DECLARATION OF JUDGE GEVORGIAN

Environmental damage — No punitive or exemplary damages in international law — Holistic approach to environmental damage — Burden of proof — Costa Rica's evidence was not persuasive — The extent of the damage can be established "as a matter of just and reasonable inference", but not the damage itself.

1. I voted in favour of all paragraphs of the *dispositif*, including the amounts for the compensation due from the Republic of Nicaragua to the Republic of Costa Rica for environmental damage. Nonetheless, taking into account that the present Judgment is the Court's first Judgment on compensation on environmental damage, I consider it necessary to express a word of prudence in relation to certain aspects of the Court's reasoning, bearing in mind the precedential character of this Judgment.

2. I consider it important that in the Court's Judgment, in the context of reparations for environmental damage, it recalls well-established rules and principles of international responsibility for wrongful acts and applicable provisions of procedural law. The first principle is that "compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible or unduly burdensome"[1]. The second is that "as a general rule, it is for the party which alleges a particular fact in support of its claims to provide the existence of that fact"[2]. The third is that "the absence of adequate evidence as to the extent of material damage will not [necessarily]. . . preclude an award of compensation for that damage"[3]. The fourth is that "compensation should not . . . have a punitive or exemplary character"[4].

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

[1] See paragraph 31 of the present Judgment (quoting from *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 103-104, para. 273).

[2] See paragraph 33 of the present Judgment (quoting from *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 15).

[3] See paragraph 35 of the present Judgment (quoting from *ibid.*, p. 337, para. 33).

[4] See paragraph 31 of the present Judgment.

Costa Rica[5]. While this holistic approach in this case may be considered generally acceptable, it must be applied with due consideration for the rule that the burden of proof rests with the party who invokes a fact. Otherwise, the risk exists of awarding *de facto* punitive or exemplary damages, a result that the Court intends to avoid.

4. In the present case, the burden of proof rests with the Applicant. The Court's mention in the Judgment of the "flexible" application of this general rule "in certain circumstances" risks being misinterpreted[6]. This circumstance — mentioned in *Diallo* — should not be assumed to have applied here, as Costa Rica had access to its own territory in order to evaluate the extent of the environmental damage caused by Nicaragua. Accordingly, only the general rule is relevant: in assessing the six categories of environmental goods and services considered by Costa Rica, the Court has to be satisfied that the Applicant has factually proven the existence of damage and of causal link.

5. Costa Rica's categories of environmental damage are: 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[7]. In its Judgment, the Court has ruled that two out of six categories are not compensable: natural hazards mitigation and soil formation and erosion control. In my opinion, the evidence submitted by the Applicant in support of two categories among the four accepted (other raw materials and biodiversity) was not persuasive.

6. Costa Rica's Neotrópica Foundation's Report based the existence of such damage on generic inferences made from studies conducted in other ecosystems that were not necessarily transferrable to Northern Isla Portillos.

For instance, in relation to raw materials:

The first study (Camacho-Valdez et al., 2014) relies on a database aggregating studies from around the world. Camacho-Valdez uses this general information to determine values for different land types; however, the report does not explain what type of land it has classified Isla Portillos nor why this general land value data is "transferrable" to the present situation.

[5] See paragraph 78 of the present Judgment; emphasis added.
[6] See paragraph 33, *ibid.*
[7] Memorial on Compensation of Costa Rica (MCCR), para. 3.16.

The second study (Mendoza-González et al., 2012), based in the Central Gulf of Mexico and relying mostly on studies conducted in Mexico, combines different ecosystems and partially estimates their value on the basis of factors alien to Isla Portillos, such as recreation, food production, waste management and medicine. It does not seem to give a separate account of the value of each one of these items, nor does Neotrópica explain the source of the value it attributes to raw materials on the basis of this study.

The third study (White, Ross and Flores, 2000) focuses on tourism and fisheries in coral reefs as reverting on the local populations of Olango Island in the Philippines; this is obviously not of concern in the present dispute.

In relation to biodiversity loss, the studies relied upon by Fundación Neotrópica focused mostly on tourism and fisheries (Camacho-Valdez et al., 2014, Samonte-Tan et al., 2007 and Barbier et al., 2002)[8].

Thus, these studies failed to present a reliable baseline or prove that Nicaragua's activities have damaged such goods or services.

7. Moreover, I have not been persuaded by Costa Rica's reasoning regarding Nicaragua's alleged damage to gas regulation and air quality services. In claiming compensation for this category, Costa Rica seems to assume that this service was provided to its own exclusive benefit and that it was the only State injured by the release of carbon to the atmosphere[9]. However, as Nicaragua has affirmed, to the extent that damage has been caused to this service, Costa Rica is entitled only to a "minuscule" share of the global damage[10].

8. The present Judgment, in my view, does not adequately address these issues and merely concludes (without further explanation) that Nicaragua's activities "have significantly affected the ability of the two impacted sites to provide the above-mentioned environmental goods and services . . . [the] impairment or loss of these four categories of environ-

[8] See MCCR, Vol. I, Ann. 1, p. 158.

[9] According to Article 46 of the ILC's Articles on State Responsibility, "[w]here several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act."

The Commentary explains that "[w]here there is more than one injured State claiming compensation on its own account . . . *evidently each State will be limited to the damage actually suffered*". (ILC Commentary on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, UN doc. A/56/10, 2001, Commentary on Article 46, para. 4, p. 124; emphasis added.)

[10] Counter-Memorial on Compensation of Nicaragua (CMCN), para. 4.26 and Rejoinder on Compensation of Nicaragua (RCN), para. 2.23.

mental goods and services . . . is a direct consequence of Nicaragua's activities"[11]. I am inclined to find such a reasoning insufficient.

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

(*Signed*) Kirill GEVORGIAN.

[11] See paragraph 75 of the present Judgment.