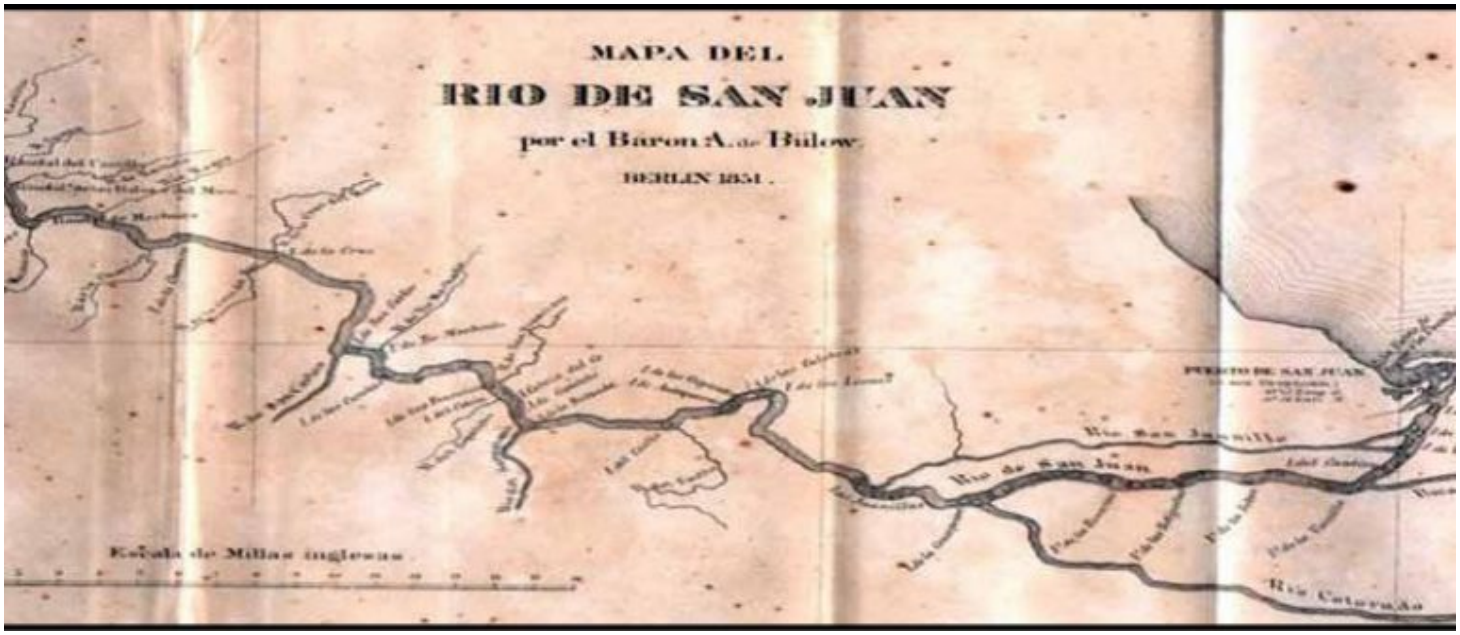


Case Comment: The International Court of Justice Orders Compensation for Environmental Damage

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By: James Hendry

The International Court of Justice for the first time assessed environmental damage in the context of a case brought by Costa Rica against Nicaragua for damage to protected wetlands in operations on territory that the Court determined belonged to Costa Rica. The Court had to determine the methodology that it would apply to assess environmental damages and its evidentiary requirements. The Court also determined the costs and expenses Costa Rica claimed were caused by the intrusion of Nicaragua.

On February 2, 2018, the International Court of Justice (ICJ) decided the issues of compensation in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*.[1] This is the first case decided by the Court on a claim for environmental damages: a category it held to be consistent with the principle of international law governing full reparation for the wrongful acts of a State on the territory of another.

Facts

Costa Rica sued Nicaragua in 2010 for Nicaraguan military incursion into Costa Rica and damage inflicted to its protected rainforests and wetlands in northern Isla Portillos on its mutual eastern boundary with Costa Rica. Nicaragua in turn sued Costa Rica for building a road along the San Juan River in this “disputed territory”. In its judgment of December 16, 2015, the Court held Costa Rica sovereign over the territory and that Nicaragua’s actions were unlawful and that it should compensate Costa Rica for damage done.[2] It made findings of fact relevant to the compensation issues.

In 2010, Nicaragua started dredging the San Juan River and dug a canal to Harbour Head Lagoon and sent some military units into the area. In 2011, the Court Ordered the parties to refrain from sending personnel into the territory, except for civilian personnel from Costa Rica to stop irreparable damage to the environment in consultation with the Secretariat of the 1971 Ramsar Convention protecting the wetlands and on notice to Nicaragua. In 2013, the Court found that Nicaragua dug two new canals in the area contrary to the 2011 Order and Ordered that Costa Rica might take measures in respect of these new canals to avoid irreparable environmental prejudice on consultation with the Secretariat. Costa Rica accordingly built a dyke across one of the canals.

Non-material damages

The Court held that its declaration that Costa Rica was sovereign over the “disputed territory” sufficiently satisfied the non-material damage resulting from this breach of territorial sovereignty.[3]

Material damages

Principles

The Court first held that it was a well-established principle of international law that compensation should “wipe out” the consequences of the illegal act and re-establish the situation that would probably have existed if the act had not been committed.[4] Compensation was not to be punitive or exemplary.[5] The claimant had to prove damages under the heads it claimed and prove that there was a sufficient direct and certain causal nexus between the wrongful act and the injury suffered, before the Court decided the amount of compensation due.[6] The Court held that damages had to be assessed flexibly: in some cases, the wrongdoer may be better able to prove the damage; in environmental cases, causation might be in issue: there might be concurrent causes and the state of the science concerning the causal link might be uncertain. The Court had to decide whether there was sufficient causal nexus on the evidence and facts. The absence of adequate evidence will not preclude an award if compensation can be determined in an otherwise principled way.[7]

Costa Rica claimed two categories of damage for unlawful activity: quantifiable environmental damages for two of the three canals and for its costs and expenses, including monitoring and remedying environmental damage.

Environmental damage

The Court held that Nicaragua owed compensation under international law for both environmental damage, that is, for the loss or impairment of the ability of the environment to provide goods and services prior to the environment's recovery, as well as expenses incurred by the State to restore or replace the damage to the environment. Payment for restoration recognizes that a State may have to take steps to restore an environment because natural recovery may not always return an environment to the state it was in before the unlawful damage.[8]

Methodology

Costa Rica advanced an "ecosystem services approach" that evaluates an environment based on the value of the goods and services it provides, either directly, such as the "direct use value" of timber, or indirectly, such as the "indirect use value" of flood prevention or gas regulation. To assess the value of the indirect uses, a value transfer approach should be used to assign a monetary value based on the value of similar ecosystems. The market value would prove the loss of direct use.

Nicaragua advanced an "ecosystem service replacement cost" approach based on the cost of preserving an equivalent area until the damaged area recovered.

The Court decided to use whatever elements of the proposed methodologies made sense because international law did not prescribe a specific methodology and damages had to be evaluated in the specific circumstances of each case according to the general principles it set out earlier.[9]

Damage to the environment

Both Parties agreed that the affected area was 6.19 hectares. It is interesting to see how the parties structured their claims and rebuttals in this novel case.

Costa Rica identified 22 categories of goods and services that could have been impaired, but claimed six: timber felled, raw materials (fibre and energy) removed, gas regulation and air quality regulation lost (such as carbon sequestration), natural hazards mitigation lost (such as coastal flooding, saline intrusion and coastal erosion), soil formation and erosion control lost (alleging Nicaragua used poorer natural replacement soil in the canals which was more susceptible to erosion) and biodiversity loss (habitat and nursery services), all based on a 50 year recovery period for the environment with a discount of 4% to recognize that the loss will decrease as the environment recovers. This claim amounted to about $3M.

Nicaragua argued that Costa Rica was entitled to $309 per hectare over 20 to 30 years with a discount of 4%. This amount was the amount Costa Rica paid landowners to protect the habitat. This totaled about $30K. Nicaragua further argued that benefits from gas regulation and air quality services would have been distributed around the world, entitling Costa Rica to only a small value of the alleged loss.

The Court held that Costa Rica could not prove the loss of ability to mitigate natural hazards due to ecological damage. The Court then found that, though Nicaragua removed about 10K cubic metres of soil, the canals have naturally refilled and are covered with vegetation. Though the replaced soil may

have been substandard, Costa Rica had not proved this led to poorer erosion control. However, the Court did find that the removal of trees and vegetation did affect the four other heads of damage, namely, loss of trees, other raw materials, gas and air quality regulation, and biodiversity and that the loss was causally connected to Nicaragua's operations.

The Court disagreed with elements of the Parties' methodology. The Court rejected the 50-year recovery projected by Costa Rica because there was no proven baseline and because various kinds of environment damage would recover at different rates.

The Court employed a wholistic approach to the valuation of damage to the ecosystem: it adopted an overall assessment of the impairment to the environment prior to recovery, rather than proceed by categories.[10] The Court reasoned that the removal of trees during the digging of the canals led to most of the damage to the environment. The wetlands in question are systems that must be treated as highly integrated. An overall valuation allows the Court to account for the wetlands' capacity for speedy regeneration from the various kinds of damage. However, even with an overall valuation, a single recovery period cannot be used for all goods and services. The Court used the four established categories of goods and services in its overall valuation. However, it did not accept Nicaragua's argument that the goods and services such as carbon sequestration would reach previous levels as fast as their methodology assumed.

In the end, the Court made an approximation (based in part on Nicaragua's "corrected analysis" undisclosed in the Reasons, except for the problems the Court found with it)[11] in the face of uncertain proof and held that Costa Rica was entitled only to about $120K for environmental damage and another $3K for restorative measures taken in the wetlands.

Costs and expenses

2010-2011

For the period prior to the withdrawal of the Nicaraguan military after the 2011 Order, Costa Rica claimed $80K costs and expenses between 2010 and April 2011: police flyovers, their salaries, two satellite images to prove Nicaragua's activities, a UN satellite report to verify these activities, salaries for National Coast Guard water transport to the area and salaries and costs of food, water and fuel for water and land transport of conservation personnel to the area.

The Court concluded that Costa Rica had proved the cost of fuel and maintenance services and the UN satellite report and that it was causally connected to Nicaragua's unlawful activities. The costs of some overflights were sufficiently connected to inspection and monitoring the damage for which Nicaragua was liable, excluding cargo transport and press flights. In contrast to the general estimates of environmental damages, the Court minutely examined the evidence of the overflights. The UN satellite report revealed the cutting of trees and the canals and so its cost was allowed. The Court followed the international practice of disallowing any salary expenses of Costa Rican public servants, unless they were temporary and extraordinary, such as overtime or supplementary personnel costs.[12]

The Court also rejected food and water and fuel costs for Costa Rican public servants: no proof connected it to monitoring unlawful environmental damage. The Court also rejected the claim for the satellite images because the evidence did not show that they were connected to verify unlawful activity.

Monitoring the 2011 and 2013 Orders

For the period after Nicaragua withdrew its military in 2011, Costa Rica claimed expenses related to the Orders' requirement to monitor their territory and to avoid irreparable prejudice to the wetlands.[13]

The Court held that some of these monitoring expenses were compensable because they were sufficiently related to Nicaragua's illegal activity.[14] The Court allowed some fuel and maintenance expenses for the aircraft used for overflight inspection of the damage in 2011 to discover the extent and means to mitigate the damage. It allowed the costs of satellite imagery from 2011 to 2015 but only for the 30 square kilometres of the damaged area and one third of the post-April 2011 UN satellite report because it bore on the detection and assessment of the damages.

Costa Rica also claimed the cost of building a dyke in consultation with the Ramsar Secretariat to prevent further damage to the wetlands and overflights afterwards to check its effectiveness.

The Court held the costs were compensable because Costa Rica showed the expenses were directly related to remedial action to prevent irreparable prejudice to the environment flowing from Nicaragua's unlawful activities. It allowed building materials for the dyke and the rental of a helicopter to get them to the wetland site, even though Costa Rica bought more supplies than it used. The Court held that it was entitled to be cautious. The Court also allowed the cost of monitoring overflights afterwards.

The Court held that no pre-judgment interest was payable in respect of environmental damage because it assessed the full impact of the unlawful activities on the environment prior to the recovery of the environment. It did allow pre-judgment interest on the costs and expenses incurred resulting from Nicaragua's unlawful activities from the date of the Court's judgment on liability as requested by Costa Rica. It also awarded post-judgment interest.

Conclusion

The *Costa Rica v. Nicaragua* case is a milestone in that it is the Court's first judgment assessing damages for environmental damage from an unlawful infringement of sovereignty.

The Court noted that there is no single accepted methodology for assessing environmental damage for compensation purposes. Costa Rica proposed an "ecosystem services approach" based on the value of a bundle of "goods and services" provided by the environment that was impaired by unlawful acts based on monetary values drawn from the market, where possible, or from studies of similar ecosystems.[15] It also claimed restoration costs. Nicaragua argued for an "ecosystem service replacement cost" for lost "goods and services" valued by referring to a price for preserving an equivalent ecosystem until the damaged area recovered. The Court chose a wholistic approach based

on an overall assessment of the impairment or loss of environmental goods and services prior to recovery, rather than deconstructing a bundle of goods and services. The Court held that an overall valuation allowed the recognition that it was the removal of trees and vegetation accounted for most of the significant environmental impairment. The Court found that Costa Rica had not proved a serious impairment to the area's ability to mitigate natural hazards such as erosion control. One of the major disagreements was the single period of assumed for recovery, which determined the length of time for which damages would be calculated: 50 years for Costa Rica and 20-30 for Nicaragua[16], both with a small discount each year accounting for gradual yearly recovery. The Court rejected the long assessment period sharply reducing damages payable by Nicaragua because it calculated that the environment would likely recover faster than assumed. The wholistic approach chosen by the Court complements its view that it did not really have the evidence that it needed to be more definitive.[17] This was the Court's first assessment. Presumably, the law will develop.

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1. *Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica*, (*Compensation*) February 2, 2018, General List No. 150 at http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN…. Paragraph references below are to this decision.
2. *Costa Rica v. Nicaragua (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)*, at http://www.icj-cij.org/files/case-related/150/150-20151216-JUD-01-00-EN….
3. Para. 27.
4. Para. 29.

5. Para. 31.
6. Para. 32.
7. Paras. 33-35.
8. Paras. 42-43.
9. Paras. 52-53.
10. Para. 78.
11. Paras. 84-86.
12. Para. 101.
13. Interestingly, the quotation from the 2011 Order reaffirmed in 2013 at para. 107 refers to the prevention of the development of criminal activity in the absence of police or security forces of either party.
14. Para. 112.
15. Para. 47.
16. Para. 58.
17. Para. 86.