ultimately assuming "the internal point of view"[15] more critically. In particular, the inquiry has aimed to understand the debate on the right to abort as men and, especially, women in Chile would, in light of their own reality and upon a look around the world. To this end, it has closely tracked and scrutinized the Chilean justices' disquisitions—which draw on those of the parties, the political establishment, and civil society—on the underlying questions as debated at home and abroad. Hopefully, the analysis undertaken will engender more dialogue in Chile and elsewhere and help open a window from which to view as vividly as possible the road behind and ahead.

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International Court of Justice—monetary damages awarded—method of calculating damages to the environment—overall valuation—pre- and post-judgment interest

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica. *At* http://www.icj-cij.org/en.
International Court of Justice, February 2, 2018.

Should trees have standing?[1] The decision of the International Court of Justice (ICJ or Court) in its *Question of Compensation (Costa Rica v. Nicaragua)* case of February 2, 2018 provides a pioneering example of damage to the environment being litigated before an international tribunal.[2] The judgment is the first time that the ICJ has adjudicated compensation for environmental damage, and it is only the third time the ICJ has awarded compensation at all.[3] Nevertheless, the ICJ boldly asserted in this case 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" (para. 42). That said, the reasoning employed by the Court leaves much to be desired. Given the increasing number of cases involving the environment, it is unfortunate that international courts and tribunals will garner only limited guidance from the methodology adopted by the ICJ in valuing environmental damage.

As for the background to this judgment, Costa Rica instituted proceedings against Nicaragua in 2010, alleging incursion, occupation, and use of its territory by Nicaragua, as

[15] Herbert Lionel Adolphus Hart, The Concept of Law 199 (1984) ("Those who accept the authority of a legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals. . . .").

[1] *See* Christopher D. Stone, Should Trees Have Standing? Law, Morality and the Environment (3d ed. 2010).

[2] Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, General List No. 150, at para. 42 (Int'l Ct. Just. Feb. 2, 2018) (hereinafter Question of Compensation).

[3] The other two cases are: Corfu Channel (U.K. v. Alb.), Judgment, 1949 ICJ Rep. 4 (Apr. 9); Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation, Judgment, 2012 ICJ Rep. 324 (June 19).

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well as breaches by Nicaragua of treaty obligations owed to Costa Rica. After joining these proceedings with those in the *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, concerning transboundary harm caused by Costa Rica, the Court handed down its judgment on the merits on December 16, 2015.[4]

In the joined cases, the Court found that Costa Rica had sovereignty over the disputed territory and that Nicaragua must compensate Costa Rica for material damage to the environment resulting from its unlawful activities on the territory. If the parties could not agree on the amount of compensation within twelve months of the judgment, compensation would be settled by the Court.[5] The parties could not reach an agreement and Costa Rica asked the ICJ to resolve the issue.

In their respective pleadings, the parties put forward very different methodologies for calculating the environmental damage in monetary terms. Costa Rica suggested an "ecosystem services approach," while Nicaragua suggested a "replacement costs approach." As a result of these differing methodologies, the parties came to significantly different conclusions as to the amount of compensation owed. Costa Rica estimated that environmental damages amounted to approximately $6.711 million. Nicaragua arrived at an amount of $188,504.

According to Costa Rica's "ecosystem services approach" the environment is valued by reference to the goods and services that comprise it. Some goods and services may be traded on the market and have a "direct use value" (e.g., timber) while other goods and services cannot be traded on the market and have an "indirect use value" (e.g., flood prevention). This approach, Costa Rica claimed, reflected the full extent of environmental damage and found support in international and domestic practice.

Under Nicaragua's "replacement costs approach," the cost of preserving an equivalent area while the affected area recovers is the value to be used to calculate the compensation owed. Nicaragua argued that its approach tracked the method used most frequently by the United Nations Compensation Commission for valuing environmental damage in the first Gulf War.

After considering the suggested approaches of the parties, the Court made a general point of principle: it is consistent with international law, especially in light of the need to ensure full reparation, to order compensation for damage to the environment. For the Court, international law permits compensation for both environmental damage and for the costs and expenses incurred by Costa Rica arising from Nicaragua's unlawful activities (e.g., monitoring and restoration of the damaged environment). While the approaches put forward by both parties had precedents, the Court noted that there was also precedent for other methods of calculating compensation. As a result, the Court reasoned that it would not choose between the two methodologies set out by the parties, but rather "[w]herever certain elements of either method offer a reasonable basis for valuation, the Court [would] nonetheless take them into account" (para. 52).

Ultimately, the Court decided to value environmental damage based on what it called an "overall valuation approach." Using this approach, compensation is calculated based on an overall evaluation of the impairment or loss of environmental goods and services, rather than by calculating the value of specific categories of environmental goods and services as well as the

[4] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 ICJ Rep. 665 (Dec. 16).

[5] *Id.*, para. 142.

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time it may take each to recover. The Court applied this methodology to the claim for damage to the environment. It would apply a different methodology later in its judgment to calculate compensation for the costs incurred by Costa Rica resulting from Nicaragua's unlawful activities, which included the cost of monitoring and repairing the environmental damage.

The Court's stated reasons for choosing the "overall valuation" methodology are worth noting. First, it was keen to adopt an approach that accounted for the correlation between the activities of Nicaragua and the harm caused to certain environmental goods and services. Second, it considered its approach more appropriate than others in light of the specific characteristics of the area affected, namely a protected wetland under the Ramsar Convention with closely interlinked environmental goods and services. Third, an overall valuation allowed the Court to take into account the capacity of the damaged area for natural regeneration. The Court also referred to the *Chorzów* formula that "the breach of an engagement involves an obligation to make reparation in an adequate form" and, accordingly, an injured party should be repaired in such a way that they are put back in the same position as if the illegal act had not occurred.[6] However, the Court is not clear on why the "overall valuation" methodology serves these aims better than the other methodologies considered. We can only assume the Court deemed those other methodologies to be either over- or under-inclusive.

A close reading of the judgment suggests that the Court's "overall valuation" was influenced by an alternative valuation offered by Nicaragua in its pleadings, the so-called "corrected analysis." The "corrected analysis" applies Costa Rica's ecosystem services approach but with significant adjustments to the categories of environmental goods and services included and the values used. Despite critiquing this "corrected analysis" in paragraph 85 of its judgment, the Court seemingly goes on to apply a variation of the "corrected analysis" for the purpose of arriving at its overall valuation in paragraph 86. While noting that the absence of certainty should not preclude it from awarding an amount approximately reflecting the environmental damage caused, the Court considered that, "for the purposes of its overall valuation, an adjustment be made to the total amount in the 'corrected analysis' to account for the shortcomings . . ." (para. 86).

As a way of justifying the potential uncertainties in the valuation of environmental damage, the Court referred to *Diallo*, a case in which "equitable considerations" were drawn upon to determine the amount of compensation.[7] This also allowed the Court room to take into account the particular contexts in which the parties found themselves. Moreover, it cited the *Trail Smelter* case,[8] which in turn refers to a U.S. Supreme Court decision[9] stating that, "[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person" and that, as such, "it will be enough if the evidence show the extent of damages as a matter of just and reasonable inference, although the result be only approximate" (para. 35).[10]

[6] Factory at Chorzów, Jurisdiction, Judgment, 1927 PCIJ (ser. A) No. 9, at 21 (July 27) [hereinafter *Factory at Chorzów* Jurisdiction]; Factory at Chorzów, Merits, 1928 PCIJ (ser. A) No. 9, at 47 (Sept. 13) [hereinafter *Factory at Chorzów* Merits].

[7] *Diallo*, *supra* note 3, at 337, para 33.

[8] Trail Smelter Arbitration (U.S. v. Can.), 3 UN Rep. Int'l Arb. Awards 1905, 1920 (Arb. Trib. 1941).

[9] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

[10] Quoting *Trail Smelter*, *supra* note 8, and *Story Parchment*, *supra* note 9.

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Before actually calculating the compensation owed, the Court sought to appraise the existence and extent of the damage as well as establish whether there existed a direct and certain causal link between the environmental harm and Nicaragua's wrongful acts. Similarly, in the latter part of the judgment assessing the costs and expenses that Costa Rica claimed it incurred from its restoration and monitoring activities, the Court placed an emphasis on the existence of a direct connection with the wrongful actions of Nicaragua. Where a link between the incurred cost and the wrongful act was lacking, the Court rejected compensation for the cost (e.g., aircraft insurance or the regular wages of government employees).

Lastly, the Court considered whether pre- and post-judgment interest could be applied to the principal amount of compensation, as argued by Costa Rica. The Court concluded that interest was payable at a rate of 4 percent per annum in the pre-judgment period and at a rate of 6 percent per annum in the post-judgment period should Nicaragua fail to pay the compensation due by April 2018.

The Court finally awarded total compensation in the amount of $378,890.59, including pre-judgment interest. On March 8, 2018, Nicaragua paid the total amount of compensation to Costa Rica.

* * * *

The Court's judgment is innovative in its award of compensation for environmental damage. The decision is also notable for its bold statements of principle, opaque methodological choices, some internal contradiction, and for awarding much lower valuations for environmental damage than the claimant had argued. Indeed, the amount awarded represented around 5 percent of the claim made by Costa Rica. Without a more detailed account of its environmental damage valuation methodology as well as the application of its nexus test to incurred costs and expenses, it is difficult to appraise whether the Court was justified in awarding this lower amount. Several aspects of the judgment can, however, be analyzed more deeply.

First, the Court boldly confirms that damage to the environment *itself* is compensable under international law. For the Court, environmental damage includes the inability of the environment to provide goods and services. This is distinct from the expenses incurred by a state as a result of such damage, which can also be compensable and include remediation and monitoring costs. In addition to its bold affirmation, the ICJ's judgment clarifies several concrete matters related to the calculation of compensation. For example, the ICJ is open to compensating the wages of officials dealing with the consequences of the wrongful acts of another state where these wages are beyond those budgeted in the ordinary course of events. The ICJ stated that this was "in line with international practice" and cited a United Nations Compensation Commission report (para. 101). In this way, it would appear that the Court made a distinction between variable and fixed costs in certain aspects of its valuation methodology.

Second, the opinion involves some opaque methodology. On the issue of interest, the Court stated that "pre-judgment interest may be awarded if full reparation for injury caused by an internationally wrongful act so requires" (para. 151). That said, the Court tempered this statement by observing that "interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case" (*id.*). The Court then made a curious distinction in awarding pre-judgment interest on the compensation for Costa Rica's restoration and

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monitoring costs but not on the compensation for environmental damage. On this issue, the Court noted it had "taken full account of the impairment or loss of environmental goods and services in the period prior to recovery" and, as such, did not need to apply pre-judgment interest to the compensation for environmental damage (para. 152). However, the Court said post-judgment interest would apply on both environmental damage and costs and expenses incurred by Costa Rica if Nicaragua did not pay the compensation ordered within the time limit it stipulated. To support this conclusion, the Court simply referred to *Diallo*, which reasoned that "the award of post-judgment interest is consistent with the practice of other international courts and tribunals."[11] The ICJ saw no reason to deviate from this approach in the present case (para. 154). The method by which the Court arrived at its interest calculations is, however, as opaque as its method for calculating the principal sum of compensation owed.

Indeed, it is far from clear how an international tribunal might calculate environmental damage in future cases based on this decision by the ICJ. While it seems appropriate to adopt a flexible approach to the calculation of compensation, leaving room to tailor a methodology to the circumstances of a given case, the Court unfortunately does not adequately explain the particulars of the methodology it used. This opacity makes it very difficult to critically assess the application of the methodology adopted by the Court, and it provides no authoritative touchstone for other international courts or tribunals dealing with similar issues.

Despite the lack of clarity, a number of critical observations can nevertheless be made. For example, the Court does not explore any baseline environmental assessment prior to Nicaragua causing the damage. This omission comes into particularly sharp focus when one recalls the emphasis the ICJ placed on applying the *Chorzów* formula,[12] which aims to put the injured party back in the position it was before the wrongful act took place. The Court also does not give a recovery period estimate or explicitly factor in the cost of mitigation or remediation measures during that recovery period. The categories of environmental goods and services are each very different from one another and should have prompted different methodologies for calculating damage to them. Here, the Court could have referred to other national and international cases which distinguish between different categories of environmental damage, such as cleanup operations performed by public employees, the use of public buildings for the conduct of cleanup operations, restoration activities, and the environmental damage caused.[13]

Third, there is some level of contradiction in the Court's judgment. Initially, it gives the impression it wants to apply a methodically clinical valuation approach. For instance, the ICJ emphasized the establishment of a direct and clear nexus between Nicaragua's activities and the environmental damage. Moreover, the judgment suggests that, as a first step, the Court is at pains to assess the existence and extent of the damage prior to calculating the monetary value of that damage. Further still, the Court initially develops an itemized list of what it deems reasonably appropriate to claim for compensation and critiques certain aspects of the detailed methodologies set out by the parties. All of this implied that the Court would

[11] *Diallo*, *supra* note 3, at 343, para. 56.

[12] *Factory at Chorzów* Jurisdiction, *supra* note 6, at 21; *Factory at Chorzów* Merits, *supra* note 6, at 47.

[13] *See, e.g.*, In the Matter of Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978, 954 F.2d 1279 (7th Cir. 1992).

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ultimately provide a detailed explanation of its favored valuation methodology. Instead, however, the Court simply embraces a less than clinical "overall valuation" approach. In doing so, it neither refers to previous practice nor elaborates upon the details of the approach, except to say that it "can account for the correlation between the removal of the trees and the harm caused to other environmental goods and services," that it "is dictated by the specific characteristics of the area affected by the activities of Nicaragua," and that it "take[s] into account the capacity of the damaged area for natural regeneration" (paras. 79–81). Exactly how and why the overall valuation approach achieves these ends remain a mystery.

The ICJ also failed to learn from previous litigation on environmental matters. For example, why did the Court not consult experts when assessing the environmental damage? It has this option open to it under Article 50 of the Statute of the ICJ. In fact, in a judgment handed down on the same day as the present case—*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*[14]—the Court had appointed its own experts. The resort to experts in scientific matters has also been encouraged by the ICJ in the past, particularly in the *Pulp Mills* case.[15] Moreover, in their Dissenting Opinion in that case, Judges Simma and Al-Khasawneh stressed the importance of referring to experts in cases involving complex scientific issues.[16] Finally, although this case is only the third in which the ICJ has awarded interstate compensation, in both of the prior decisions it appointed its own experts to assess the compensation amount.[17]

To take another example, investment tribunals have had recourse to experts in the face of complex counterclaims for environmental damage. In a 2015 ICSID dispute, *Perenco v. Ecuador*,[18] the respondent argued that the claimant had caused environmental damage in the amount of $3 billion. Recognizing the difficulty in appraising the value of such damage and criticizing the testimony of the parties' experts, the Tribunal in that case appointed its own independent environmental expert to assist with the task.[19]

In a further example, *Burlington Resources Inc. v. Ecuador*, an ICSID tribunal ordered the payment of $41 million in compensation for environmental damage caused.[20] It did so on the basis of Ecuadorian national law but the methodology adopted by the Tribunal is, nevertheless, of note. In particular, the Tribunal assessed the harm caused and reparation cost at each of the forty sites in the oil field exploited by the claimant and even made site visits.

In the final analysis, these recent cases and others evidence a trend toward the environment becoming a more regular feature of international adjudication.[21] Despite the flaws in the

[14] Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicar.); Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicar.), General List Nos. 157 & 165 (Int'l Ct. Just. Feb. 2, 2018).

[15] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 ICJ Rep. 14, 36, para. 167 (Apr. 20).

[16] *Id.*, Dissenting Opinion of Judges Simma and Al-Khasawneh, at paras. 3, 8.

[17] *Corfu Channel*, *supra* note 3, at 4; *Diallo*, *supra* note 3, at 324.

[18] Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Eduador (Petroecuador), ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (Aug. 11, 2015).

[19] *Id.*, para. 587.

[20] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5.

[21] *See, e.g.*, *id*; *Perenco v. Ecuador*, *supra* note 18; The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017); Dispute Concerning

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judgment of the ICJ in the *Question of Compensation* case, it is significant that the Court found environmental damage itself to be compensable, at least in the form of goods and services provided by the environment. The Court did not take a direct step toward "standing" for trees because it awarded compensation for damage to Costa Rica but it did perhaps take an indirect step by finding damage to the environment itself requires compensation, beyond just the costs of environmental remediation and monitoring. In the present hostile climate around matters of the environment, this and other recent cases show that "oaks may still grow strong in contrary winds."[22]

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[22] An adaptation of the Peter Marshall quotation: "When we long for life without difficulty, remind us that oaks grow strong under contrary winds and diamonds are made under pressure," *available at* https://www.goodreads.com/author/quotes/33254.Peter_Marshall.

Delimitation of the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire), ITLOS Case No. 23 (Sept. 23, 2017). For a fuller exploration of trends and prospects in the extension of environmental protection through litigation, see Jason Rudall, Altruism in International Law (2017) (unpublished Ph.D. thesis, Graduate Institute of International and Development Studies) (on file with author).

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