this implies that in cases when the balance tilts ever so slightly toward the "con," the Court would not be able to indicate interim measures. Given the past history of the Court's decisions on this issue,[119] it is highly unlikely that this interpretation would ever gain any real measure of popularity with the international judiciary.

A second interpretation of the weighty arguments test is that it is merely a policy based test. In other words, the weighty arguments necessary to meet this test may be nothing more than extra-judicial considerations either in favor or against the Court's taking jurisdiction. This interpretation is more likely to become a factor in the Court's decisions given that in two recent cases, including *Nicaragua v. United States*,[120] defendants have attempted to sway the Court's decision by advancing these policy arguments.

III. The ICJ's Application of the Legal Tests to *Nicaragua v. United States*

In ruling on the Nicaraguan request for interim protective measures in *Nicaragua v. United States*, the Court utilized the prima facie possibility test. In doing so the Court ruled that Nicaragua had met the requirements of that test and was therefore entitled to the interim measures of protection. Specifically, the Court stated:

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117. *See* notes 73-94, 110 and accompanying text.

118. *See supra* notes 65-66.

119. *See supra* text accompanying notes 63-66, 83-84, 95-96.

120. Nicaragua v. United States, *supra* note 11, at 475 and 476. *See also* U.S. v. Iran (Interim Protection), *supra* note 19, at 7-10.

> Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded.[121]

This ruling by the Court, although resolving one assertion made by the United States in protesting the exercise of the Court's jurisdiction, did not conclusively determine all the bases upon which the United States challenged that jurisdiction.

The United States further attempted to prevent the Court from indicating provisional measures by advancing certain policy arguments against an international adjudication of the dispute. The United States argued that the issues raised in the dispute comprised:

> but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region. These matters are the subject of regional diplomatic efforts known as the "Contadora Process." . . . The concern of the United States is that bilateral judicial proceedings initiated by Nicaragua would impede this ongoing multilateral diplomatic process.[122]

Clearly, the United States attempted to advance two extra-judicial policy arguments. First, the United States asserted that the situation at issue was a political, sociological and economic problem that could not be solved through legal proceedings. Second, on-going negotiations between the parties would make legal proceedings particularly inappropriate.

In at least one previous case, *United States v. Iran*,[123] the Respondent likewise contended that regardless of the Court's jurisdiction over the dispute, political policy arguments counseled against the admissibility of Petitioner's claim. In *United States v. Iran* Respondent Iran asserted that the true issues involved in the case could be resolved only through political channels, rather than by legal proceedings. The International Court rejected Iran's policy arguments and stated that, despite the political context in which the dispute arose, "the detention of internationally protected persons as hostages cannot, in the view of the Court, be regarded as something 'secondary' or 'marginal' having regard to the importance of the legal prin-

121. Nicaragua v. United States, *supra* note 11, at 473.
122. U.S. Letter of April 13, 1984, *supra* note 54.
123. United States v. Iran (Interim Protection), *supra* note 19.

ciples involved."[124]

The Court addressed the policy arguments submitted by Iran not as "weighty arguments" but rather as a defense to the question of the "international scope" of the claim.[125] As evidence of this, the Court reasoned that because the situation in Tehran posed a serious threat to international peace and security, its resolution might naturally involve the International Court.[126] The Court did not consider what positive effects, if any, its adjudication over the claim might have insofar as easing the tension between the parties or assuring the safety of the American hostages were concerned. The Court merely noted that no provision of the Statute or Rules contemplated that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute had other aspects.[127]

As defendant in *Nicaragua v. United States*, the representative of the United States argued that the questions raised in the dispute should be more properly committed to resolution by the political organs of the United Nations and the Organization of American States (OAS).[128] The United States pointed out that, while all situations involving the threat or use of force:

> necessarily involve Article 2(4) and Article 51 of the United Nations Charter or other issues of law or legally significant facts, . . . that does not mean that this Court can, or should, take cognizance of the legal aspects of those situations in the midst of ongoing hostilities, and while the political processes of the United Nations and the OAS are still engaged.[129]

In response to this argument, the International Court cited its own case law on the political question issue. The Court pointed out that in previous decisions, it had established the rule that the Court is not required to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects.[130] Additionally, the Court stated that it should not reject an essentially judicial task merely because the issues before the Court are intertwined with political questions.[131]

Despite this reliance by the International Court on previous case law, the *Nicaragua v. United States* case differs in two significant respects from any other politically oriented case to come before the World Court. First, Nicaragua's lawsuit represents the first instance

124. *Id.* at 15.
125. *See supra* note 111 and accompanying text.
126. United States v. Iran (Interim Protection), *supra* note 19, at 15.
127. *Id.*
128. Nicaragua v. United States, *supra* note 11, at 476.
129. *Id.*
130. *See, e.g.*, United States v. Iran (Interim Protection), *supra* note 19, at 15.
131. Nicaragua v. United States, *supra* note 11, at 476.

in which the International Court has been called upon to resolve what is essentially a continuing armed conflict. Second, the fact that Nicaragua and the United States were involved in diplomatic negotiations at the time Nicaragua initiated proceedings also distinguishes this case from earlier cases in which the Court voted to indicate provisional measures. In *United States v. Iran*, for example, diplomatic relations between the two parties had been completely suspended as a result of the hostage crisis. The facts of that case revealed little chance of peaceful reconciliation at the time legal proceedings were brought before the International Court.[132] In contrast, in *Nicaragua v. United States*, the United States repeatedly argued that the Central American conflict could be better resolved by means of a diplomatic approach. The Contadora Peace Process presented such an alternative.[133]

The Contadora Group[134] lists among its objectives: a program of verifiable arms reductions by Central American countries, the patrolling of borders to stop the flow of guerillas and arms and the withdrawal of foreign advisors from the region. The Group's goal is to embody its objectives in treaties between antagonistic nations in the region and between the United States and Nicaragua.[135] The basic terms of the proposed United States-Nicaraguan treaty would require the United States to remove its troops and advisors from Honduras and El Salvador in exchange for a cessation of Nicaraguan support for Salvadoran insurgents and the removal of Cuban and other advisors from Nicaragua.[136] The United States has publicly spoken in favor of the process and the Nicaraguan head of State participated in the signing of a joint declaration giving full support to Contadora.[137]

However, despite these moves toward a peaceful resolution of United States-Nicaraguan differences, it is possible that the International Court's May 1984 order of injunctive relief has had the detrimental effect on the negotiations that the United States representative asserted it would have in his argument to the Court. On January 18, 1985, White House officials announced that the United States had suspended negotiations with the government in Managua.[138] One senior Reagan official stated that talks with the Sandinistas were largely unproductive due to the fact the ICJ's indicia of interim relief gave Nicaragua no incentive to make concessions. The official

132. *See generally* United States v. Iran (Interim Protection), *supra* note 19.
133. *See supra* note 7.
134. *See supra* notes 7 and 47 and accompanying text.
135. *See generally* 23 INT'L LEGAL MAT. 836-863 (1984).
136. *Id.*
137. Christian Sci. Monitor, Feb. 6, 1984 at 2, col. 1.
138. N.Y. Times, Jan. 19, 1985, at 4, col. 1.

said that the Reagan Administration planned to appeal to Congress to resume aid to Nicaragua rebels to provide the kind of leverage the White House believed to be lacking.[139]

A quick study reveals that the interim measures indicated by the International Court[140] have had no true positive effect on the troubled situation in Central America.[141] This is largely due to American non-compliance which has been prompted by the fact that the United States, like all nations, will act in its own political best interests even in defiance of international law.

On January 18, 1985, the very same day the United States suspended negotiations with Managua, the United States formally withdrew from the proceedings initiated by Nicaragua in the International Court of Justice.[142] The United States asserted that the proceedings constituted a misuse of the Court for political purposes and that the conflict in Central America could only be resolved by political and diplomatic means rather than through a judicial tribunal.[143] Given the connection between the United States withdrawal from the proceedings in the World Court and the simultaneous discontinuance of negotiations with Nicaragua, it is clear that although the United States seeks to end the turmoil in Central America, it will attempt to do so acting in accordance with political norms rather than in compliance with international law as that law is articulated by the International Court.

IV. Conclusion

The International Court of Justice is the final authority on the issue of its own jurisdiction. A study of the Court's own precedents indicates that under the principles established in those cases, the Court was clearly seized of the requisite incidental jurisdiction necessary to indicate interim measures in the case of *Nicaragua v. United States*. Nevertheless, given the political ramifications of the controversy the Court might have chosen to pursue an alternative other than that of ordering injunctive relief in a situation in which compliance was unlikely as it did in the *Trial of the Pakistani Prisoners of War*.[144]

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139. *Id.*

140. *See supra* note 56.

141. Harvard Law Professor Abram Chayes, who has served as an attorney for the Government of Nicaragua in its case before the ICJ, believes that the Court's final decision on the merits will affect the debate among Americans on United States actions in Central America. *U.S. Policy Goes on Trial, supra* note 34, at 85.

142. *U.S. Withdrawal From the Proceedings Initiated by Nicaragua in the International Court of Justice, reprinted in* N.Y. Times, Jan. 19, 1985, at 4, col. 1 (statement issued by U.S. State Department) [hereinafter cited as *U.S. Withdrawal*].

143. *Id.*

144. Trial of Pakistani Prisoners of War, *supra* note 97.

In the *Trial of Pakistani Prisoners of War*, the Court declined to reach a decision on the request for interim measures for inherently political reasons. Based on the mere likelihood that the parties to the controversy would begin diplomatic negotiations, the Court removed the case from its docket. Given the same, if not greater, likelihood of negotiations between the contestants in *Nicaragua v. United States*, the International Court might have refused the request for injunctive relief or at least delayed its decision.

The Court's decision to grant Nicaragua's request for provisional measures is especially open to criticism given the fact that in some important respects the case is one of first impression.[145] Because the United States claimed that its actions were motivated by the political doctrine of collective security and of self defense against aggression, the role of the International Court in the dispute has raised substantial controversy.[146] Indeed, for the first time, the Court has been accused of departing from its tradition of judicial restraint and of venturing into "treacherous political waters."[147] The International Court of Justice cannot risk becoming stigmatized as a political institution, or its credibility as a respected international authority will suffer.

Party compliance poses an additional difficulty in cases in which the International Court chooses to grant injunctive relief. In the *Fisheries Jurisdiction* cases as well as in *United States v. Iran* respondents ignored the Court's suggestion of provisional measures. By its formal withdrawal from World Court proceedings, the United States clearly implied that it will also defy the Court's indication that the United States cease covert military activities in Nicaragua. Because the International Court has no practical means of enforcing its own rulings, it must rely on a certain amount of self-policing by individual States. Keeping in mind the inherent political nature of those States, and the fact that they act in their political best interests, the Court would do well to exercise greater judicial restraint when deciding whether to take cognizance of politically oriented disputes.

Noreen M. Tama

145. *See supra* text accompanying note 132.
146. *U.S. Withdrawal, supra* note 142, at col. 6.
147. *Id.*