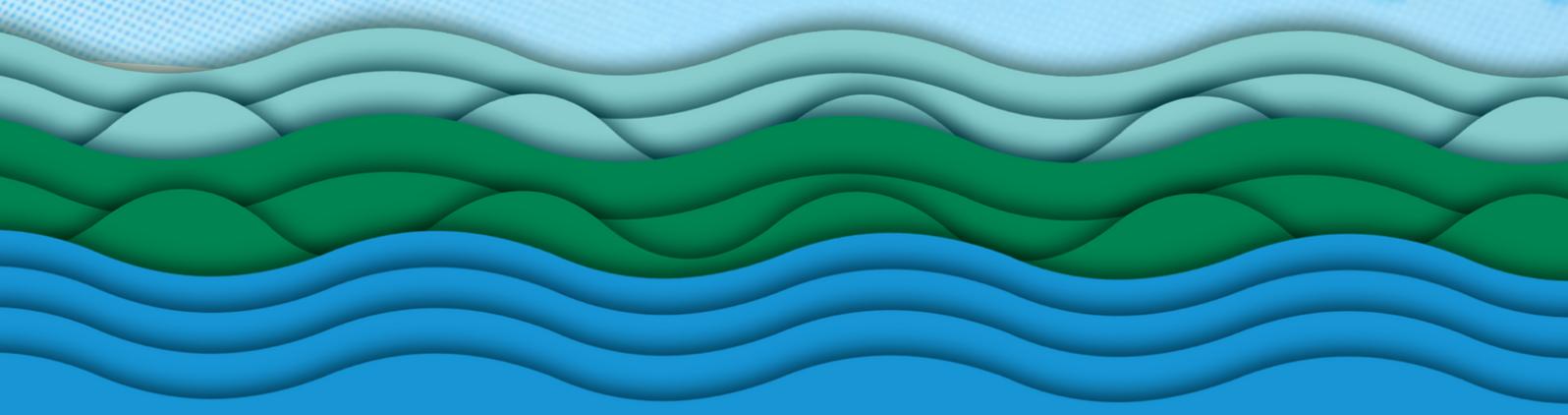




**ENVIRONMENT
PEOPLE LAW**

The rule of law for the protection of the environment

IDENTIFYING THE AMOUNT OF COMPENSATION FOR ENVIRONMENTAL DAMAGES IN A CASE OF THE INTERNATIONAL COURT OF JUSTICE “COSTA RICA vs. NICARAGUA”



Identifying the amount of compensation for environmental damages in a case of the International Court of Justice “Costa Rica vs. Nicaragua”

On November 18, 2010 the Republic of Costa Rica filed an application instituting procedures against the Republic of Nicaragua with respect to “incursion, occupation of and use by the Army of Nicaragua the territory of Costa Rica, as well as [alleged] breaches of Nicaragua’s obligations towards Costa Rica”, in particular, violation of the principle of territorial integrity and the prohibition of the threat of force or use of force.

In its application Costa Rica stated that Nicaragua in two separate incidents occupied the territory of Costa Rica in connection with the construction of canal from the San Juan River to Laguna Los Portillos (also known as “Harbour Head Lagoon”) and carried out certain related works of dredging in the San Juan River. According to the representatives of Costa Rica, dredging works and canal construction seriously affected the water flow to the Colorado River in Costa Rica and cause additional damage to the Costa Rican territory, including wetlands and national wildlife protected areas, situated in the region. This case was registered in the general list of Court judgements under the title “Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica vs. Nicaragua*)» (hereinafter the “*Costa Rica vs. Nicaragua case*”).

First of all, the International Court of Justice considered the issue what state has the sovereignty over this disputed territory. For this end the Court considered provisions of the Border Treaty as of 1858. The International Court of Justice concluded that in this case Costa Rica had sovereignty over this disputed territory, and the activities carried out by Nicaragua in this territory in dispute since 2010, constituted violation of Costa Rica’s territorial integrity. By constructing canals and establishing its military presence in the disputed territory Nicaragua violated territorial sovereignty of Costa Rica.

Due to the aforementioned, the International Court of Justice held that Costa Rica had the right to be compensated for material damages, these states should start negotiations aimed at reaching a compensation agreement, and if the parties failed to make such an agreement within 12 months period since the date of the judgement, the Court would settle the amount of compensation at the request of one of the parties.

The violator, i.e. Nicaragua, had the following stance on the issue of calculation and payment of compensation for environment restoration: “With regards to the restoration payment, Payne & Unsworth report indicates that “within the context of environmental damage assessment the parties mainly use payments to the land preservation banks, for example, wetlands banks, or payments to the landowners for preservation or protection of the environment as a compensation of environmental damage”. This a favourable approach as

these actions provide for the same level of environmental services which would have been available if certain damage had not been caused. This approach would be reasonable and simple to be applied in regards to the damage caused to the disputed territory, since, according to Payne & Unsworth Report, “Costa Rica has an active market paying the landowners and communities for managing the environment and provision of ecosystem services”.

However, the International Court of Justice did not adopt the view of Nicaragua on “restoration payments” to be used in the environmental loss assessment. Unlike broad recognition by the Advisory Opinion of the Inter-American Court on Human Rights of the continuous individual obligations of the state regarding prevention of transboundary harm that may happen due to the infrastructure projects in the Big Caribbean Basin, the decision of the International Court of Justice has significantly decreased the amount of compensation regarding the initial demands of Costa Rica, separating compensation obligation of Nicaragua as part of environmental reparations, and personal obligations of Costa Rica to mitigate environmental consequences in case of potential environmental damage. These events illustrate the fact that though it is recognized that all the states share responsibility for environment protection, specific distribution of environmental reparations paid in the form of compensation will not necessarily be incurred by the state committing environmental offences, at least, as far as the International Court of Justice is concerned.

First of all, the International Court indicated that the area affected by unlawful activities of Nicaragua is 6,19 hectares. Using its “ecosystem approach”, predicting loss when restoration of the affected territory will take 50 years, Costa Rica demanded approximately 6,711 million \$ USD for damage compensation, and also approximately 0,5 million \$ USD as debt interests. On the basis of “restoration payment” theory and referring to the sum of 309 \$ USD per hectare (the amount of money Costa Rica pays to the landowners and communities as incentive to protect the environment within the national environment protection programs) per year for the restoration period from 20 to 30 years Nicaragua calculated that Costa Rica was entitled to no more than 188 504,00 \$ USD.

The court was guided by the concept of “damage and causal link”. The Court explained its position on the concept of damage and causal link, taking into account scientific uncertainty, related to the statement of environmental harm:

“34. In cases of alleged damage to the environment, there may be specific problems related to the damage and causal link. Damage can be caused by several simultaneous causes, or the state of research on the causal link between the wrongdoing and harm may be uncertain. These are the challenges that need to be addressed as they arise in the light of the

facts of the case and the evidence presented to the Court. Finally, the Court must decide whether there is a sufficient causal link between the wrongful act and the damage caused”.

It should be stressed that the Court has not elaborated any criteria for sufficiency of causal link, especially when environmental damage arises due to unlawful wrongdoings of the state.

With regards to the losses estimate, the Court referred to its judgement in the Diallo case, where “considerations of justice” were used to consider the positions of parties to a case, as well as reference of the arbitrage Trail Smelter to the US Supreme Court judgement of 1931 in the case *Story Parchment Company vs. Paterson Parchment Paper Company*, which stated that in a case on delicts “preventing clear determination of the amount of losses... it will suffice if the evidence demonstrate that the amount of losses is the subject of a just and well-grounded conclusion, though the estimate is very approximate”. The court stated that “the damage to the environment and consequent impairment or loss of the ability of the environment to provide goods and services was compensable under international law”.

In particular, the Court drastically reduced the amount of compensation to Costa Rica to the amount of 120 000 \$ USD for the impairment or loss of the environmental goods and services, 2 708,39 \$ USD for restoration measures in respect of the wetlands protected at the international level, the sum in the amount of 236 032,16 \$ USD as annual interests in the amount of 4% for the period from the Judgment of 2015 and in accordance with the Compensation Judgment of 2015 to 20 150,04 \$ USD, and also awarded the interests of 6% to these amounts, to be paid from April 2, 2018. The total amount of compensation awarded to Costa Rica was 378 890,59 \$ USD, which is about 5% from Costa Rica's demands.

Considering the fact that the environmental impact assessment experts in a case were appointed by the Court as far back as in 2015, it was surprising that the Court did not conduct checking of experts expected to estimate environmental damage (at least the judgement on compensation dated from February 2, 2018 does not mention any information in this part). The judgement on compensation from February 2, 2018 also does not mention any consultations of the Court with independent experts (institutions, organizations or certain scholars). According to the powers of the Court, provided for in Article 50 of the International Court Charter, taking into account the level of scientific uncertainty one could have expected such consultations when estimating losses for the restoration for the affected territory of 6,19 hectares (in particular, whether this period is 50 years, as stated by Costa Rica, or 20-30 years, as stated by Nicaragua). From the text of the judgement on compensation from February 2, 2018 it is not clear whether the Court referred to the Secretariat of the Ramsar Convention (or any other international environmental organization, for instance, UN Environmental Programme) for assistance during this stage of compensation estimate.

However, the judgement on compensation of the International Court of February 2, 2018 seems to provide a detailed list of what the Court considered proper – with respect to circumstances of the litigants and Costa Rica’s own obligations on natural disasters mitigation, without clear determination of scientific or actual grounds to award the compensation of a certain amount for causing damages to each of the subject of the damage, related to the unlawful activities of Nicaragua.

The Court also stated that “environmental damage assessment requires ecosystem-based approach, presupposing general evaluation of impairment or losses of environmental goods and services till the moment of restoration, and not putting down the cost of specific categories of environmental goods and services and evaluating the restoration period for each and every of them”. These considerations were provided without clear explanations of what this “general estimate” is, and whether the latter is based on reliable scientific expertise on evaluation of short-term and long-term damage to the wetlands, protected at the international level according to the Ramsar Convention. However, the Court just found that this approach “is dictated by the peculiarities of the territory, affected by Nicaragua’s activities, which is situated on the wetlands of the North-East of the Caribbean Basin, protected under the Ramsar Convention, that have various environmental benefits and services, which are interrelated....this general estimate will enable the Court to consider whether the affected area has potential for natural restoration”.

With the finding that Costa Rica had the right only to 120 000 \$ USD for impairment or loss of environmental goods and services at the affected territory in the pre-restoration period and 2 708,39 \$ USD for restoration measures, it was surprising that contrary to the established practice of environmental compensation it was not indicated the basic environmental assessment of the affected area before Nicaraguan activities in relation to environmental damage caused, restoration period assessment (and to what extent it can be achieved in a natural way or by the intentional measures of Costa Rica), as well as budget estimate for mitigation or restoration measures during the restoration period. There is no description of Nicaragua’s obligations with respect to consequences mitigation following the precautionary principle.

It is important to address the following findings of the Court:

1. Costa Rica failed to demonstrate that the affected territory due to the changes of its environmental nature lost the ability to mitigate natural disasters or that such services were damaged. The evidence provided to the Court shows that there was significant restoration of vegetation.
2. Since the Court does not have clear evidence of the basic condition of the whole complex of environmental goods and services existing in the disputed territory before the activities of Nicaragua, the Court dismissed 50-year territory restoration

period. It also found wrong to estimate similar restoration time for different categories of goods and services identified by Costa Rica.

3. The most significant damage to the territory, causing other environmental impairments, is deforestation by Nicaragua during canyon excavations. The general estimate may take into account correlation between deforestation and damage caused to other environmental goods and services (such as other raw materials, services on gas pollution and air quality regulation, as well as biodiversity from the viewpoint of habitat and nursery).
4. “Corrected analysis” of Nicaragua, estimating the damage caused to four categories of environmental goods and services (trees, other raw materials, gas pollution and air quality regulation, as well as biodiversity) in the amount of 84 296 \$ USD is insufficient. Lack of certainty as to the amount of damage does not actually prevent the Court from awarding the compensation, which, in its opinion, approximately reflects the cost of impairment or loss of environmental goods and services. Preserving certain elements of the “corrected analysis” the Court finds it reasonable, for the purpose of its general evaluation, to introduce corrections to the general amount in [Nicaragua] “corrected analysis” to address the identified gaps.

It is evident that the Court used “the corrected analysis” of Nicaragua as its starting point and then introduced modifications – choice of methodology which remains intransparent and has not been discussed in the entire judgement on compensation. Taking into account the fact that four categories of environmental goods and services require totally different scientific considerations for damage estimation (in particular, regarding the consequences for biodiversity, which frequently depend on the complex impact assessment or even consideration regarding the climate change impact on the affected territory), it is surprising that the Court has not given any detailed considerations to any scientific methodologies (irrespective of the fact whether they have been provided by the litigants or obtained by the Court from the independent experts) to estimate losses for each of these categories.

The International Court has conducted detailed investigations and description of the Costa Rica’s expenses incurred due to the unlawful activities by Nicaragua, and also expenses related to the monitoring of affected territory, such as flight expenses, trucks, satellite images, etc. In the end, the Court reduced the claim of Costa Rica in this part from the amount of approximately 3,5 million \$ USD to less than 10% amounting to 236 032,16 \$ USD. It should be noted that the Court has not allocated expenses for legal representation.

In general, on each of the aspects of the damage assessment the Court was guided by the following algorithm: 1. Establishing the damage; 2. Establishing causal link between the violation and the damage; 3. Researching the evidence base that proves this causal link;

4. Determining approximate cost of object affected due to the violation which is proved by reliable evidence.

CONCLUSIONS

While the first UN's International Court of Justice's landmark ruling on compensation for environmental damage deserves lots of praise, there are some concerns about the Court's methodology for assessing environmental damage in respective cases. The Court's arguments in its compensation judgement do not describe scientific studies of short-term and long-term environmental damage assessments for complex environmental phenomena such as biodiversity, energy, air quality and the impact of climate change, which will also be felt in the affected area. Demonstrating the scientific grounds of the interrelationship of the state responsibility regarding the prevention, redress and mitigation of damages caused, the Court could at least properly justify the use of one or another method of calculating damages.

Bibliography:

1. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) /[Электронный ресурс]. – Режим доступа: <https://www.icj-cij.org/en/case/150>
2. 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/[Электронный ресурс]. – Режим доступа: <https://www.ejiltalk.org/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/>
3. CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA V. NICARAGUA) /[Электронный ресурс]. – Режим доступа: <https://www.icj-cij.org/public/files/case-related/150/150-20170602-WRI-01-00-EN.pdf>
4. Restoring marine environmental damage: Can the Costa Rica v Nicaragua compensation case influence the BBNJ negotiations? /[Электронный ресурс]. – Режим доступа: <https://onlinelibrary.wiley.com/doi/epdf/10.1111/reel.12309>