

## ZOOM IN

### *The Question:*

**The ICJ and the compensation for environmental damage in the Costa Rica/Nicaragua case: Does the application of equitable principles offset independent technical expertise?**

*Introduced by Elena Fasoli*

The Judgment of the International Court of Justice (ICJ) on 2 February 2018 (hereinafter Judgment on Compensation), regarding compensation owed by Nicaragua to Costa Rica presents a unique opportunity for the Court to develop its views on compensation for environmental damage.<sup>1</sup>

The Judgment on Compensation deals, *inter alia*, with the assessment of the sum due to Costa Rica for the impairment or loss of environmental goods and services and for the expenses incurred in monitoring or remedying the damaged environment by the unlawful activities of Nicaragua (so-called ‘damage caused to the environment in and of itself’). The latter activities include the excavation of some channels in an area (the northern part of Isla Portillos) that the Court had already found in 2015 to belong to Costa Rica.<sup>2</sup> This area is situated in a fresh-

<sup>1</sup> ICJ *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 of 2 February 2018. See D Desierto, ‘Environmental Damages, Environmental Reparations, and the Right to a Healthy Environment: The ICJ Compensation Judgment in Costa Rica v. Nicaragua and the IACtHR Advisory Opinion on Marine Protection for the Greater Caribbean’ (2018) EJIL: Talk!; E Fasoli, ‘The Judgment of the International Court of Justice in Compensation Owed by The Republic of Nicaragua to the Republic of Costa Rica: Preliminary Remarks with Regard to Environmental Damage’ (2018) 73 *La Comunità Internazionale* 99.

<sup>2</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Rep 740-741 para 229.

water wetland, internationally protected under the 1971 Ramsar Convention on Wetlands.<sup>3</sup>

In the Judgment on Compensation the ICJ introduced the concept of ‘overall evaluation approach’ in order to arrive at the quantum of compensation due to Costa Rica, as opposed to a separate assessment of each category of goods and services (ie the loss of the ability of the area to mitigate natural hazards; soil formation/erosion control; the loss of trees and of other raw materials, such as fibre and energy; gas regulation and air quality; and the loss of biodiversity with specific regard to habitat and nursery). The Court stated that the application of this approach was

‘dictated by the specific characteristics of the affected area by the activities of Nicaragua, which is situated in the Northeast Caribbean Wetland, a wetland protected under the Ramsar Convention, where there are various environmental goods and services that are closely interlinked ... such an overall valuation will allow the Court to take into account the capacity of the damaged area for natural regeneration.’<sup>4</sup>

The ICJ combined this approach with the analysis made by the experts of Nicaragua (which adjusted the amount of compensation asked for by Costa Rica, totaling US\$ 6.711.685) with some alteration of the specific amount.<sup>5</sup> As it has been noted, this was a quite opaque and un-discussed choice of methodology and

‘it is surprising that the Court did not elaborate further on any evidence of scientific methodologies ... for damages assessment with specific respect to each of these categories.’<sup>6</sup>

Eventually, the Court awarded Costa Rica the sum of US\$ 2.708.39 for the costs incurred for restoration measures in respect of the wetland and the sum of US\$ 120.000 for the impairment or loss of the environmental goods and services of the impacted area in the period prior to

<sup>3</sup> Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) UNTS no 14583, 246.

<sup>4</sup> Judgment on Compensation (n 1) paras 80-81.

<sup>5</sup> *ibid* paras 78-85.

<sup>6</sup> *D Desierto* (n 1).



recovery.<sup>7</sup> It is quite unclear, though, how the Court arrived at this amount.

The ICJ seemed to refer to the existence of certain shortcomings, such as, for example, the fact that there was no evidence before the Court that supported the assumption (put forward by Nicaragua) that there would be no loss in fibre and energy after the first year,<sup>8</sup> but after such kind of (quite vague) considerations, the Court just seemed to stick a wet finger in the air.

The Court purported to justify the way it reached the specific amount of compensation awarded to Costa Rica by referring to the ‘principle of law’ which was relied on by the Arbitral Tribunal in the Trail Smelter case, namely, that of the ‘just and reasonable inference’ of the extent of the damages,<sup>9</sup> and declared that:

‘[i]n respect of the valuation of damage, the Court recalls that the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation to that damage.’<sup>10</sup>

However, one could wonder whether, in such a case involving highly complex and technical evaluation, the discretion for the Court to decide whether or not to avail itself of additional expertise<sup>11</sup> (for example, economists, expert in loss of natural resources), could be simply offset by resorting to equitable principles. It seems in fact that one thing is to apply equitable principles in order to decide the quantum after having appreciated all the available valuation methods and determined the one considered more appropriate in the specific case. Quite another thing is to resort to equitable principles after considering only the methodologies presented by the Parties.<sup>12</sup> Interestingly, none of the Judges in-

<sup>7</sup> Judgment on Compensation (n 1) paras 86-87.

<sup>8</sup> *ibid* para 85.

<sup>9</sup> *Trail Smelter Case (United States v Canada)* Award 16 April 1938 UN Reports of Intl Arbitral Awards vol III (1938) 1911, 1920.

<sup>10</sup> Judgment on Compensation (n 1) para 35.

<sup>11</sup> This is possible, for example, under art 50 of the Court’s Statute: ‘[t]he Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion’.

<sup>12</sup> E Fasoli (n 1) 113.



volved in this case suggested that the Court should have taken the opportunity to consult additional ‘outside expertise’ in order to evaluate the damage in economic terms.

Against the above background, we have invited contributors to this zoom-in to discuss the following issues: the current challenges in compensating environmental damage, including through commenting on the Court’s choice of methodology for valuing the damage in order to assess the final quantum; and the issue of the consultation of experts in highly scientific and technical cases, in particular, whether this new pronouncement by the ICJ has advanced the understanding as to where to strike the right balance between the discretion afforded to the Court to decide the case (ie the right amount of compensation) autonomously through the application of equitable principles, and the opportunity to consult external experts when the complexity of the task assigned to the Court is simply too high and cannot be resolved through general inference and equity.

