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Summary

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Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) — Question of compensation

Summary of the Judgment of 2 February 2018

I. INTRODUCTORY OBSERVATIONS (PARAS. 21-28)

The Court observes at the outset that, pursuant to the findings set out in its Judgment of 16 December 2015, and in view of the lack of agreement between the Parties and of the request made by Costa Rica, it falls to the Court to determine the amount of compensation to be awarded to Costa Rica for material damage caused by Nicaragua's unlawful activities on Costa Rican territory. The Court begins by recalling certain facts on which it based that Judgment.

The issues before the Court have their origin in a territorial dispute between Costa Rica and Nicaragua over an area abutting the easternmost stretch of the Parties' mutual land boundary. This area, referred to by the Court as the "disputed territory", was defined by the Court in its Order on provisional measures of 8 March 2011 as follows: "the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the [2010] disputed caño, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon".

On 18 October 2010, Nicaragua started dredging the San Juan River in order to improve its navigability. It also carried out works in the northern part of Isla Portillos, excavating a channel ("caño") on the disputed territory between the San Juan River and Harbor Head Lagoon (hereinafter referred to as the "2010 caño"). Nicaragua also sent some military units and other personnel to that area.

In its Order on provisional measures of 22 November 2013, the Court found that two new caños had been constructed by Nicaragua in the disputed territory (hereinafter referred to as the "2013 caños"). Nicaragua acknowledged that the excavation of the caños represented an infringement of its obligations under the 2011 Order.

The Court further observes that, following its 2013 Order, after consultation with the Secretariat of the Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971 (hereinafter the "Ramsar Convention"), Costa Rica constructed, during a short period in late March and early April 2015, a dyke across the eastern of the two 2013 caños (hereinafter referred to as the "2013 eastern caño").

In its Judgment of 16 December 2015, the Court found that sovereignty over the "disputed territory" belonged to Costa Rica and that consequently Nicaragua's activities, including the

excavation of three caños and the establishment of a military presence in that territory, were in breach of Costa Rica's sovereignty. The Court held that Nicaragua had therefore incurred the obligation to make reparation for the damage caused by its unlawful activities and that Costa Rica was entitled to receive compensation for material damage caused by those breaches of obligations by Nicaragua that had been ascertained by the Court. The present Judgment determines the amount of compensation due to Costa Rica.

II. LEGAL PRINCIPLES APPLICABLE TO THE COMPENSATION DUE TO COSTA RICA (PARAS. 29-38)

Before turning to the consideration of the issue of compensation due in the present case, the Court states some of the principles relevant to its determination. It notes that it is a well-established principle of international law that "the breach of an engagement involves an obligation to make reparation in an adequate form". The Court further observes that the obligation to make full reparation for the damage caused by a wrongful act has been recognized by the Court in a number of cases. The Court has also held that 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.

The Court considers that, in order to award compensation, it has to ascertain whether, and to what extent, each of the various heads of damage claimed by the Applicant can be established and whether they are the consequence of wrongful conduct by the Respondent, by determining "whether there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant". Finally, the Court has to determine the amount of compensation due.

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. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court.

In 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 for that damage.

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The Court notes that in the present case, Costa Rica claims compensation for quantifiable environmental damage and for costs and expenses incurred as the result of Nicaragua's unlawful activities, including expenses incurred to monitor or remedy the environmental damage caused.

III. COMPENSATION FOR ENVIRONMENTAL DAMAGE (PARAS. 39-87)

1. The compensability of environmental damage (paras. 39-43)

The Court observes that it has not previously adjudicated a claim for compensation for environmental damage. However, it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage.

The Court is therefore of the view that damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment.

The Court adds that 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.

2. Methodology for the valuation of environmental damage (paras. 44-53)

The Court gives an overview of the methodology advanced by each Party for the valuation of environmental damage in the present case. The methodology that Costa Rica considers most appropriate, which it terms the “ecosystem services approach”, follows the recommendations of an expert report commissioned from Fundación Neotrópica, a Costa Rican non-governmental organization. Costa Rica claims that the valuation of environmental damage pursuant to an ecosystem services approach is well recognized internationally, up-to-date, and is also appropriate for the wetland protected under the Ramsar Convention that Nicaragua has harmed. 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.

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.

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The Court acknowledges that the valuation methods proposed by the Parties are sometimes used for environmental damage valuation in the practice of national and international bodies, and are not therefore devoid of relevance to the task at hand. However, it points out that 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 states that it 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. This approach is dictated by two factors: first, international law does not prescribe any specific method of valuation

for the purposes of compensation for environmental damage; secondly, it is necessary, in the view of the Court, to take into account the specific circumstances and characteristics of each case.

In determining the compensation due for environmental damage, the Court explains that it 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.

3. Determination of the extent of the damage caused to the environment and of the amount of compensation due (paras. 54-87)

The Court turns to the determination of the extent of the damage caused to the environment and of the amount of compensation due. It notes that Costa Rica claims compensation (i) for the impairment or loss of environmental goods and services as a result of Nicaragua's activities and (ii) for restoration costs, comprising the cost of replacement soil in the two caños and costs for the restoration of the wetland.

The Court observes that, although Costa Rica identifies 22 categories of goods and services that could have been impaired or lost as a result of Nicaragua's wrongful actions, it claims compensation in respect of only six of them: standing timber; other raw materials (fibre and energy); gas regulation and air quality; natural hazards mitigation; soil formation and erosion control; and biodiversity, in terms of habitat and nursery.

Before assigning a monetary value to the damage to the environmental goods and services caused by Nicaragua's wrongful activities, the Court announces that it will determine the existence and extent of such damage, and whether there exists a direct and certain causal link between such damage and Nicaragua's activities. It will then establish the compensation due.

The Court is of the view that Costa Rica has not demonstrated that the affected area, due to a change in its ecological character, has lost its ability to mitigate natural hazards or that such services have been impaired. As regards soil formation and erosion control, Nicaragua does not dispute that it removed approximately 9,500 cubic metres of soil from the sites of the 2010 caño and the 2013 eastern caño. However, the evidence before the Court establishes that both caños have subsequently refilled with soil and there has been substantial revegetation. Accordingly, the Court finds that Costa Rica's claim for the cost of replacing all of the soil removed by Nicaragua cannot be accepted. There is some evidence that the soil which was removed by Nicaragua was of a higher quality than that which has now refilled the two caños but Costa Rica has not established that this difference has affected erosion control and the evidence before the Court regarding the quality of the two types of soil is not sufficient to enable the Court to determine any loss which Costa Rica might have suffered.

The Court then examines the four other categories of environmental goods and services for which Costa Rica claims compensation (namely, trees, other raw materials, gas regulation and air quality services, and biodiversity). The Court finds that the evidence before it indicates that, in excavating the 2010 caño and the 2013 eastern caño, Nicaragua removed close to 300 trees and cleared 6.19 hectares of vegetation. The Court considers that these activities have significantly affected the ability of the two impacted sites to provide the above-mentioned environmental goods and services. It is therefore the view of the Court that impairment or loss of these four categories of environmental goods and services has occurred and is a direct consequence of Nicaragua's activities.

With regard to the valuation of the damage caused to environmental goods and services, the Court states that it cannot accept the valuations proposed by the Parties. In respect of the valuation proposed by Costa Rica, the Court has doubts regarding the reliability of certain aspects of its methodology. Costa Rica assumes, for instance, that a 50-year period represents the time necessary

for recovery of the ecosystem to the state prior to the damage caused. However, in the first instance, there is no clear evidence before the Court of the baseline condition of the totality of the environmental goods and services that existed in the area concerned prior to Nicaragua's activities. Secondly, the Court observes that different components of the ecosystem require different periods of recovery.

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 value of the impairment or loss of environmental goods and services prior to recovery rather than attributing values to specific categories of environmental goods and services, and estimating recovery periods for each of them.

First, the Court observes, in relation to the environmental goods and services that have been impaired or lost, that the most significant damage to the area, from which other harms to the environment arise, is the removal of trees by Nicaragua during the excavation of the *caños*. An overall valuation can account for the correlation between the removal of the trees and the harm caused to other environmental goods and services. Secondly, an overall valuation approach is dictated by the specific characteristics of the area affected 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. Thirdly, such an overall valuation will allow the Court to take into account the capacity of the damaged area for natural regeneration.

These considerations also lead the Court to conclude, with regard to the length of the period of recovery, that a single recovery period cannot be established for all of the affected environmental goods and services.

In its overall valuation, the Court takes into account the above-mentioned categories of environmental goods and services the impairment or loss of which has been established.

The Court recalls that, in addition to the two valuations, respectively submitted by Costa Rica and Nicaragua, Nicaragua also provides an alternative valuation of damage, calculated on the basis of the four categories of environmental goods and services. This valuation adopts Costa Rica's ecosystems services approach but makes significant adjustments to it. Nicaragua refers to this valuation as a "corrected analysis". The Court considers, however, that Nicaragua's "corrected analysis" underestimates the value to be assigned to certain categories of goods and services prior to recovery.

The Court further recalls that the absence of certainty as to the extent of damage does not necessarily preclude it from awarding an amount that it considers approximately to reflect the value of the impairment or loss of environmental goods and services. In this case, the Court, while retaining some of the elements of the "corrected analysis", considers it reasonable that, for the purposes of its overall valuation, an adjustment be made to the total amount in the "corrected analysis" to account for its shortcomings. The Court therefore awards to Costa Rica 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 recovery.

In relation to restoration, the Court rejects Costa Rica's claim of US\$54,925.69 for replacement soil for the reasons given above. The Court, however, considers that the payment of compensation for restoration measures in respect of the wetland is justified in view of the damage caused by Nicaragua's activities. Costa Rica claims compensation in the sum of US\$2,708.39 for this purpose. The Court upholds this claim.

IV. COMPENSATION CLAIMED BY COSTA RICA FOR COSTS AND EXPENSES
(PARAS. 88-147)

The Court notes that, in addition to its claims of compensation for environmental damage, Costa Rica requested that it be awarded compensation for costs and expenses incurred as a result of Nicaragua's unlawful activities.

1. Costs and expenses incurred in relation to Nicaragua's unlawful activities in the northern part of Isla Portillos between October 2010 and April 2011
(paras. 90-106)

The Court turns to the assessment of the compensation due for costs and expenses incurred by Costa Rica as a consequence of Nicaragua's presence and unlawful activities in the northern part of Isla Portillos between October 2010 and April 2011. Upon examination of all the relevant evidence and documents, the Court considers that Costa Rica has, with reference to two heads of expenses provided adequate evidence demonstrating that some of the costs incurred have a sufficiently direct and certain causal nexus with the internationally wrongful conduct of Nicaragua.

The first head of expenses, which the Court finds compensable in part, relates to fuel and maintenance services for police aircraft used to reach and overfly the northern part of Isla Portillos. It appears from the evidence submitted to the Court that the Costa Rican Air Surveillance Service carried out several overflights of the relevant area in the period in question. The Court states that it is satisfied that some of these flights were undertaken in order to ensure effective inspection of the northern part of Isla Portillos, and thus considers that these ancillary costs are directly connected to the monitoring of that area that was made necessary as a result of Nicaragua's wrongful conduct.

Turning to the question of quantification, the Court observes that Costa Rica claims US\$37,585.60 "for fuel and maintenance services for the police aircraft used" to reach and to overfly the "disputed territory" on various days in October 2010 and November 2010. In this regard, Costa Rica has presented evidence in the form of relevant flight logs, and an official communication dated 2 March 2016, totalling US\$37,585.60. The Court notes that Costa Rica calculated the expenses under this head on the basis of the operating costs for the hourly use of each aircraft deployed; these operating costs included expenses for "fuel", "overhaul", "insurance" and "miscellaneous". With regard to the "insurance" costs, the Court considers that Costa Rica has failed to demonstrate that it incurred any additional expense as a result of the specific missions of the police aircraft over the northern part of Isla Portillos. This insurance expense is thus not compensable. As to the "miscellaneous" costs, Costa Rica has failed to specify the nature of this expense. The Court therefore considers that these miscellaneous expenses are not compensable.

The Court also excludes the cost of flights to transport cargo or members of the press, the cost of flights with a destination other than the northern part of Isla Portillos, as well as the cost of flights for which, in the relevant flight logs, no indication of the persons on board has been given. The Court finds that Costa Rica has failed to demonstrate why these missions were necessary to respond to Nicaragua's unlawful activities and that it has therefore not established the requisite causal nexus between Nicaragua's unlawful activities and the expenses relating to these flights.

The Court also considers it necessary to recalculate the compensable expenses based on the information provided in the above-mentioned official communication of 2 March 2016 and in the flight logs, by reference to the number and duration of the flights actually conducted in October and November 2010 in connection with the inspection of the northern part of Isla Portillos, and only taking into account the costs of "fuel" and "overhaul". The Court accordingly finds that, under this head of expenses, Costa Rica is entitled to compensation in the amount of US\$4,177.30 for October 2010, and US\$1,665.90 for November 2010, totalling US\$5,843.20.

The second head of expenses that the Court finds compensable relates to Costa Rica's claim for the cost of obtaining a report from UNITAR/UNOSAT dated 4 January 2011. The evidence shows that Costa Rica incurred this expense in order to detect and assess the environmental impact of Nicaragua's presence and unlawful activities in Costa Rican territory. The Court has reviewed this report and is satisfied that the analysis given therein provides a technical evaluation of the damage that has occurred as a consequence of Nicaragua's unlawful activities in the northern part of Isla Portillos.

Turning to the question of quantification, the Court notes that Costa Rica has presented a numbered and dated invoice from UNITAR/UNOSAT for US\$15,804, with an annexed cost breakdown. The Court considers that there is a sufficiently direct and certain causal nexus between Nicaragua's activities and the cost of commissioning the report. The Court therefore finds that Costa Rica is entitled to full compensation for this expense.

The Court then turns to those heads of expenses with reference to which it considers that Costa Rica has failed to meet its burden of proof.

The Court notes that three heads of expenses (incurred between October 2010 and April 2011) for which Costa Rica seeks compensation relate to salaries of Costa Rican personnel allegedly involved in monitoring activities in the northern part of Isla Portillos. The total amount claimed by Costa Rica for this category of expense is US\$9,135.16. In this regard, the Court considers that salaries of government officials dealing with a situation resulting from an internationally wrongful act are compensable only if they are temporary and extraordinary in nature. In other words, a State is not, in general, entitled to compensation for the regular salaries of its officials. It may, however, be entitled to compensation for salaries in certain cases, for example, where it has been obliged to pay its officials over the regular wage or where it has had to hire supplementary personnel, whose wages were not originally envisaged in its budget. The Court notes that this approach is in line with international practice.

The Court observes that, in the present proceedings, Costa Rica has not produced evidence that, between October 2010 and April 2011, it incurred any extraordinary expenses in terms of the payment of salaries of government officials. The Court therefore finds that Costa Rica is not entitled to compensation for the salaries of personnel employed by the Air Surveillance Service, the National Coast Guard Service and the Tortuguero Conservation Area (referred to by the Spanish acronym ACTo).

The Court further observes that three other heads of expenses are closely related to the functions of those personnel employed by ACTo (to conduct environmental monitoring missions in or near the northern part of Isla Portillos), for which Costa Rica claims costs totalling US\$801.69 incurred in connection with food and water supplies (US\$446.12), fuel for fluvial transportation (US\$92) and fuel for land transportation (US\$263.57). Having reviewed the evidence put before it, the Court notes that, in terms of costs related to land transportation, and to food and water, no specific information is provided to show in what way these expenses were connected to Costa Rica's monitoring activities undertaken as a direct consequence of Nicaragua's unlawful activities in the northern part of Isla Portillos in the period between October 2010 and April 2011. Moreover, the evidence does not provide any information whatsoever regarding costs incurred in connection with fluvial transportation.

In light of the above, the Court considers that Costa Rica has failed to provide sufficient evidence to support its claims for the expenses under these three heads.

The Court finally turns to Costa Rica's claim that it be compensated in the amount of US\$17,600 for the cost of purchasing two satellite images, which, in its view, were necessary in order to verify Nicaragua's presence and unlawful activities in the northern part of Isla Portillos. Having reviewed the evidence adduced by Costa Rica in support of this claim — in the form of two

invoices — the Court notes that neither of these invoices provides any indication as to the area covered by the two satellite images. It follows that the Court cannot conclude, on the basis of these documents, that these images related to the northern part of Isla Portillos, and that they were used for the verification of Nicaragua's presence and unlawful activities in that area. The Court therefore finds that Costa Rica has not provided sufficient evidence in support of its claim for compensation under this head of expenses.

In conclusion, the Court finds that Costa Rica is entitled to compensation in the amount of US\$21,647.20 for the expenses it incurred in relation to Nicaragua's presence and unlawful activities in the northern part of Isla Portillos between October 2010 and April 2011. This figure is made up of US\$5,843.20 for the cost of fuel and maintenance services for police aircraft used to reach and to overfly the northern part of Isla Portillos, and US\$15,804 for the cost of obtaining a report from UNITAR/UNOSAT to verify Nicaragua's unlawful activities in that area.

2. Costs and expenses incurred in monitoring the northern part of Isla Portillos following the withdrawal of Nicaragua's military personnel and in implementing the Court's 2011 and 2013 Orders on provisional measures (paras. 107-131)

With regard to compensation for monitoring activities claimed to have been carried out in implementation of the Court's 2011 and 2013 Orders, the Court considers that Costa Rica has, with reference to three heads of expenses, provided adequate evidence demonstrating that some of these expenses have a sufficiently direct and certain causal nexus with the internationally wrongful conduct of Nicaragua identified by the Court in its 2015 Judgment.

First, the Court finds partially compensable Costa Rica's expenses for its two-day inspection of the northern part of Isla Portillos on 5 and 6 April 2011, both in co-ordination and together with the Secretariat of the Ramsar Convention. This mission was carried out for the purposes of making an assessment of the environmental situation in the area and of identifying actions to prevent further irreparable damage in that part of the wetland as a consequence of Nicaragua's unlawful activities. Based on the technical report produced by the officials of the Secretariat of the Ramsar Convention, it is the view of the Court that the inspection was directly connected to the monitoring of the northern part of Isla Portillos that was made necessary as a result of Nicaragua's wrongful conduct.

Turning to the question of quantification, the Court notes that Costa Rica claims US\$20,110.84 "for fuel and maintenance services on the police aircrafts used" and US\$1,017.71 "for the salaries of air surveillance service personnel", based on relevant flight logs and an official communication dated 2 March 2016 from the Administrative Office of the Air Surveillance Service of the Department of Air Operations of the Ministry of Public Security. The Court considers it necessary to evaluate the compensable expenses by reference to the information provided in the above-mentioned official communication and in the flight logs, and only taking into account the costs of "fuel" and "overhaul". The Court therefore finds that, under this head of expenses, Costa Rica is entitled to compensation in the amount of US\$3,897.40. With regard to Costa Rica's claim for salaries and related allowances for Air Surveillance Service personnel involved in aircraft missions, the Court finds that Costa Rica is not entitled to claim the cost of salaries for the April 2011 inspection mission. As noted earlier, a State cannot recover salaries for government officials that it would have paid regardless of any unlawful activity committed on its territory by another State.

Secondly, the Court finds partially compensable Costa Rica's claim for the purchase, in the period running from September 2011 to October 2015, of satellite images effectively to monitor and verify the impact of Nicaragua's unlawful activities. To the extent that these satellite images cover the northern part of Isla Portillos, the Court considers that there is a sufficiently direct and certain causal nexus between the internationally wrongful conduct of Nicaragua identified by the

Court in its Judgment on the merits and the head of expenses for which Costa Rica seeks compensation.

Turning to the question of quantification, the Court notes that Costa Rica has presented evidence in the form of numbered and dated invoices and delivery reports corresponding to the purchase of satellite images from INGENOVACIONES GEOGRÁFICAS S.A. and from GeoSolutions Consulting, Inc. S.A. Under this head of expenses, Costa Rica claims a total of US\$160,704. Having carefully reviewed these invoices and delivery reports, the Court considers that they can be divided into three sets, by reference to the area covered by the satellite images. The first set relates to the satellite images that cover the northern part of Isla Portillos; the second set relates to the satellite images that cover the general area of the northern border with Nicaragua; and the third set provides no indication of the area covered by the satellite images.

The Court considers that, as the satellite images contained in the first and second sets of invoices all cover the northern part of Isla Portillos, their purchase is, in principle, compensable. However, the Court notes that most of these satellite images cover an area that extends beyond the northern part of Isla Portillos, often covering an area of around 200 square kilometres. Moreover, these images are charged by unit price per square kilometre, mostly at the rate of US\$28. The Court finds that it would not be reasonable to award compensation to Costa Rica for these images in full. Given the size of the northern part of Isla Portillos, the Court is of the view that a coverage area of 30 square kilometres was sufficient for Costa Rica effectively to monitor and verify Nicaragua's unlawful activities. The Court therefore awards Costa Rica, for each of the invoices relating to satellite images covering the northern part of Isla Portillos, compensation for one satellite image covering an area of 30 square kilometres at a unit price of US\$28 per square kilometre.

With regard to the other set of invoices, which provides no indication of the area covered by the satellite images, the Court considers that Costa Rica has not established the necessary causal nexus between Nicaragua's unlawful activities and the purchase of the satellite images in question.

Consequently, the Court finds that Costa Rica is entitled to compensation in the amount of US\$15,960 for the expenses incurred in purchasing the satellite images.

Thirdly, the Court finds partially compensable Costa Rica's claim for the cost of obtaining a report from UNITAR/UNOSAT dated 8 November 2011. Costa Rica incurred this expense in order to detect and assess the environmental impact of Nicaragua's presence and unlawful activities in Costa Rican territory. The Court has reviewed this UNITAR/UNOSAT report (which consists of three sections) and observes that the analysis given in Section 2, entitled "Updated status of the new channel along [the] Río San Juan (map 4)", provides a technical evaluation of the damage that occurred as a consequence of Nicaragua's unlawful activities in the northern part of Isla Portillos. The Court concludes that Costa Rica has proven that there exists a sufficiently direct and certain causal nexus between the internationally wrongful conduct of Nicaragua identified by the Court in its Judgment on the merits and the purchase of the UNITAR/UNOSAT report.

Turning to the question of quantification, the Court notes that the three sections of the UNITAR/UNOSAT report are separable (in the sense that each section is self-standing) and only the content of Section 2 of the report is directly relevant. The Court thus considers that the total amount of compensation should be limited to one third of the total cost of the report. On that basis, the Court finds that Costa Rica is entitled to compensation under this head of expenses in the amount of US\$9,113.

With regard to the other heads of expenses for compensation, the Court observes that Costa Rica's claims can be separated into three categories: (i) those claims which relate to two new police stations in Laguna Los Portillos and Laguna de Agua Dulce, (ii) those claims which relate to a biological station at Laguna Los Portillos, and (iii) those claims which relate to the salaries of personnel involved in monitoring activities, as well as the ancillary costs of supplying food and

water, and the costs of fuel for transportation of ACTo personnel. The Court finds that none of the costs incurred in connection with the equipment and operation of the police stations are compensable because the purpose of the said stations was to provide security in the border area, and not in particular to monitor Nicaragua's unlawful activities in the northern part of Isla Portillos. Moreover, Costa Rica has not presented any evidence to demonstrate that the equipment purchased and the operational costs were sufficiently linked with the implementation of the provisional measures ordered by the Court. As to the costs incurred in connection with the maintenance of the biological station, the Court similarly finds that none of the expenses incurred under this head are compensable because there was no sufficiently direct causal link between the maintenance of this station and Nicaragua's wrongful conduct in the northern part of Isla Portillos. With reference to the third category, as already explained earlier in the context of similar claims for compensation made by Costa Rica, the Court does not accept that a State is entitled to compensation for the regular salaries of its officials. The Court also considers that Costa Rica has not provided any specific information to show in what way the expenses claimed for food and water, and for fuel for transportation for ACTo personnel, were connected with Costa Rica's monitoring of the northern part of Isla Portillos following the withdrawal of Nicaragua's military personnel.

In conclusion, the Court finds that Costa Rica is entitled to compensation in the amount of US\$28,970.40 for the expenses it incurred in relation to the monitoring of the northern part of Isla Portillos following the withdrawal of Nicaragua's military personnel and in implementing the Court's 2011 and 2013 Orders on provisional measures. This figure is made up of US\$3,897.40 for the cost of overflights performed by the Air Surveillance Service on 5 and 6 April 2011, US\$15,960 for the purchase, in the period running from September 2011 to October 2015, of satellite images of the northern part of Isla Portillos, and US\$9,113 for the cost of obtaining a report from UNITAR/UNOSAT providing, *inter alia*, a technical evaluation of the damage that occurred as a consequence of Nicaragua's unlawful activities in the northern part of Isla Portillos.

3. Costs and expenses incurred in preventing irreparable prejudice to the environment (the construction of a dyke and assessment of its effectiveness) (paras. 132-146)

The Court recalls that in its Order of 22 November 2013 on the request presented by Costa Rica for the indication of new provisional measures, it indicated, in particular, that

“[f]ollowing consultation with the Secretariat of the Ramsar Convention and after giving Nicaragua prior notice, Costa Rica may take appropriate measures related to the two new caños, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory”.

The Court begins by setting out some of the factual background. From 10 to 13 March 2013, the Secretariat of the Ramsar Convention carried out an onsite visit to the northern part of Isla Portillos to assess the damage caused by Nicaragua's constructions of the two new caños. Following this site visit, in August 2014, the Secretariat produced a report (Ramsar Advisory Mission No. 77) with recommendations on mitigation measures focused on the 2013 eastern caño. It requested that Costa Rica submit an implementation plan and recommended that it commence a monitoring programme. In accordance with that request, Costa Rica's Ministry of the Environment and Energy formulated an implementation plan, dated 12 August 2014. That plan set out in detail the proposed measures, consisting of the construction of a dyke to ensure that the waters of the San Juan River were not diverted through the 2013 eastern caño.

Costa Rica proposed to begin works in September 2014 and requested that Nicaragua grant it access to the San Juan River to facilitate the undertaking. After no agreement had been reached between the Parties, Costa Rica made arrangements to contract a private civilian helicopter for the purposes of the construction works. According to Costa Rica, this was necessary because its Air Surveillance Service did not possess any type of aircraft with the capacity to carry out such works.

Costa Rica states that its police and ACTo personnel provided ground support for the operation. The works to construct the dyke were carried out over a period of seven days, from 31 March to 6 April 2015. Costa Rican personnel charged with the protection of the environment monitored the works by means of periodic inspections. Costa Rica also carried out overflights of the northern part of Isla Portillos in June, July and October 2015, in order to assess the effectiveness of the works that had been completed to construct the dyke.

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The Court finds that the costs incurred by Costa Rica in connection with the construction in 2015 of a dyke across the 2013 eastern caño are partially compensable. In its view, Costa Rica has provided evidence that it incurred expenses that were directly related to the remedial action it undertook in order to prevent irreparable prejudice to the environment of the northern part of Isla Portillos following Nicaragua's unlawful activities. In this regard, Costa Rica advances three heads of expenses: (i) overflight costs prior to the construction of the dyke; (ii) costs connected with the actual construction of the dyke; and (iii) overflight costs subsequent to the construction of the dyke.

The Court notes that, with reference to the first head of expenses, Costa Rica states that on 25 July 2014, it hired a private civilian helicopter to conduct a site visit to the northern part of Isla Portillos, in order to assess the situation of the two 2013 caños for the purposes of determining the measures required to prevent irreparable prejudice to the environment of that area. According to Costa Rica, the cost of the flight for this mission amounted to US\$6,183. The invoice submitted by Costa Rica for the cost of this flight indicates that the purpose of the flight was "for transportation of staff on observation and logistics flight to Isla Calero". The flight description also shows that this flight was nowhere near the construction site. In light of this evidence, the Court considers that Costa Rica has not proven that the 2014 helicopter mission was directly connected with the intended construction of the dyke across the 2013 eastern caño. In the Court's view, the expenses for this flight are thus not compensable.

The Court further notes that, with reference to the second head of expenses, Costa Rica refers to the costs incurred in terms of the purchase of construction materials and the hiring of a private civilian helicopter to transport personnel and materials required to construct the dyke across the 2013 eastern caño. Costa Rica has divided these costs under the second head of expenses into two categories, namely, helicopter flight hours (US\$131,067.50) and "purchase of billed supplies" (US\$26,378.77). With regard to the first category, the Court states that it is satisfied that the evidence adduced fully supports Costa Rica's claim. In so far as the second category is concerned, the Court is of the view that the purchase of construction materials should, in principle, be fully compensated. With regard to the surplus construction materials, the Court considers that, given the difficulty of access to the construction site of the dyke, located in the wetlands, it was justified for Costa Rica to adopt a cautious approach and to ensure, at the start, that the construction materials it purchased and transported were sufficient for the completion of the work. The costs incurred for the purchase of construction materials which turned out to be more than what was actually used are, in the present circumstances, compensable. In the Court's view, what matters, for the consideration of the claim, is reasonableness. The Court does not consider the amount of materials purchased by Costa Rica unreasonable or disproportionate to the actual needs of the construction work. Thus the Court, after recalculation, finds that Costa Rica should be compensated in the total amount of US\$152,372.81 for the costs of the construction of the dyke (made up of the cost for the helicopter flight hours in the amount of US\$131,067.50 and the purchase of billed supplies in the amount of US\$21,305.31).

Finally, with reference to the third head of expenses, the Court recalls that Costa Rica is claiming expenses in connection with overflights made on 9 June, 8 July and 3 October 2015 for the purposes of monitoring the effectiveness of the completed dyke. The Court considers that these expenses are compensable as there is a sufficiently direct causal nexus between the damage caused to the environment of the northern part of Isla Portillos, as a result of Nicaragua's unlawful activities, and the overflight missions undertaken by Costa Rica to monitor the effectiveness of the newly constructed dyke. In the Court's opinion, Costa Rica has also discharged its burden of proof in terms of providing evidence of the cost of flight hours incurred in respect of the hired private civilian helicopter used to access the northern part of Isla Portillos. Costa Rica has submitted three invoices, accompanied by flight data which indicated that the flight route took the aircraft over the dyke. In the Court's view, it is evident that the helicopter hired for these missions had to overfly other parts of Costa Rican territory in order to reach the construction site of the dyke. Moreover, the Court observes that there is nothing on the record to show that these overflights were not en route to the dyke area, nor that the helicopter missions were unrelated to the purpose of monitoring the effectiveness of the dyke. The Court finds that the total expense incurred by Costa Rica under this head of expenses, totalling US\$33,041.75, is therefore compensable.

In conclusion, the Court finds that Costa Rica is entitled to compensation in the amount of US\$185,414.56 for the expenses it incurred in connection with the construction in 2015 of a dyke across the 2013 eastern caño. This figure is made up of US\$152,372.81 for the costs of the construction of the dyke, and US\$33,041.75 for the monitoring overflights made once the dyke was completed.

4. Conclusion (para. 147)

It follows from the Court's analysis of the compensable costs and expenses incurred by Costa Rica as a direct consequence of Nicaragua's unlawful activities in the northern part of Isla Portillos, that Costa Rica is entitled to total compensation in the amount of US\$236,032.16.

V. COSTA RICA'S CLAIM FOR PRE-JUDGMENT AND POST-JUDGMENT INTEREST (PARAS. 148-155)

The Court notes that, according to Costa Rica, in view of the extent of damage suffered, full reparation cannot be achieved without payment of interest. Costa Rica claims both pre-judgment and post-judgment interest.

The Court recalls that in the practice of international courts and tribunals, pre-judgment interest may be awarded if full reparation for injury caused by an internationally wrongful act so requires. Nevertheless, it states that interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case.

The Court observes that, in the present case, the compensation to be awarded to Costa Rica is divided into two parts: compensation for environmental damage and compensation for costs and expenses incurred by Costa Rica in connection with Nicaragua's unlawful activities. The Court considers that Costa Rica is not entitled to pre-judgment interest on the amount of compensation for environmental damage; in determining the overall valuation of environmental damage, the Court has taken full account of the impairment or loss of environmental goods and services in the period prior to recovery.

With regard to the costs and expenses incurred by Costa Rica as a result of Nicaragua's unlawful activities, the Court notes that most of such costs and expenses were incurred in order to take measures for preventing further harm. The Court awards Costa Rica pre-judgment interest on the costs and expenses found compensable, accruing, as requested by Costa Rica, from

16 December 2015, the date on which the Judgment on the merits was delivered, until 2 February 2018, the date of delivery of the present Judgment. The annual interest rate is fixed at 4 per cent. The amount of interest is US\$20,150.04.

With regard to Costa Rica's claim for post-judgment interest, the Court recalls that in the case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), the Court awarded post-judgment interest, observing that "the award of post-judgment interest is consistent with the practice of other international courts and tribunals". The Court sees no reason in the current case to adopt a different approach. Thus, although it has every reason to expect timely payment by Nicaragua, the Court decides that, in the event of any delay in payment, post-judgment interest shall accrue on the principal sum. This interest shall be paid at an annual rate of 6 per cent.

VI. TOTAL SUM AWARDED (PARA. 156)

The Court concludes that the total amount of compensation to be awarded to Costa Rica is US\$378,890.59 to be paid by Nicaragua by 2 April 2018. This amount includes the principal sum of US\$358,740.55 and pre-judgment interest on the compensable costs and expenses in the amount of US\$20,150.04. It adds that, should payment be delayed, post-judgment interest on the total amount will accrue as from 3 April 2018.

VII. OPERATIVE PART (PARA. 157)

For these reasons,

THE COURT,

(1) Fixes the following amounts for the compensation due from the Republic of Nicaragua to the Republic of Costa Rica for environmental damage caused by the Republic of Nicaragua's unlawful activities on Costa Rican territory:

(a) By fifteen votes to one,

US\$120,000 for the impairment or loss of environmental goods and services;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judge ad hoc Guillaume;

AGAINST: Judge ad hoc Dugard;

(b) By fifteen votes to one,

US\$2,708.39 for the restoration costs claimed by the Republic of Costa Rica in respect of the internationally protected wetland;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judges ad hoc Guillaume, Dugard;

AGAINST: Judge Donoghue;

(2) Unanimously,

Fixes the amount of compensation due from the Republic of Nicaragua to the Republic of Costa Rica for costs and expenses incurred by Costa Rica as a direct consequence of the Republic of Nicaragua's unlawful activities on Costa Rican territory at US\$236,032.16;

(3) Unanimously,

Decides that, for the period from 16 December 2015 to 2 February 2018, the Republic of Nicaragua shall pay interest at an annual rate of 4 per cent on the amount of compensation due to the Republic of Costa Rica under point 2 above, in the sum of US\$20,150.04;

(4) Unanimously,

Decides that the total amount due under points 1, 2 and 3 above shall be paid by 2 April 2018 and that, in case it has not been paid by that date, interest on the total amount due from the Republic of Nicaragua to the Republic of Costa Rica will accrue as from 3 April 2018 at an annual rate of 6 per cent.

Judges CANÇADO TRINDADE, DONOGHUE and BHANDARI append separate opinions to the Judgment of the Court; Judge GEVORGIAN appends a declaration to the Judgment of the Court; Judge ad hoc GUILLAUME appends a declaration to the Judgment of the Court; Judge ad hoc DUGARD appends a dissenting opinion to the Judgment of the Court.

Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 13 parts, Judge Cançado Trindade begins by explaining that, although he has concurred with his vote to the adoption of the present Judgment ordering compensation, there are related issues underlying the present decision of the ICJ but left out of its reasoning; his outlook of reparations for environmental damages being much wider, he feels obliged to dwell upon, and to leave on the records, the foundations of his own personal position thereon. After all, this is the first case ever in which the ICJ is called upon to pronounce on reparations for environmental damages.

2. Those issues, to start with, are: a) the principle neminem laedere and the duty of reparation for damages; b) the indissoluble whole of breach and prompt reparation; c) duty of reparation as a fundamental, rather than “secondary”, obligation; d) reparations in the thinking of the “founding fathers” of the law of nations: their perennial legacy; e) reparation in all its forms (compensation and others); f) reparation for environmental damages, the intertemporal dimension, and obligations of doing in regimes of protection.

3. And the remaining issues, all in logical sequence, are: g) the centrality of restitutio and the insufficiencies of compensation; h) the incidence of considerations of equity and jurisprudential cross-fertilization; i) environmental damages and the necessity and importance of restoration; and j) restoration beyond simply compensation: the need for non-pecuniary reparations. He at last proceeds to his final considerations, and to an epilogue containing a recapitulation of all points examined herein.

4. Judge Cançado Trindade begins by pondering that the Court’s reasoning should have been much wider, going beyond compensation, encompassing also the consideration of restoration measures, and distinct forms of reparation. In his view, “[t]he Court should have taken another step forward in the present domain of reparations, as it did in its previous Judgment on reparations (of 19.06.2012) in the case of A.S. Diallo (Guinea versus D.R. Congo)”; in both cases, - he added, - reparations are “to be considered within the framework of international regimes of protection: in the A.S. Diallo case, human rights protection, and in the present case, environmental protection” (paras. 2-3).

5. He then observes, in recalling the Court’s jurisprudence constante, that, according to a well-established principle of international law, reparation must cease all consequences of the unlawful act and re-establish the situation which existed prior to the occurrence of the breach. Recourse is to be made, first, to restitutio in integrum, - he proceeds, - and, when restitution is not possible, one then turns to compensation. The conception of the duty of reparation for damages has deep-rooted historical origins, going back to antiquity and Roman law; it was inspired by the natural law general principle of neminem laedere (paras. 7-11).

6. Judge Cançado Trindade stresses that the breach causing harm promptly generates the duty of reparation; breach and prompt reparation complement each other, forming an indissoluble whole (paras. 12-13). And he adds that responsibility for environmental damage and reparation cannot make abstraction of the temporal dimension; after all, responsibility for environmental damage has an inescapable longstanding dimension. In his own words,

“As cases concerning environmental damage show, the indissoluble whole formed by breach and reparation has a temporal dimension, which cannot be overlooked. In my perception, it calls upon looking at the past, present and future

altogether. The search for restitutio in integrum, e.g., calls for looking at the present and the past, as much as it calls for looking at the present and the future. As to the past and the present, if the breach has not been complemented by the corresponding reparation, there is then a continuing situation in violation of international law.

As to the present and the future, the reparation is intended to cease all the effects of the environmental damage, cumulatively in time. It may occur that the damage is irreparable, rendering restitutio in integrum impossible, and then compensation applies. In any case, responsibility for environmental damage and reparation cannot, in my view, make abstraction of the intertemporal dimension (...). After all, environmental damage has a longstanding dimension” (paras. 14-15).

7. He further stresses that the duty of prompt reparation is a fundamental, rather than “secondary”, obligation: it is an imperative of justice, - as he already pointed out in his Separate Opinion (para. 97) in the previous case on reparations decided by the ICJ, that of A.S. Diallo (Guinea *versus* D.R. Congo, Judgment of 19.06.2012). Along the centuries, it is in jusnaturalist thinking that attention to prompt reparation has been properly pursued (para. 29). Going well beyond the reasoning of the Court in the present Judgment on Compensation Owed by Nicaragua to Costa Rica, Judge Cançado Trindade sustains that, first, reparations are to be properly appreciated within the conceptual framework of restorative justice; and secondly, exemplary reparations exist and gain in importance within regimes of protection and in face of environmental damages (paras. 16-19).

8. In his following considerations, Judge Cançado Trindade observes that, in the law of nations, reparation is necessary to the preservation of the international legal order, thus responding to a true international need, in conformity with the recta ratio; this latter, and the rationale of reparation, were already dwelt upon in the writings of the “founding fathers” of the law of nations (XVIth century onwards). Such writings also turned to the forms of reparation (namely, restitutio in integrum, satisfaction, compensation, rehabilitation and guarantee of non-repetition of acts or omissions in breach of international law). All these points are part of their perennial legacy on prompt reparation, in the line of jusnaturalist thinking (paras. 20-27). And he adds:

“The wisdom of the thinking of the “founding fathers” of law of nations (droit des gens) has rendered its legacy perennial, endowed with topicality even in our days, in this second decade of the XXIst century. In my perception, the lessons extracted from their jusnaturalist thinking have helped to shape the attention devoted to principles (like those resting in the foundations of the duty of reparation) by Latin American legal doctrine, with its influential contribution to the progressive development of international law” (para. 28).

9. In sequence, Judge Cançado Trindade asserts that, in order to say what the Law is (juris dictio) as to the fundamental duty of reparation, the Court cannot restrict itself only to compensation, even if the contending parties address just this latter. Restitutio in integrum is the modality of reparation par excellence, the first one to be sought. All forms of reparation (namely, restitutio in integrum, satisfaction, compensation, rehabilitation and guarantee of non-repetition of acts or omissions in breach of international law), complement each other.

10. He recalls that, in the present Separate Opinion in the cas d’espèce as well as in his previous Separate Opinions in the cases of Armed Activities on the Territory of the Congo (Order of 06.12.2016), and of A.S. Diallo (Judgment of 19.06.2012) (paras. 11-16; and 50-51, 54, 80, 83 and 90, respectively), - and earlier on in several of his Individual Opinions in the Inter-American

Court of Human Rights (IACtHR), - he makes reiteratedly the point that there are circumstances in which the simple quantification of damages (for compensation) is insufficient, calling thus for other forms of reparation (paras. 29-37).

11. Judge Cançado Trindade then sustains that obligations of doing - which are essential to restoration - assume particular importance in the consideration of reparations within the framework of regimes of protection (such as that of the environment); obligations of doing are essential to restoration (paras. 38-41). Restorative justice encompasses reparations in all their forms, to be all kept in mind. In his perception, only by means of restorative measures will the damaged environment be made to return, to the extent possible, to the pre-existing situation (remediation) (paras. 42-46, 53-58 and 80).

12. Judge Cançado Trindade proceeds, in underlining that in the case of reparations (in all its forms) for environmental harm, one is to resort to considerations of equity, which cannot be minimized (as juspositivists in vain try to do); such considerations assist international tribunals to adjudicate matters ex aequo et bono (paras. 47-48, 52 and 78). He warns that greater attention is to be given to jurisprudential cross-fertilization, in particular to the relevant case-law of the IACtHR and the ECtHR on reparations in their distinct forms. International tribunals, especially those operating within the framework of international regimes of protection (mainly the IACtHR), do not hesitate to make recourse to considerations of equity (paras. 39-51).

13. Next, he further warns that “[c]ompensation, in sum, is not self-sufficient; it is interrelated with other forms of reparation, and to restoration at large” (para. 53). In the present case, remediation of the environmental damage calls for going beyond compensation only, so as consider restoration measures (para. 58). Full reparations, in a case of the kind of the present one, in his view can only be attained within the framework of restorative justice.

14. Judge Cançado Trindade then points out that environmental harms also concern populations; one is to address environmental vulnerability, in seeking to secure human health (1992 Rio de Janeiro Declaration on Environment and Development), the right of living (paras. 60 and 74-77). The realization of justice can be seen in itself as a form of reparation, when securing satisfaction to those victimized. To him, environmental damages cannot be precisely assessed and quantified only in financial or pecuniary terms; full reparation is not attainable by compensation only.

15. In his understanding, attention is thus to be kept on the importance of restoration measures, beyond monetary compensation (e.g., planting trees to restore biodiversity), so as to achieve the remediation of the environmental harms. There is need to consider also non-pecuniary reparations (paras. 59-64). And he adds that

“the realization of justice, seeking to cease the effects of the harmful acts, can be seen in itself as a form of reparation, when securing satisfaction to those victimized. Restorative justice is considerably important: even if restitutio in integrum is not attainable, other forms of reparation such as rehabilitation and satisfaction are to be pursued so as to achieve restoration. Rehabilitation and satisfaction are forms of non-pecuniary reparation, requiring obligations of doing (cf. section VII, supra) to the effect of restoration. To them one can add the guarantee of non-repetition of the breaches” (para. 65).

16. Restoration measures can, with the passing of time, cease the consequences of the environmental damages. Judge Cançado Trindade then emphasizes that one is to bear in mind “the

intrinsic value of the environment for the populations”; taking, for example, the question of reparation in respect of the damage done to wetlands, the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat draws attention to the interdependence of human beings and their environment, thus rendering it “necessary here to go beyond the strict inter-State outlook, and to keep in mind the populations of the countries concerned” (para. 70).

17. Moving to his final considerations, Judge Cançado Trindade next warns that it should be pointed out that the monetary sums ordered by the ICJ in the present Judgment could be used “to plant trees and other plants, seeking to restore biodiversity, and increase the future provision of such services as gas regulation, air quality and raw materials, besides other restorative measures” (para. 79). In effect, - he adds, - as to the duty of reparation, “lessons from the past have simply not been learned yet”; the application of that duty in contemporary international law seems to be still in its infancy (para. 93). There thus remains nowadays a long way to go, - he concludes, - so as to ensure, within the wider framework of restoration, the progressive development of international law in the domain of reparations (para. 93).

Separate opinion of Judge Donoghue

Judge Donoghue has submitted a separate opinion that sets out the reasons for her votes with respect to compensation for the impairment or loss of environmental goods and services (paragraph 157 (1) (a)) and restoration costs (paragraph 157 (1) (b)).

She has voted in favour of the award of compensation to Costa Rica for the impairment or loss of environmental goods and services (paragraph 157 (1) (a)), but she considers that the evidence only supports compensation in the range of US\$70-75,000. She does not consider that Costa Rica’s claim for the value of the restoration of the wetland is supported by the evidence and thus has voted against paragraph 157 (1) (b).

Separate opinion of Judge Bhandari

Judge Bhandari agrees with the Court’s Judgment on compensation, but wishes to place on record his views on certain issues which the Court did not address in detail. According to Judge Bhandari, the Court correctly stated that restitution is the preferred method for compensation under current international law, as reflected in Articles 35 and 36 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“ARSIWA”). He states that there are two reasons why the Court awarded compensation, instead of restitution, in the present case. First, the present case falls within the scope of one of the exceptions to the availability of restitution under Article 35 ARSIWA, namely that restitution would be “materially impossible”. Second, an injured State may choose to specify which method of reparation it prefers upon notifying the responsible State of its claim, as provided under Article 43 ARSIWA. In its Application instituting proceedings before the Court (18 November 2010), Costa Rica requested that Nicaragua be ordered to pay compensation for the unlawful activities carried out in the affected area.

Judge Bhandari is of the view that the Court should have elaborated further on the method for determining the quantum of compensation. According to him, the evidence provided by the Parties was not sufficient for the determination of such quantum. In cases in which the Court does not have adequate evidence before it, compensation should be awarded based on equitable considerations. Judge Bhandari believes that the Court ought to have stated more clearly that it determined the amount of compensation due based on equitable considerations.

Judge Bhandari is also of the view that the precautionary approach should have played a more central role in the proceedings opposing Costa Rica to Nicaragua. He notes that the precautionary approach has been incorporated into a growing number of international instruments. Moreover, international courts and tribunals have referred to it in recent decisions, stating that it could be considered to be part of customary international law.

In addition, Judge Bhandari notes the paramount importance of environmental protection. Owing to the supreme interest that humankind holds in the preservation of the natural environment, Judge Bhandari is of the opinion that international law ought to develop in order to allow punitive or exemplary damages where serious harm has been caused to the environment. According to him, States have expressly created international obligations for the protection and preservation of the environment. Moreover, science has proven beyond doubt that humanity will suffer tremendously if the natural environment is irremediably prejudiced by human activity. Judge Bhandari believes that developing international law to allow award of punitive or exemplary damages is also in line with the approach of domestic courts in certain jurisdictions, with the “polluter pays principle”, and with the need to deter States from harming the environment in the future. However, an award of punitive or exemplary damages should not be out of proportion with respect to the actual harm caused by the responsible State.

Declaration of Judge Gevorgian

Judge Gevorgian explains that while agreeing with the dispositif of the Judgment, including both the amount of compensation due from the Republic of Nicaragua to the Republic of Costa Rica and the application of a “holistic” approach in assessing environmental damages, he nonetheless wishes to express caution in relation to certain aspects of the Court’s reasoning, since it is the Court’s first Judgment on environmental damages as such.

First, though the Court’s acknowledges a potentially “flexible” application of the general rule that the burden of proof rests with the party seeking compensation, this flexible approach was not applied in the present case. As such, in this case, the burden of proof rested with the Applicant.

Second, of the six categories of potential damages identified by Costa Rica, the Judgment found that four, namely: standing timber; other raw materials (fibre and energy); gas regulation and air quality; and biodiversity, in terms of habitat and nursery, had sufficient evidence to support a finding of compensation. Judge Gevorgian was not persuaded by the evidence presented by Costa Rica to justify compensation for either gas regulation and air quality nor biodiversity.

With respect to gas regulation and air quality, Judge Gevorgian notes that, as affirmed by Nicaragua, any damage done to gas regulation and air quality by the release of carbon dioxide into the atmosphere was felt globally. As such, to the extent that this damage effected Costa Rica, Costa Rica is only entitled to a miniscule share of the global damage.

With respect to biodiversity, Judge Gevorgian notes the absence of a baseline to measure any damage to the wetlands against. While acknowledging the various studies presented, Judge Gevorgian found that these studies were done with respect to different areas, industries, and did not assist in providing a clear baseline to measure the damage that Nicaragua’s activities have done. As such, Costa Rica has failed to meet its burden of proof with respect to this head of damage.

Finally, Judge Gevorgian, while supporting the total compensation award, notes that it is important not to interpret the present Judgment in far-reaching terms and that any possibility of interpreting the “overall assessment” of environmental damage as being “punitive or exemplary” should be avoided so as not to jeopardize the peaceful settlement of environmental disputes.

Declaration of Judge ad hoc Guillaume

1. Given that Costa Rica assessed the material damage caused by Nicaragua at US\$6,711,685.26, Judge ad hoc Guillaume observes that, in fixing the principal sum of compensation due at US\$358,740.55, the Court has rejected the majority of Costa Rica's submissions. He agrees with the Court's assessment, even though he finds it generous in certain respects, but wishes to clarify his views on certain points.

2. Regarding compensation for "restoration costs" anticipated by Costa Rica in respect of the "protected wetland", while Judge ad hoc Guillaume supports the solution adopted by the Court, he expresses the hope that this work, which is ill-defined in the case file, will actually be planned and carried out.

3. Regarding compensation for environmental damage, Judge ad hoc Guillaume points to the mistakes in the assessment submitted by Costa Rica, particularly as regards the calculation of damages for the felling of trees, and those relating to gas regulation and air quality. He notes that although the method of assessment put forward by Nicaragua is preferable, it is not without its own problems. He concludes that the evaluation of damage in this instance is necessarily only approximate.

4. Judge ad hoc Guillaume welcomes the Court's decision not to uphold Costa Rica's claims for the reimbursement of expenses relating, inter alia, to the establishment of police posts: such expenses were not directly linked to Nicaragua's unlawful activities. Furthermore, redeploying the personnel concerned did not generate any additional expenses for Costa Rica.

5. Finally, Judge ad hoc Guillaume observes that the Court has, for the first time, awarded pre-judgment interest to the Applicant and considers this a sensible solution in this particular instance, given the nature of the expenses incurred by Costa Rica. He notes that it leaves room in the future for assessments to vary from case to case.

Dissenting opinion of Judge ad hoc Dugard

Judge ad hoc Dugard's disagreement with the Judgment relates to both the method employed by the Court to reach its decision on the quantum of damages to be awarded and the amount determined by the Court in its quantification of environmental damages.

The Court awarded US\$120,000 for environmental damage. In Judge ad hoc Dugard's opinion a considerably 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.

Precise quantification of the harm caused by Nicaragua to Costa Rica's environment is impossible. 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.

The approach which the Court followed for quantification of environmental damage is unsatisfactory. The Court's apparent reliance on the "corrected analysis" of Payne and Unsworth (Nicaragua's experts) is problematic for several reasons which are addressed in the dissenting opinion. For one, the "corrected analysis" attaches a value to each head of damage in isolation.

Secondly, certain elements of the “corrected analysis” cannot legitimately be relied upon by the Court as providing a “reasonable basis” for its own valuations. Thirdly, the Court rejects Costa Rica’s argument that the recovery period for goods and services is 50 years, but gives no indication of what it considers to be the appropriate recovery period for the goods and services in question.

In the present case there are a number of equitable considerations that the Court might and should have taken into account in its quantification of damages including 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.

In relation to the loss of gas regulation, 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. The obligation not to engage in wrongful deforestation that results in the release of carbon into the atmosphere and the loss of gas sequestration services is an obligation erga omnes.

In assessing compensation in this case, the Court should have had regard to the gravity of Nicaragua’s unlawful activities, and the amount of compensation should be assessed so as to fit the wrongful conduct. 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. Without advocating the imposition of punitive damages, it is possible to take account of the gravity of Nicaragua’s conduct in seeking to fully restore Costa Rica to the position which it enjoyed prior to Nicaragua’s violation taking place.
