

**ACCEL
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**The
Certain Activities Case
in the ICJ
(*Costa Rica v Nicaragua*)
Compensation
(February 2018)**

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SYDNEY



Certain Activities case: Costa Rica v Nicaragua

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA
(COSTA RICA v. NICARAGUA)
COMPENSATION OWED BY THE REPUBLIC OF NICARAGUA
TO THE REPUBLIC OF COSTA RICA

Judgment on compensation, 2 February 2018.
(The original merits judgement was on 16 December 2015.)

Judgment at:

<http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf>

Summary at:

<http://www.icj-cij.org/files/case-related/150/150-20180202-SUM-01-00-EN.pdf>



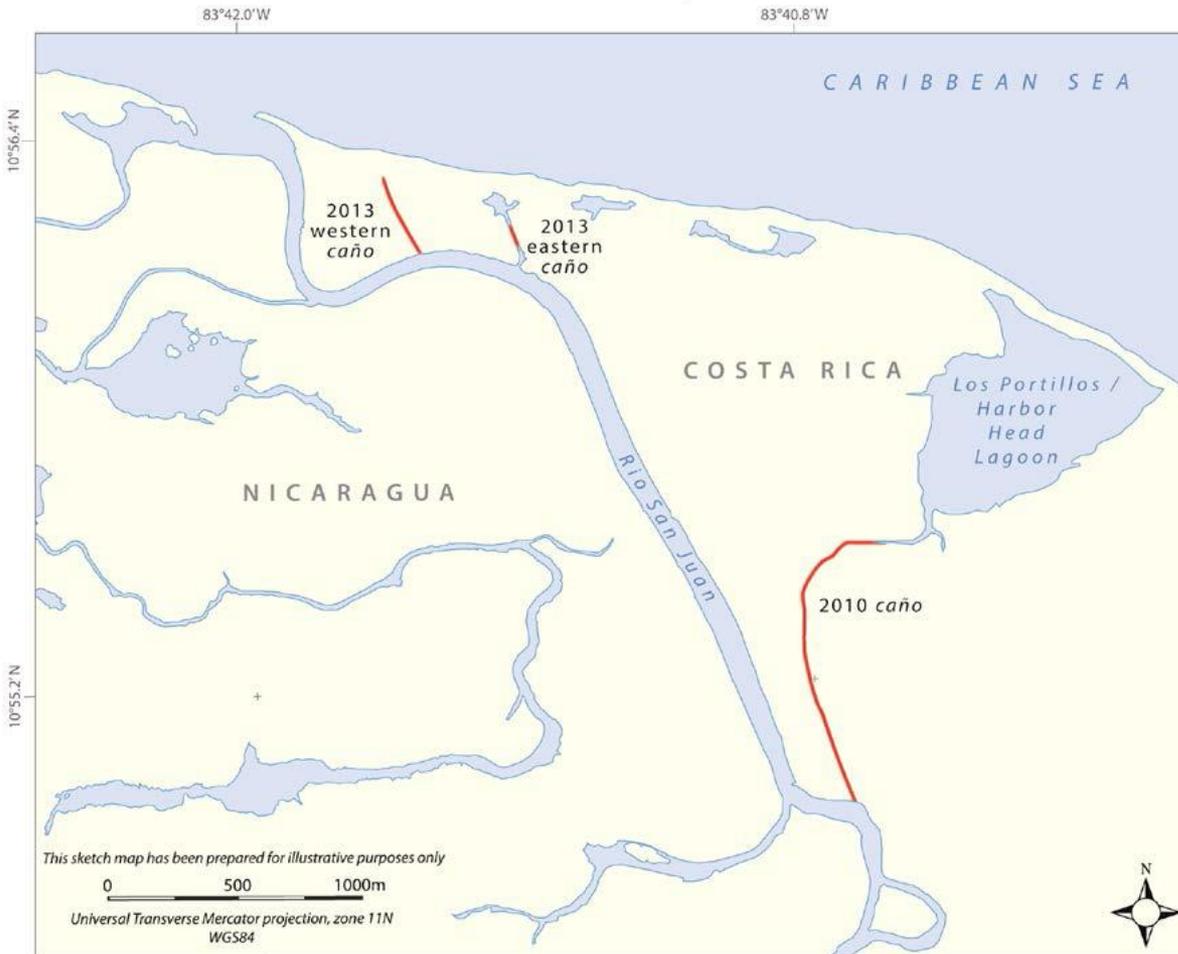
7. In 2015 on the merits, the Court found, *inter alia*, with regard to the *Costa Rica v Nicaragua* case, that **Costa Rica had sovereignty over the “disputed territory”, and that, by excavating three caños and establishing a military presence on Costa Rican territory, Nicaragua had violated the territorial sovereignty of Costa Rica.**

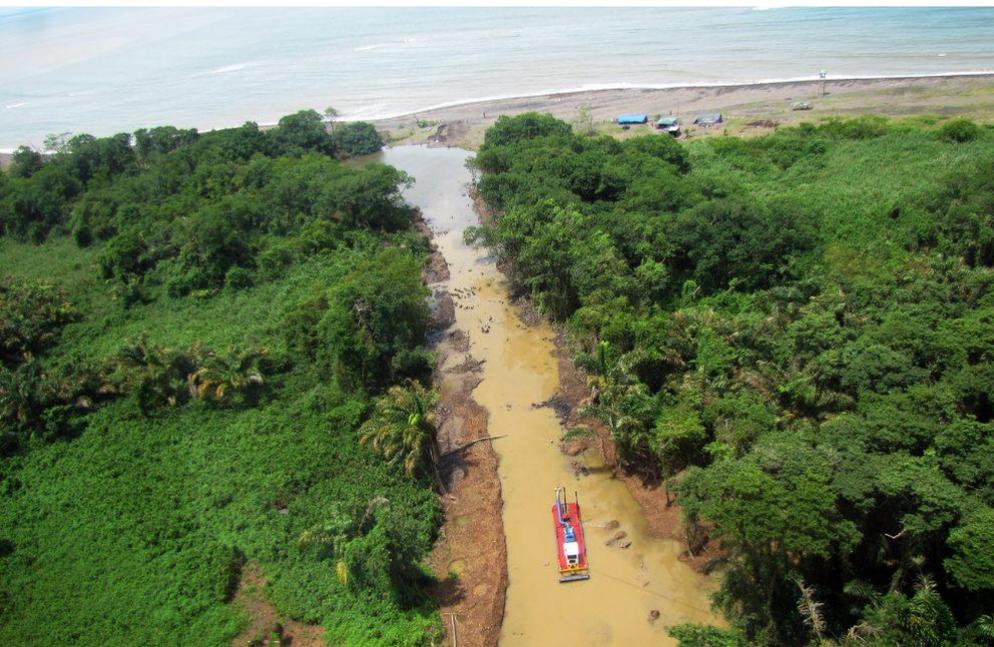
8. The Court found that Nicaragua had “the **obligation to compensate Costa Rica for material damages caused by Nicaragua’s unlawful activities on Costa Rican territory**”.

**In total, Costa Rica’s claim for compensation was:
US\$ 6,708,776.96 (+ interest).**

Nicaragua argued it should not pay more than US\$ 188,504.

Sketch-map
The three caños in the northern part of Isla Portillos







27.

The Court found that **its declaration that Nicaragua had breached Costa Rica's territorial sovereignty provided adequate satisfaction for the non-material damage suffered.**

31.

Compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible or unduly burdensome.

Compensation should not, however, have a punitive or exemplary character.

34.

In cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation.

The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain.

41.

The Court has not previously adjudicated a claim for compensation for environmental damage.

43.

Payment for restoration accounts for the fact that natural recovery may not always suffice to return an environment to the state in which it was before the damage occurred.

In such instances, active restoration measures may be required in order to return the environment to its prior condition, in so far as that is possible.

44.

Costa Rica accepts that there is no single method for the valuation of environmental damage and acknowledges that a variety of techniques have been used in practice at both the international and national level.

45.

In the present case, the methodology that Costa Rica considers most appropriate, which it terms the “ecosystem services approach” (or “environmental services framework”).

47.

Costa Rica explains that, according to the ecosystem services approach, the value of an environment is comprised of goods and services that may or may not be traded on the market.

Goods and services that are traded on the market (such as timber) have a “direct use value” whereas those that are not (such as flood prevention or gas regulation) have an “indirect use value”.

In Costa Rica’s view, the valuation of environmental damage must take into account both the direct and indirect use values of environmental goods and services in order to provide an accurate reflection of the value of the environment.

In order to ascribe a monetary value to the environmental goods and services that Nicaragua purportedly damaged, **Costa Rica uses a value transfer approach for most of the goods and services affected. Under the value transfer approach, the damage caused is assigned a monetary value by reference to a value drawn from studies of ecosystems considered to have similar conditions to the ecosystem concerned.**

However, Costa Rica uses a direct valuation approach where the data for such valuation is available.

49.

For its part, **Nicaragua considers that Costa Rica is entitled to compensation “to replace the environmental services that either have been or may be lost prior to recovery of the impacted area”, which it terms the “ecosystem service replacement cost” or “replacement costs”.**

According to Nicaragua, the proper method for calculating this value is by reference to the price that would have to be paid to preserve an equivalent area until the services provided by the impacted area have recovered.

[Offsetting!]

51.

Nicaragua contends that the methodology that Costa Rica adopts is a “benefits transfer” approach, which seeks to value the damaged environmental services by reference to values assigned to such services in other places and in other contexts.

In Nicaragua’s view, such an approach is unreliable and has not been used widely in practice.

52.

The Court notes that the valuation methods proposed by the Parties are sometimes used ... but **they are not the only methods used by such bodies for that purpose, nor is their use limited to valuation of damage since they may also be used to carry out cost/benefit analysis of environmental projects and programmes for the purpose of public policy setting.**

The Court will not therefore choose between them or use either of them exclusively for the purpose of valuation of the damage caused to the protected wetland in Costa Rica.

Wherever certain elements of either method offer a reasonable basis for valuation, the Court will nonetheless take them into account.

53.

In determining the compensation due for environmental damage, the Court will assess the value to be assigned to the restoration of the damaged environment as well as to the impairment or loss of environmental goods and services prior to recovery.

55.

Costa Rica claimed compensation in respect of six categories:

- standing timber;
- other raw materials (fibre and energy);
- gas regulation and air quality;
- natural hazards mitigation;
- soil formation and erosion control;
- biodiversity, in terms of habitat and nursery.

60.

Costa Rica claims, following the six categories of environmental goods and services that it contends have been lost, under a first head of damage, compensation for trees that were felled.

61.

Nicaragua argues that the *caño* has quickly revegetated and is now virtually indistinguishable from the surrounding areas.

62.

Costa Rica claims compensation, under a second head of damage, for “other raw materials” (namely, fibre and energy) that Nicaragua allegedly removed from the affected area in the course of its excavation works.

63.

With regard to “other raw materials” (namely, fibre and energy), Nicaragua argues that, due to its rapid recovery, the area impacted by its activities has regained the ability to provide those goods and services.

64.

Thirdly, Costa Rica claims **compensation for the impaired ability of the affected area to provide gas regulation and air quality services, such as carbon sequestration.**

65.

Nicaragua contests Costa Rica's valuation of the gas regulation and air quality services – the **benefits from gas regulation and air quality services are distributed across the entire world, and thus Costa Rica is entitled only to a small share of the value of this service.**

66.

Under the fourth head of damage, Costa Rica contends that freshwater wetlands, such as the affected area, are valuable assets to mitigate natural hazards, such as coastal flooding, saline intrusion and coastal erosion. The ability of the affected area to provide such services has been impaired by Nicaragua's actions.

Costa Rica values this service at \$2,949.74 per hectare (for the first year after the loss was caused, adjusted to 2016 prices), based on the selection of a "low value" from a range of studies from Belize, Thailand and Mexico.

67.

In Nicaragua's view, Costa Rica identifies no natural hazards that the affected area mitigated nor does it explain how Nicaragua's works impacted any natural hazard mitigation services provided.

Furthermore, Nicaragua argues that Costa Rica's valuation is based entirely on a value transferred from a study that is irrelevant to the present case (a study on the hazard mitigation services provided by coastal mangroves in Thailand).

68.

Under the fifth head of damage, Costa Rica claims that the sediment that has refilled the *caños* is both of a poorer quality and is more susceptible to erosion.

69.

Nicaragua argues that the *caños* have refilled rapidly with sediment and are now covered with vegetation.

70.

Finally, Costa Rica claims compensation for the loss of biodiversity services in the affected area, both in terms of habitat and nursery services.

Costa Rica's valuation of biodiversity services is based on studies that quantify the value of biodiversity in other ecosystems (namely, in Mexico, Thailand and the Philippines).

71.

Nicaragua argues that, due to its rapid recovery, the affected area has regained the ability to provide biodiversity services.

78.

The Court considers that it is **appropriate to approach the valuation of environmental damage from the perspective of the ecosystem as a whole, by:**

adopting an overall assessment of the impairment or loss of environmental goods and services prior to recovery,

rather than by:

attributing values to specific categories of environmental goods and services and estimating recovery periods for each of them.

79.

First, in relation to the environmental goods and services that have been impaired or lost, **the most significant damage to the area, from which other harms to the environment arise, is the removal of trees.**

An **overall valuation** can account for the **correlation between the removal of the trees and the harm caused to other environmental goods and services** (such as other raw materials, gas regulation and air quality services, and biodiversity in terms of habitat and nursery).

80.

Secondly, an overall valuation approach is dictated by the specific characteristics of the area affected, which is situated in a wetland protected under the *Ramsar Convention*, where there are various environmental goods and services that are closely interlinked.

Wetlands are among the most diverse and productive ecosystems in the world. The interaction of the physical, biological and chemical components of a wetland enable it to perform many vital functions, including supporting rich biological diversity, regulating water régimes, and acting as a sink for sediments and pollutants.

81.

Thirdly, such an overall valuation will allow the Court to take into account the **capacity of the damaged area for natural regeneration.**

82.

These considerations lead to conclusion that **a single recovery period cannot be established for all of the affected environmental goods and services.**

Despite the close relationship between these goods and services, the period of time for their return to the pre-damage condition necessarily varies.

In respect of environmental damage:

Claimed:

- \$2,148,820.82 in respect of the 2010 *caño*.
- \$674,290.92 in respect of the 2013 eastern *caño*.
- \$57,634.08 for restoration costs.
- Total: **\$2,880,745.82**.

Received:

- **\$120,000** for the impairment or loss of the environmental goods and services of the impacted area in the period prior to recovery.
- **\$2,708.39** claimed as payment of compensation for restoration measures in respect of the wetland.

So ... \$2,880,745.82 ... v ... \$122,708.39 ...?



SEPARATE OPINION OF JUDGE DONOGHUE (USA):



3.

Damage to the environment can include not only damage to physical goods, such as plants and minerals, but also to the “services” that they provide to other natural resources (for example, habitat) and to society.

Reparation is due for such damage, if established, even though the damaged goods and services were not being traded in a market or otherwise placed in economic use. Costa Rica is therefore entitled to seek compensation for “pure” environmental damage, which the Court calls “damage caused to the environment, in and of itself”.

5.

Costa Rica offers little evidence to support its assertions regarding the extent of damage or the particular goods and services that it claims to have lost.

18.

Trees and other plants play an important role in carbon sequestration and deforestation can contribute to climate change.

As Nicaragua points out, however, deforestation in one State leads to global damage to the capacity for carbon sequestration.

Costa Rica nonetheless claims that it is entitled to compensation for the entire amount that it considers to be the value of the loss of carbon sequestration capacity.

19.

Given the weight that Costa Rica attaches to its claim for damage to gas regulation and air quality services, its evidence in support of that claim should have been solid.

However, Costa Rica relies primarily on a study authored by a graduate student that offers a valuation of damage far in excess of other studies noted by Costa Rica.

22.

Valuation of damage to environmental goods and services that have not been traded in a market is a matter of approximation and extrapolation. Neither Party presents a methodology that is entirely satisfactory. However, the approaches suggested by the Parties can assist the Court in arriving at an appropriate level of compensation.

32.

I agree with the Court that **valuation of “pure” environmental damage is inevitably an approximation based on just and reasonable inferences.**

In the present case the alleged damage is to a small area ...

34.

As the Court observes, **“active restoration measures” may be warranted when natural recovery does not suffice to restore the damaged environment to its prior condition.**

It was open to Costa Rica to pursue such active measures (for example, the replanting of trees) and to seek compensation for the cost of those measures.

35.

In the absence of evidence that Costa Rica intends to pursue active “restoration of the wetland” measures, I consider that the compensation to Costa Rica for environmental damage should have been limited to compensation for the value of environmental goods and services impaired or lost as a consequence of Nicaragua’s unlawful activities.



DECLARATION OF JUDGE GEVORGIAN (Russia):



1.

Taking into account that the present Judgment is the Court's first Judgment on compensation on environmental damage, I consider it necessary to express a **word of prudence** in relation to certain aspects of the Court's reasoning, bearing in mind the **precedential character of this Judgment**.

3.

In assessing the amount of compensation, the present Judgment relies on an "**overall assessment** of the impairment or loss of environmental goods and services prior to recovery" **as opposed to a separate assessment of each of the categories of goods and services** claimed by Costa Rica.

While this holistic approach in this case may be considered generally acceptable, it must be applied with due consideration for the rule that the burden of proof rests with the party who invokes a fact.

Otherwise, the risk exists of awarding *de facto* punitive or exemplary damages, a result that the Court intends to avoid.

7.

I have not been persuaded by Costa Rica's reasoning regarding Nicaragua's alleged **damage to gas regulation and air quality services**.

In claiming compensation for this category, **Costa Rica seems to assume that this service was provided to its own exclusive benefit and that it was the only State injured by the release of carbon to the atmosphere**.

However, as Nicaragua has affirmed, to the extent that damage has been caused to this service, Costa Rica is entitled only to a "minuscule" share of the global damage.

9.

An "overall assessment" of environmental damage should exclude the possibility of being interpreted as "punitive or exemplary". It is one thing to assess the extent of the damage "as a matter of just and reasonable inference", as the present Judgment does in valuing Nicaragua's environmental damage. But it is another to apply this logic to the determination of the existence of a damage that is contested by the Respondent, or to compensate one single State for an injury *erga omnes* caused by another State. In my opinion, the Court's ruling must not be interpreted in such far-reaching terms; otherwise, the peaceful settlement of environmental disputes may be jeopardized.



SEPARATE OPINION: JUDGE CANÇADO TRINDADE (Brazil):



2.

The Court's reasoning is, to my mind, far too strict, this being the first case ever in which it is called upon to pronounce on reparations for environmental damages.

The Court's reasoning should have been much wider, going beyond compensation, encompassing also the consideration of restoration measures, and distinct forms of reparation.

19.

I sustain that reparations - including compensation - can and do have an exemplary character.

50.

In the present Judgment **the ICJ seems obsessed with compensation only, losing sight of this latter's close relationship with other forms of reparation.**

Its view of reparations is largely and unduly focused on, or limited to, compensation, pecuniary reparation only.

53.

Compensation, in sum, is not self-sufficient; it is interrelated with other forms of reparation, and to restoration at large.

54.

In a case of environmental damages like the present one, full reparations can only be attained, in my understanding, within the framework of restorative justice.

55.

Any compensation awarded for environmental damage is to be used for restoration.

59.

In my understanding, mere pecuniary compensation - the only one that the legal profession is used to claiming, without much reflection - cannot at all prescind from endeavours of restoration, so as to achieve a proper remediation of environmental damage.

60.

After all, environmental harms concern populations, and the protections of human beings and their environment are interrelated.

66.

The forms of reparation are distinct components of the duty to remedy promptly the wrong done, so as to cease its effects. Breach and reparation thus form an indissoluble whole.

68.

After all, **can environmental damage be precisely assessed and quantified only in financial or pecuniary terms? Not at all. In case of environmental damage, one should first look at *restitutio*. And considerations of equity have an incidence in the context of environmental harm.**

70.

To address reparation for environmental harm only from the angle of financial compensation is wholly unsatisfactory. One has to bear in mind the intrinsic value of the environment for the populations, and the harm done to it cannot be remedied only by the quantification of financial compensation.

71.

In other circumstances also, when faced with a large collectivity of victims, the ICJ cannot consider compensation only. **Compensation (for environmental damage, and for costs and expenses consequently incurred) is just one aspect [or element] of the matter.** After all, environmental harm affects also the populations concerned and full reparation cannot lose sight of that.

72.

Environmental harm further affects the right of living.

74.

The right of living brings to the fore the necessity and the importance of restoration - by means of reparation in all its forms, starting with the consideration of *restitutio*.

75.

Restoration of a damaged environment to its original condition may be complicated by the fact that environmental damage is often irreversible.

81.

Monetary compensation clearly has its limitations. It needs to be coupled with restoration measures, so as to minimize the damages - even if restitutio is not wholly attainable.

Restoring the harmed environment can repair the damages as much as possible.

Restoration, furthermore, opens ways for rehabilitation, and points towards the guarantee of non-repetition of the harmful occurrences. Reparation is to be contemplated and pursued in all its forms.

82.

Last but not least, may I conclude in drawing attention to the fact that, unfortunately, lessons from the past have simply not been learned yet. ... **Monetary or pecuniary quantification of environmental damage *per se* does not provide full reparation, in the wider framework of restoration. There remains nowadays a long way to go**, in the endeavours towards the progressive development of international law in the domain of reparations.



SEPARATE OPINION OF JUDGE BHANDARI (India):



2.

Restitution is the preferred method of reparation under international law. However, in the circumstances of this case the appropriate method of reparation is compensation.

5.

First, ... **under the circumstances restitution would be “materially impossible”**.

Even if trees from which timber is harvested could be regrown, thus achieving some sort of *restitutio in integrum*, it seems extremely difficult Nicaragua could restore situation existing prior to its activities in the affected area in respect of air quality, soil erosion, loss of biodiversity.

6.

Second, an injured State can in principle choose which method of reparation it prefers ... Costa Rica sought pecuniary compensation.

10.

Concerning valuation, I believe that the amount awarded to Costa Rica for environmental damage has not been sufficiently explained by the Court's reasoning.

The present case compellingly illustrates the difficulties of quantifying damages for environmental harm.

The felling of trees by Nicaragua prior to the digging of the *caños* could not be made good simply by awarding Costa Rica the costs of lost timber.

Through photosynthesis, the felled trees also produced oxygen, which was used by a number of living organisms in the affected area, including humans and a variety of animals. Through their roots, such trees also exchanged elements with the soil and the organisms living therein, especially nitrogen-fixing bacteria.

The difficulty in assigning a monetary value to such arboreal activities seems apparent, since it is unclear and uncertain how long it would take for the felled trees to regrow and for the environmental services lost to be restored as a result.

12.

The Court could have **explained in more detail how it determined the quantum of compensation awarded for environmental harm.**

13.

The growing awareness of the need to protect the natural environment is also shown by the **crystallization of the precautionary approach into a customary rule of international law.**

15.

The apparent crystallization of the precautionary approach into a customary rule of international law was a rapid process, which took place over only three decades.

16.

Current international law excludes awards of punitive or exemplary damages.

While I agree with the view that current international law does not include punitive or exemplary damages, I believe that additional considerations are relevant, including whether, in light of the circumstances of the case, **punitive damages ought to be awarded as a sufficient deterrent against future conduct which might result in environmental harm.**

17.

The preservation of the natural environment is vital to the survival of mankind. States have recognized the necessity of preserving the environment by gradually endorsing the precautionary approach. ... In the present case, the **Court was presented with an opportunity to develop the law of international responsibility beyond its traditional limits by elaborating on the issue of punitive or exemplary damages.**

18.

Science has proven that damage to the environment adversely affects human beings in a manner which is far-reaching and, often, not precisely quantifiable. It has been established by scientific evidence that humanity will suffer tremendous harm if irremediable damage is caused to the Earth's natural environment. **Preserving and protecting the natural environment ought to be one of the supreme obligations under international law in the twenty-first century.**

I am persuaded that an extraordinary situation warrants a remedy that is correspondingly extraordinary.

I am of the view that **this case presents such an extraordinary situation, and that the law of international responsibility ought to be developed to include awards of punitive or exemplary damages in cases where it is proven that a State has caused serious harm to the environment.**

The importance which humanity attaches, or ought to attach, to the well-being of the natural environment justifies, in my view, a progressive development in this direction.

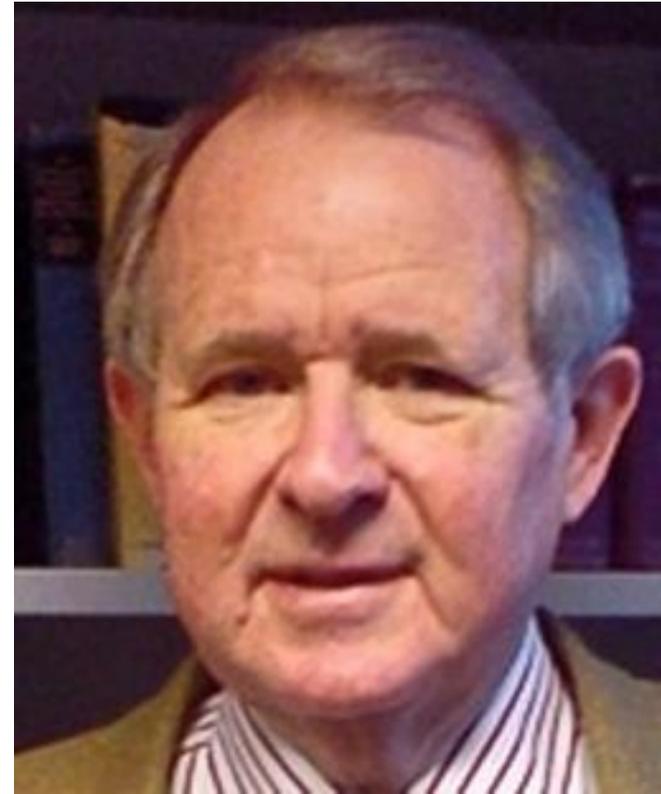
19.

In my view, the principle that polluters must bear the financial costs of their activities causing harm to the environment should also extend to punitive damages.

Only if those causing harm to the environment, are made to pay beyond the quantifiable damage can they be deterred from causing similar harm in the future.



DISSENTING OPINION OF JUDGE AD HOC DUGARD (South Africa):



Dissenting opinion of Judge *ad hoc* Dugard (South Africa):

2.

On the face of it this case may appear to be trivial.

Damage to a wetland of 6.19 hectares for which the injured State claims a mere \$6,711,685.26 in compensation hardly suggests that this is an important case requiring the serious attention of the International Court of Justice.

Such an assessment would, however, be wrong.

The dispute between Costa Rica and Nicaragua involves **three** fundamental issues:

- **the forcible invasion of the territory of a State,**
- **the purposeful damage to an internationally protected wetland, and**
- **the calculated and deliberate violation of an Order of this Court.**

5.

This claim obliges the Court to place a monetary figure on the harm done to Costa Rica's environment by Nicaragua's unlawful activities.

Inevitably this monetary quantification will be seen as the measure of the Court's concern for the protection of the environment in an age in which most nations agree on the need for a national and international commitment to the preservation of the environment of our planet.

6.

The assessment of damage to the environment is a difficult task rendered even more difficult by the absence of an agreed scientific method for making such an assessment. Costa Rica claims \$2,880,745.82 while Nicaragua estimates that only the paltry sum of \$34,987 is due.

7.

I would have awarded Costa Rica considerably more than that awarded by the Court.

The sum of \$120,000 constitutes a mere token for substantial harm caused to an internationally protected wetland by egregious conduct.

11.

Costa Rica proposed an **“ecosystems service approach”** ... which maintained that **environmental damage might be calculated on the basis of the reduction or loss of the ability of the environment to provide certain goods and services.**

12.

Nicaragua, for its part, proposed a less complicated method of assessment which involved an **“ecosystem service replacement cost”** in terms of which Costa Rica was only entitled to compensation to replace environmental services that either have been or may be lost prior to the recovery of the impacted area.

18.

In my view **this is a grossly inadequate valuation for environmental damage caused to an internationally protected wetland, having regard to the context of the harm caused. A much higher compensation is warranted**, one that takes account of an increased valuation of the impairment to trees, raw materials, biodiversity and gas regulation; the inclusion of a valuation for the impairment of soil formation; harm caused to the environment; the implications of the felling of trees and the destruction of undergrowth for climate change; and the gravity of an intentional harm caused to the environment of a wetland by Nicaragua.

22.

In recent years there has been considerable criticism of the Court's handling of evidence in complex factual situations and highly technical matters. Much of the criticism has been directed at the lack of transparency displayed by the Court in its explanations of how it has evaluated the evidence and how it has reached its conclusions on disputed facts.

In these circumstances one might have expected the Court to pay particular attention to providing a satisfactory explanation for its finding.

29.

In the present case there are a number of equitable considerations that the Court might, and in my judgment, should have taken into account in its quantification of damages. These include the protection of the environment, the importance attached to measures to combat climate change in today's world, and the gravity of the respondent State's actions. Unfortunately, the Court appears to have had regard only to the character of the affected area as an internationally protected wetland.

30.

The destruction of the environment is both an internationally wrongful act and an international crime.

In the present case Nicaragua intentionally caused damage to the environment of another State in an internationally protected wetland.

31.

Wetlands are highly sensitive ecosystems of particular importance. Harm to this environment should to be treated with a high degree of seriousness and this should be reflected in the amount of compensation awarded

33.

The correlation between deforestation and climate change is clear. Although this branch of science is still developing there is no doubt that the destruction of trees exacerbates climate change.

Mature forests store quantities of carbon in the trees themselves and in the soil surrounding trees in the form of decaying plant matter. When trees are destroyed carbon is released into the atmosphere, increasing the amount of carbon dioxide and other greenhouse gases which accelerate global warming and climate change.

35.

Nicaragua argued that the cost of lost carbon sequestration reflects the value to the world population of this ecological service and that Costa Rica was therefore not entitled to claim for the full amount of harm done. Undoubtedly this is a matter of concern to the international community as a whole.

Nevertheless it is common knowledge that third States hardly ever, if ever, assert their rights arising from the violation of obligations *erga omnes*.

In these circumstances it is the State most immediately affected that is most likely to assert these rights on behalf of both itself and the global community.

Costa Rica should therefore have been allowed to recover compensation in full for this harm.

In making this claim Costa Rica asserted an interest owed both to itself and to the international community as a whole.

36.

The Court failed to make any finding on which States might bring a claim despite the fact that it was central to Nicaragua's argument on the valuation of the impairment of carbon sequestration and gas regulation. Nor did it answer the question of whether harm to gas regulation services is ever capable of recovery in full by a single State.

It missed an opportunity to contribute to the progressive development of customary international law on the mitigation of climate change.

37.

The Court cannot ignore the relevance of the Paris Agreement on climate change of 4 November 2016 to its decision in this case. Over 170 States parties, which include Nicaragua and Costa Rica, have committed themselves to the aim of reducing greenhouse gas emissions and have therefore recognized a link between greenhouse gas emissions and climate change. The Parties have also recognized the importance of the conservation and enhancement of sinks and reservoirs of greenhouse gases

38.

The Court should have had regard to Article 4 of the Paris Agreement, in terms of which parties aim to reach a “global peaking of greenhouse gas emissions” as soon as possible.

To this end, parties determine individual targets for themselves and are under the obligation to make efforts to achieve those targets. Each party is required to “prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve” and “shall pursue domestic mitigation measures, with the aim of achieving” these NDCs.

This demonstrates that, although it remains true that at a practical level the world as a whole benefits from clean air and from a reduction in each individual State’s carbon emissions, the global community has purposefully adopted an approach to gas regulation that individualizes States’ obligations.

As a corollary to this approach, gas regulation services are perceived as accruing primarily as a benefit to individual States.

Indeed, if the costs and benefits associated with the management of gas regulation services were not individualized in this way, there would be no mechanism for holding individual states to account for efforts to reduce their carbon emissions under Article 4 of the Paris Agreement.

39.

This is the first occasion that the International Court of Justice has addressed this issue. In an age of serious debate about the means to be employed to combat climate change it is inevitable that close attention will be paid to the pronouncement of the Court on this subject.

The failure of the Court to address this matter will be interpreted as an unwillingness on its part to join the global consensus determined to combat climate change.

40.

Nicaragua's conduct in these proceedings has been characterized by bad faith and a determination to deliberately flout international law and the Court's authority. At the same time this conduct has shown a complete disregard for the environment of an internationally protected wetland.

43.

Given the gravity of Nicaragua's violations of international law, the scale of compensation should be higher than it would otherwise be for lawful conduct that caused environmental damage.

47.

Costa Rica has claimed what appears to be an inflated sum ... But this should not conceal the fact that **Costa Rica suffered serious environmental harm** and that this was not the result of a negligent misinterpretation of an historical boundary but of a wilful and deliberate strategy to extend the territory of Nicaragua by damaging and re-shaping the environment of an internationally protected wetland. In the course of this action Nicaragua caused serious harm to the trees, vegetation, and soil of Costa Rica. It irresponsibly disturbed the biodiversity of the wetland and contributed, albeit minimally, to global warming by damaging carbon sequestration.

These are serious violations.

In making its award the Court should have reflected that seriousness by placing a higher monetary sum on the valuation of the environmental goods and services impaired by Nicaragua and the impact of Nicaragua's actions on an internationally protected wetland.

Nicaragua's destruction of close to 300 trees of over 100 years old provided the Court with an opportunity to pronounce on the implications of this conduct for climate change and to attach a monetary value to this factor.

Unfortunately this opportunity was missed.

Finally, the conduct of Nicaragua in the course of its invasion, occupation and excavation of the wetland should not have been overlooked in the quantification of damages.

For these reasons I believe that the award of compensation for the impairment of environmental goods and services made by the Court in the sum of \$120,000 **fails to meet the standards of fairness and equity propounded by the tribunal in the *Trail Smelter* case.**



Comment:

- While not having direct precedent value, decisions of the International Court of Justice do provide an important lead for national legal systems.
- The decision of the ICJ on compensation for environmental damage in the *Certain Activities* case in February 2018 is the first time the ICJ has considered quantifying compensation for environmental damage.

- While unanimous on the need for compensation to be paid, the Court split markedly on the weight to be given to different factors.
- Some judges took a very cautious approach, especially against providing compensation for anything but direct, proved damage and which avoided punitive or exemplary damages.
- Others argued for a much wider approach which took included punitive or exemplary damages and which took account of more modern concerns for the environment worldwide.

- **The implications of the judgment going forward?**



End.