SEPARATE OPINION OF JUDGE BHANDARI

Relationship between compensation and restitution in the present case — Costa Rica chose compensation as an appropriate method for reparation in the present case — Insufficiency of evidence submitted by the Parties on the quantification of environmental damage — Necessity to quantify the damage based on equitable considerations — Relevance of the precautionary approach — Punitive or exemplary damages are justified where a State has caused serious injury to the environment — Ensuring environmental protection is one of the supreme obligations under international law in the twenty–first century.

1. I concur with the Court's reasoning on compensation owed to Costa Rica for Nicaragua's unlawful activities. However, I wish to make some comments, additional to the Court's Judgment, on the determination of the quantum of compensation by reference to equitable considerations, on the relevance of the precautionary approach and on punitive damages in international law.

A. Restitution and Compensation in the Present Case

2. It is established that restitution is the preferred method of reparation under international law. However, in the circumstances of this case the appropriate method of reparation is compensation. The Court confirmed that "compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible or unduly burdensome" (Judgment, para. 31), supporting its statement by reference to the 2010 Judgment in *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*[1]. The Court did not elaborate any further.

3. Article 35 of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") provides that "[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed"[2], or, in other words, to re-establish the *status quo ante*. However, there are two exceptions to this obligation to make reparation by way of restitution: first, restitution must not be

[1] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 103–104, para. 273.

[2] Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 96.

"materially impossible"[3]; second, restitution must not "involve a burden out of all proportion to the benefit deriving from [it] instead of compensation". Article 36 of ARSIWA states that "[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, *insofar as such damage is not made good by restitution*"[4] (emphasis added). The text of Article 36 clearly conveys that compensation is available as a method for reparation only in so far as the damage is not made good by restitution. The hierarchy between restitution and compensation is confirmed by the International Law Commission's ("ILC") commentary to Article 36, which states that the former has "primacy as a matter of legal principle"[5], but can be "partially or entirely ruled out either on the basis of the exceptions expressed in Article 35, or because the injured State prefers compensation or for other reasons"[6]. The Court upheld the primacy of restitution over compensation in earlier decisions[7].

4. In the present case, there are two reasons why compensation, despite not being the preferred method for reparation as a matter of legal principle, is the form which Nicaragua's reparation must take.

5. First, the present case falls within the scope of one of the exceptions to restitution listed in Article 35 of ARSIWA, since under the circumstances restitution would be "materially impossible". The Court was requested to award compensation for environmental damage, which is unlikely to be made good by way of restitution. In paragraph 55 of its Judgment, the Court noted that Costa Rica requested to be compensated for six categories of goods and services lost owing to Nicaragua's activities: "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". It seems clear that it would be impossible for Nicaragua to revert to the *status quo ante* (i.e., the situation existing before the unlawful activities in the affected area). Even if one considered that trees from which timber is harvested could be regrown, thus achieving some sort of *restitutio in inte-*

[3] Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 96.

[4] *Ibid.*

[5] *Ibid.*, p. 99, para. 3.

[6] *Ibid.*

[7] *Pulp Mills on the River Uruguay*, *supra* note 1, pp. 103-104, para. 273; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 198, para. 153. See also *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

grum, it seems extremely difficult that Nicaragua could restore the situation existing prior to its activities in the affected area in respect of air quality, soil erosion, and loss of biodiversity.

6. Second, an injured State can in principle choose which method of reparation it prefers in order for the responsible State to make good the damage caused. According to the ILC's commentary to the ARSIWA, the "provision of each of the forms of reparation . . . may . . . be affected by any valid election that may be made by the injured State as between different forms of reparation"[8], since "in most circumstances the injured State is entitled to elect to receive compensation rather than restitution"[9]. The ILC's commentary refers to Article 43 of the ARSIWA, under which an injured State invoking the responsibility of another State may specify, in its notice of claim, "*(b)* what form reparation should take . . ."[10]. Although in its Application instituting proceedings of 18 November 2010 Costa Rica did not state its preference for compensation, simply requesting the Court "to determine the reparation which must be made by Nicaragua"[11], it later unequivocally asked Nicaragua to provide compensation and not restitution. In its Memorial of 5 December 2011, Costa Rica stated that it "seeks pecuniary compensation from Nicaragua for all damages caused by the unlawful acts that have been committed or may yet be committed"[12]. In its final submissions at the closure of the oral proceedings on the merits (28 April 2015), Costa Rica again requested the Court to order Nicaragua to "make reparation in the form of compensation for the material damage . . . including but not limited to . . . damage arising from the construction of artificial *caños* and destruction of trees and vegetation on the 'disputed territory'"[13].

7. On these grounds, restitution, despite being the preferred method of reparation as a matter of legal principle, is not the most appropriate method of reparation given the circumstances of the present case. Compensation is the appropriate, and the first legally available, method to repair the damage suffered by Costa Rica.

[8] Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 96, para. 4.

[9] *Ibid.*

[10] *Ibid.*, p. 119.

[11] Application instituting proceedings (18 November 2010), para. 42.

[12] Memorial of Costa Rica (5 December 2011), para. 7.10.

[13] CR 2015/14, p. 70 (Ugalde-Alvarez).

B. Determining the Quantum of Compensation by Reference to Equitable Considerations

8. In paragraph 72 of the Judgment, the Court explained its three-step methodology used in order to determine the *quantum* of compensation owed to an injured State. Under this approach, formulated in *Diallo*, the Court must determine that: (i) a State suffered an injury; (ii) there is a "sufficiently direct and certain causal nexus" between the responsible State's unlawful activities and the injured State's injury (causation); and (iii) the amount due in compensation[14].

9. The Court established that Costa Rica suffered an injury in its Judgment of 16 December 2015[15]. By finding, in the 2015 Judgment, that Nicaragua breached its international obligations vis-à-vis Costa Rica, the Court also implicitly found that there was a "sufficiently direct and certain causal nexus" between Nicaragua's activities and the injury suffered by Costa Rica. Accordingly, the Court decided, in the 2015 Judgment, that Nicaragua shall pay compensation to Costa Rica[16].

10. Concerning valuation, I believe that the amount awarded to Costa Rica for environmental damage has not been sufficiently explained by the Court's reasoning. In paragraphs 76-77 of the Judgment, the Court expressed its view that the evidence provided by both Parties did not support the valuations proposed in their respective written proceedings. In its commentary to Article 36 ARSIWA, the ILC admitted that "[d]amage to . . . environmental values . . . may be difficult to quantify"[17]. The present case compellingly illustrates the difficulties of quantifying damages for environmental harm. The felling of trees by Nicaragua prior to the digging of the *caños* could not be made good simply by awarding Costa Rica the costs of lost timber. Through photosynthesis, the felled trees also produced oxygen, which was used by a number of living organisms in the affected area, including humans and a variety of animals. Through their roots, such trees also exchanged elements with the soil and the organisms living therein, especially nitrogen-fixing bacteria. The difficulty in assigning a monetary value to such arboreal activities seems apparent, since it is unclear and uncertain how long it would take for the felled trees to regrow and for the environmental services lost to be restored as a result.

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[14] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 14.

[15] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road by Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 740, para. 229 (2) to (4).

[16] *Ibid.*, para. 229 (5) *(a)*.

[17] Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 101, para. 15.

11. In a case such as this, in which the evidence presented to the Court is inadequate to precisely quantify the compensation to be awarded to an injured party, I believe that the most appropriate decision is to award the injured State a lump sum amount of compensation based on equitable considerations. The Court did not clearly state that it reached its decision on quantum based on equitable considerations. However, such an approach would be consistent with the 2012 Judgment in *Diallo*, in which the Court considered it "appropriate to award an amount of compensation based on equitable considerations"[18]. Moreover, it is also consistent with the Court's decision in the present Judgment not to apply one specific method of valuation (para. 52).

12. The Court could have been more explicit concerning its approach to determining the quantum of compensation, with particular regard to the use of equitable considerations in cases in which the available evidence is not adequate as to the exact amount to be awarded to an injured State. If it had done so, the Court would have been consistent with its previous jurisprudence on compensation and would have explained in more detail how it determined the quantum of compensation awarded for environmental harm.

C. The Precautionary Approach under International Environmental Law

13. The growing awareness of the need to protect the natural environment is also shown by the crystallization of the precautionary approach into a customary rule of international law. The precautionary approach was first formulated in a non-binding international instrument, namely under Principle 15 of the 1992 Rio Declaration. However, States have subsequently incorporated the precautionary approach into a considerable number of binding treaty provisions, which include, among others, Article 3 (3) of the 1992 United Nations Framework Convention on Climate Change[19], Article 2 (2) *(a)* of the 1992 OSPAR Convention[20], and Article 6 of the 1995 Fish Stocks Agreement[21]. More recently, States made direct references to the need of adopting the precautionary approach in resolution 66/288 of 27 July 2012, which the United Nations General Assembly unanimously adopted as an endorsement of the Rio+20 Declaration[22].

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[18] *Ahmadou Sadio Diallo*, *supra* note 14, p. 337, para. 33.

[19] United Nations, *Treaty Series (UNTS)*, Vol. 1771, p. 107.

[20] *Ibid.*, Vol. 2354, p. 67.

[21] *Ibid.*, Vol. 2167, p. 3.

[22] UN doc. A/RES/66/288, Annex: "The future we want" (11 September 2012), paras. 158 and 167.

14. International courts and tribunals also recognized the importance of the precautionary approach. In the 1990s, the Court did not explicitly rely, or indeed mention, the precautionary approach in its judicial decisions on environmental law issues[23]. However, in its 2010 Judgment in *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, the Court stated that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute [of the River Uruguay]"[24]. Similarly, the International Tribunal for the Law of the Sea ("ITLOS") did not rely on the precautionary approach in its early decisions, although it seemed to include implicit references to that approach in its reasoning in *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan)*[25]. In its 2011 Advisory Opinion the Seabed Disputes Chamber of ITLOS observed that "the precautionary approach has been incorporated into a growing number of international treaties and other instruments", which "has initiated a trend towards making this approach part of customary international law"[26].

15. The apparent crystallization of the precautionary approach into a customary rule of international law was a rapid process, which took place over only three decades. The speed of this process could be seen as a testament to the consciousness of the international community of States with respect to environmental protection. On these grounds, it would seem appropriate for the Court to rely more explicitly on the precautionary approach in future disputes raising issues of international environmental law.

D. Punitive or Exemplary Damages for Environmental Harm

16. Current international law thus excludes awards of punitive or exemplary damages. In its Judgment, the Court stated that "[c]ompensation should not . . . have a punitive or exemplary character" (para. 31). While I agree with the view that current international law does not include

[23] See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *(New Zealand* v. *France) Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 290, para. 5; *Gabćikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 41-42, para. 54.

[24] *Pulp Mills on the River Uruguay*, *supra* note 1, p. 71, para. 164.

[25] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 296, paras. 73-80.

[26] *Responsibility and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 47, para. 135. ITLOS as a full tribunal mentioned the precautionary approach in the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 59, para. 208.

punitive or exemplary damages, I believe that additional considerations are relevant, including whether, in light of the circumstances of the case, punitive damages ought to be awarded as a sufficient deterrent against future conduct which might result in environmental harm.

17. The preservation of the natural environment is vital to the survival of mankind. States have recognized the necessity of preserving the environment by gradually endorsing the precautionary approach (see above). Moreover, they have created a number of international law instruments which address issues relating to environmental protection. For example, Part XII of the 1982 United Nations Convention on the Law of the Sea[27] is entirely dedicated to the protection of the marine environment. Article XX, paragraphs *(b)* and *(g)*, of the 1947 General Agreement on Tariffs and Trade ("GATT")[28] provides for exceptions to obligations under the GATT in case some trade–restrictive measures are, respectively, measures "*(b)* necessary to protect human, animal or plant life or health", or measures "*(g)* relating to the conservation of exhaustible natural resources". Article I of the 1977 Convention on the prohibition of military or any other hostile use of environmental modification techniques[29] states that

> "[e]ach State Party . . . undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party".

In the present case, the Court was presented with an opportunity to develop the law of international responsibility beyond its traditional limits by elaborating on the issue of punitive or exemplary damages.

18. Science has proven that damage to the environment adversely affects human beings in a manner which is far-reaching and, often, not precisely quantifiable. It has been established by scientific evidence that humanity will suffer tremendous harm if irremediable damage is caused to the Earth's natural environment. Preserving and protecting the natural environment ought to be one of the supreme obligations under international law in the twenty-first century. I am persuaded that an extraordinary situation warrants a remedy that is correspondingly extraordinary[30]. I am of the view that this case presents such an extraordinary situation, and that the law of international responsibility ought to be developed to

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[27] *UNTS*, Vol. 1833, p. 3.
[28] *Ibid.*, Vol. 1867, p. 187.
[29] *Ibid.*, Vol. 1108, p. 153.
[30] *Samaj Parivartana Samudaya* v. *State of Karnataka*, (2013), *Supreme Court of India Cases (SCC)*, Vol. 8, p. 154, para. 37; cited in *Samaj Parivartana Samudaya and Ors.* v. *State of Karnataka and Ors.* (2017), *SCC*, Vol. 5, p. 434, para. 15.

include awards of punitive or exemplary damages in cases where it is proven that a State has caused serious harm to the environment. The importance which humanity attaches, or ought to attach, to the well-being of the natural environment justifies, in my view, a progressive development in this direction.

19. Awards of punitive damages in these circumstances would seem to be in line with the domestic court practice in certain jurisdictions where judicial decisions on environmental harm cases have been handed down. For instance, under Indian law punitive or exemplary damages are awarded "whenever the defendant's conduct is found to be sufficiently outrageous to merit punishment"[31]. This approach extends to cases concerning environmental harm, in which a "person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner"[32]. In addition, under Indian law it is firmly established that there is absolute liability for harm to the environment, in accordance with the "polluter pays principle"[33]. According to Indian courts, this principle is part of the concept of "sustainable development"[34], as well as of customary international law[35]. In my view, the principle that polluters must bear the financial costs of their activities causing harm to the environment should also extend to punitive damages. Only if those causing harm to the environment, are made to pay beyond the quantifiable damage can they be deterred from causing similar harm in the future.

20. According to the United States Supreme Court, awards of punitive damages take "the reprehensibility of the defendants' conduct, their financial condition, the magnitude of the harm, and any mitigating facts" into consideration, amongst other factors[36]. As an additional sum with the objective to punish and discourage, punitive damages could also serve as a means to prevent or discourage activities that harm the environment and have catastrophic consequences[37].

21. Nevertheless, in awarding punitive or exemplary damages international courts and tribunals should not lose sight of the kind of environmental harm caused by a State, as well as of its extent. Although punitive damages can be justified based on humanity's necessity to live in a safe

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[31] *Common Cause* v. *Union of India* (1999), *SCC*, Vol. 6, p. 667, paras. 133-134.

[32] *M. C. Mehta* v. *Kamal Nath* (2000), *SCC*, Vol. 6, p. 213, para. 24.

[33] *Vellore Citizens' Welfare Forum* v. *Union of India* (1996), *SCC*, Vol. 5, p. 647, para. 12; *Indian Council for Enviro-Legal Action* v. *Union of India* (2011), *SCC*, Vol. 8, p. 161, para. 37.

[34] *Vellore Citizens' Welfare Forum* v. *Union of India* (1996), *supra* note 33, para. 12.

[35] *Ibid.*, para. 15.

[36] *Exxon Shipping Co. et al.* v. *Baker et al.* (2008), *United States Reports*, Vol. 554, p. 481.

[37] *Ibid.*

and healthy environment, they should not be completely disproportionate with respect to the financially assessable impact of a State's environmentally harmful activities.

(Signed) Dalveer BHANDARI.