COMPENSATION AWARDS IN INTERNATIONAL ENVIRONMENTAL LAW: TWO RECENT DEVELOPMENTS

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I. INTRODUCTION

International law has increasingly incorporated environmental protection as an objective, and international courts and arbitral tribunals must address environmental disputes. This Comment discusses two recent decisions: *Compensation owed by Nicaragua to Costa Rica* and *Burlington Resources*—cases decided at the International Court of Justice (ICJ) and the International Center for Settlement of Investment Disputes (ICSID), respectively. The goal is to illustrate how international courts and arbitration tribunals have decided cases involving environmental disputes and ordered reparations for environmental harm.

On February 2, 2018, the ICJ granted damages for environmental harm for the first time.[1] The Court had already recognized both procedural and substantive obligations related to environmental protection in previous cases—but had never before granted compensation as a remedy for violations of international environmental law. In the *Costa Rica* case, the

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1. 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, ¶ 41 (Feb. 2, 2018), http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf (recognizing that the Court had never awarded compensation to remediate environmental damage before).

Court addressed environmental damage through the lens of general state responsibility and focused on compensation for the immediate harm.[2] The decision avoided addressing concerns about environmental restoration, prevention of future environmental harm, and other applicable remedies available in addition to compensation.

The *Burlington Resources* case, by contrast, concerns an international investment dispute and the application of domestic environmental law to the conduct of foreign investors.[3] In its counterclaim, the government of Ecuador argued that the investor was liable for causing damage to the environment. Due to the circumstances of the case, the Tribunal had to apply domestic law to resolve the dispute.[4] The case is notable because the Ecuadorian Constitution incorporates environmental protection principles, and Ecuadorian law establishes strict liability for environmental damages.[5] Nevertheless, the Tribunal restricted the scope of the reparation on the grounds that the investor was one of multiple agents responsible for the damages.

As environmental concerns become increasingly prevalent, international dispute settlement bodies will have to determine not only the rights and obligations that follow from environmental law, but also how to properly remediate violations of these obligations. In Section I, this Comment discuss the sources of law the ICJ and the ICSID Tribunal used to justify each decision and to define the rules on liability for environmental harm. By contrasting the ICJ and the ICSID cases, this Comment shows that international dispute settlement institutions may find environmental preservation requirements in both international and domestic law. As a consequence, the definition of environmental harm and the determination of the liability regime will vary depending on the primary source of law applicable to the case.

Section II discusses how the ICJ and the ICSID Tribunal determined the reparation for environmental damage. In both

2. *Id.* ¶ 11.

3. *See* Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims (Feb. 7, 2017).

4. Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 509 (Dec. 14, 2012).

5. Constitución de la Republica del Ecuador [Constitution] Oct. 20. 2008, art. 395–99.

cases, compensation for the actual damage was the main remedy for material environmental harm. Nevertheless, the notion that environmental damage should be remediated with compensation is controversial. In their separate opinions, the ICJ judges present the core arguments against the general idea that compensation for the caused harm is satisfactory. They argue that environmental harm may be difficult or impossible to repair. Reparations should therefore account for long term effects of the illegal action and provide incentives for environmental protection.[6]

These two decisions, among others,[7] indicate that the international legal order imposes procedural and substantive obligations on states and non-state actors to not harm the environment or biodiversity. However, other challenges remain. International dispute resolution bodies still have to address questions related to whether compensation is adequate to remedy environmental harm and who has standing to bring claims when the harm is to shared resources or when responsibility for the harm is diffuse.

The ICJ decision on the *Costa Rica* case was a step forward for environmental protection because it acknowledged that transboundary environmental harm is a violation of international law and requires reparation. Nevertheless, the Court still needs to address questions about the role of scientific evidence in assessing the degree of harm to the environment and the scope of the reparation. The ICJ could have gone beyond compensation, given more weight to the precautionary principle, and adopted a forward-looking approach by imposing obligations to prevent future environmental damage to the region. The ICSID Tribunal, for its part, was highly technical and—although its decisions must be based on a protective domestic regime—only obligated the company to restore the en-

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6. *See, e.g.*, Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Separate Opinion of Judge *ad hoc* Dugard, ¶ 47 (Feb. 2, 2018), http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-06-EN.pdf.

7. *See, e.g.*, Monica Feria-Tinta & Simon Milnes, *The Rise of Environmental Law in International Dispute Resolution: Inter-American Court of Human Rights Issues Landmark Advisory Opinion on Environmental and Human Rights*, EJIL: TALK! (Feb. 26, 2018), https://www.ejiltalk.org/the-rise-of-environmental-law-in-international-dispute-resolution-inter-american-court-of-human-rights-issues-landmark-advisory-opinion-on-environment-and-human-rights/.

vironment to the *status quo ante* and not to pre-human conditions.

Given the scientific uncertainties about the preservation of the environment and biodiversity, future litigation and arbitration will have to incorporate and develop the concerns highlighted in both decisions. There is still room for discussion on the scope of the obligations of international environmental law and the available remedies.

II. Applicable Law: Definition of the Environmental Harm and Liability Regime

In the *Costa Rica* and *Burlington* cases, international law played two different roles. In the *Costa Rica* case, the ICJ relied on the sources of law detailed in Article 38 of its statute—addressing treaties, international custom, and general principles of law.[8] In the *Burlington* case, the ICSID Tribunal's jurisdiction was restricted to the law agreed upon by the parties or the law of the hosting state, and rules of international law where applicable.[9] Hence, the legal framework for either case is different.

The ICJ determined the compensation owed by Nicaragua to Costa Rica in the context of a broader territorial dispute. The states were in dispute over their respective sovereignty of a nearby area where they had both developed infrastructure projects. Costa Rica had built a road along the river that divides the two countries—the San Juan river—and Nicaragua had occupied and excavated artificial channels in an area which Costa Rica claimed as part of its territory.[10] The Court had to address these mutual sovereignty claims as well as disputes over environmental damage allegedly caused by both States.[11] The Court also had to decide whether the parties violated their procedural and substantive obligations under international environmental law.

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8. Costa Rica v. Nicar., Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica.

9. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), Oct. 14, 1966, 575 U.N.T.S. 159; Burlington v. Ecuador, Counterclaims, ¶ 74.

10. 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, 2015 I.C.J. 665, ¶ 65–66, 145 (Dec. 16).

11. *Id.* ¶ 92.

With respect to procedural obligations, the ICJ had previously decided that, as a matter of customary law, States have to conduct environmental impact assessments and are obligated to consult and notify neighboring States before undertaking any activity that has a significant risk of causing transboundary harm.[12] In this particular case, the Court decided that while Nicaragua's dredging program did not carry significant risk of harm,[13] Costa Rica had violated international law by not conducting an environmental impact assessment before constructing the road along the border.[14]

As for the parties' substantive obligations, the Court took into account scientific evidence presented by the parties when assessing the material harm. The Court concluded that while the activities of Costa Rica did not cause environmental harm to Nicaragua,[15] Nicaragua had caused harm to Costa Rica by dredging a channel on Costa Rican territory.[16] By occupying and conducting certain activities within Costa Rica's borders, Nicaragua damaged the environment of a wetland internationally protected by the Ramsar Convention.[17]

In determining whether either of the States violated their international obligations, the ICJ analyzed rules of treaty and customary international law, as well as its own precedent. Following its conclusions in the *Pulp Mills* case, the ICJ reaffirmed that States must conduct environmental impact assessments, consult, and notify neighboring States when their conduct potentially causes significant transboundary harm.[18] In addition, if a State causes environmental harm to another, it is obligated to repair the damage.

By contrast, in the *Burlington* case and with respect to Ecuador's environmental counterclaim, the ICSID Tribunal determined that the hosting state law applies to the case and international law had secondary application. The environmental

12. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (discussing procedural obligations and the principle of prevention).

13. Costa Rica v. Nicar., 2015 I.C.J. ¶ 112.

14. *Id.* ¶ 173.

15. *Id.* ¶ 217.

16. *Id.* ¶¶ 92–93.

17. Costa Rica v. Nicar., Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica, ¶ 80.

18. Costa Rica v. Nicar., 2015 I.C.J. ¶¶ 104, 161.

dispute is one of several issues that emerged from Production Sharing Contracts (PSCs) between Ecuador and Burlington Resources.[19] Under the terms of the Bilateral Treaty between Ecuador and the United States, Burlington initiated arbitral proceedings claiming that Ecuador expropriated its oilfields.[20] In its counterclaims, Ecuador argued that Burlington caused damage to the environment and that consequently the company should be liable.

According to the Tribunal, the parties did not specify any legal regime applicable to torts.[21] As a consequence, the Tribunal followed the rule of Article 42(1) of the ICSID Convention which establishes that, in the absence of agreement on applicable law, "the Tribunal shall apply the law of the Contracting State party to the dispute . . . and such rules of international law as may be applicable."[22] As Ecuadorian law contains rules on environmental protection and environmental harm liability both in the Constitution and statutes, the Tribunal relied mostly on Ecuadorian law to assess the damage and potential remedy.[23]

While Ecuador's 1978 and 1998 Constitutions contained provisions on environmental protection, the 2008 Constitution elaborated on the previous regimes. It grants constitutional rights to nature (referred to as *Pachamama*), and promotes sustainable development and equitable redistribution of resources.[24] The Constitution requires the State to manage strategic sectors of the economy to help further "environmental sustainability, precaution, and efficiency,"[25] and decrees that environmental claims are imprescriptible.[26] In addition, the 2008 Constitution establishes a regime of strict liability. Ecuadorian case law under the prior constitution supports strict liability for environmental damage based on the theory of risk.[27]

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19. Burlington v. Ecuador, Counterclaims, ¶ 52–58.

20. Burlington v. Ecuador, Liability, ¶ 546 (recognizing that Ecuador expropriated Burlington's investment).

21. Burlington v. Ecuador, Counterclaims, ¶ 74.

22. Convention on the Settlement of Investment Disputes, *supra* note 9.

23. Burlington v. Ecuador, Counterclaims, ¶ 74.

24. *Id.* ¶ 195.

25. *Id.* ¶ 204 (citing CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR [CONSTITUTION] Oct. 20. 2008, art. 313(1)).

26. *Id.* ¶ 207.

27. *Id.* ¶¶ 223–49.

The protective regime in Ecuador's constitutions informed the decision of the Tribunal in the *Burlington* case. Due to the strict liability regime, the company could only avoid responsibility for environmental damage if it proved that the harm was caused by third parties or by the State itself.[28] This in turn would determine whether the company had to restore the protected ecosystem to pre-human conditions or only to repair the damage caused during the concession period. The Tribunal concluded that under Ecuadorian law, the company was not liable for the damage that occurred before or after its activities and did not have an obligation to fully restore the environment to pre-human conditions.[29]

The *Costa Rica* and *Burlington* cases demonstrate how the definition of environmental damage and liability regimes may vary across international dispute settlement cases. In the *Costa Rica* case, the ICJ reinforced the general rule of international law that States have procedural and substantive obligations of preventing transboundary environmental harm. In the *Burlington* case, by contrast, the ICSID Tribunal applied a strict liability regime to environmental damage because of the role of environmental protection and sustainable development in the Ecuadorian Constitution. It is not only general international law, but also domestic constitutional principles, that may be used as tools to protect the environment in international adjudication.

III. Reparations: Limitations of Compensation

After determining in each of the cases that the conduct of one of the parties had illegally caused environmental harm, the ICJ and the ICSID Tribunal decided how the damage should be remediated. In both cases, compensation was the main method of reparation. This section discusses how the ICJ and the ICSID reached the conclusion that compensation was the adequate remedy—as well as the limitations of compensation as a remedy for environmental damage. This Comment argues that neither the ICJ nor the ICSID Tribunal properly explained why compensation is the adequate and sole remedy for environmental harm.

28. *Id.* ¶ 264.
29. *Id.* ¶ 275.

Throughout the dispute between Costa Rica and Nicaragua, the ICJ did not discuss in depth what type of reparation is most adequate to remediate environmental damage. When the Court determined that Costa Rica had violated its procedural obligations by failing to conduct an environmental impact report, it concluded that the declaration in the judgment that Costa Rica had violated its obligations constituted "the appropriate measure of satisfaction for Nicaragua."[30] In the absence of material harm, the official declaration of wrongfulness remediates the violation of the obligation. The Court, however, failed to consider the impact of this decision on other States' conduct. By establishing that satisfaction is the adequate remedy for failing to conduct an environmental impact assessment, the Court gave States little incentive to comply with their procedural obligations. When States become aware that the only remedy against their violation of procedural obligations is a declaration of wrongfulness, and that the obligation to compensate exists only when material harm occurs, they may avoid the costs of conducting environmental impact assessments and take the risk of causing environmental damage.

In addition, the Court did not provide guidelines on how an environmental impact assessment should be conducted.[31] Although States have autonomy to define the requirements of environmental impact assessments under domestic system, it is unclear from the decision of the ICJ what requirements the assessment needs to fulfill to comply with the international law. The Court neither established minimum core requirements nor provided a definitive rule on what requirements prevail if neighboring States have different domestic standards.

When the Court identified the material damage that Nicaragua caused to Costa Rica's environment, it concluded that compensation was the appropriate remedy without consider-

30. Costa Rica v. Nicar., 2015 I.C.J. ¶ 224.

31. *See* Diane Desierto, *Evidence but not Empiricism? Environmental Impact Assessments at the International Court of Justice in Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road Along the San Juan River (Nicaragua v. Costa Rica)*, EJIL: TALK! (Feb. 26, 2016), https://www.ejiltalk.org/evidence-but-not-empiricism-environmental-impact-assessments-at-the-international-court-of-justice-in-certain-activities-carried-out-by-nicaragua-in-the-border-area-costa-rica-v-nicaragua-and-con/.

ing the alternatives.[32] Although compensation was the remedy requested by the parties, the Court missed the opportunity to discuss the particularities of environmental restoration and preservation, and whether a combination of alternative remedies could better fit these particularities.

The *Costa Rica* decision states that environmental preservation is the subject of several international agreements and customary international law. Moreover, the ICJ highlights that the damaged area is protected by the Ramsar Convention on Wetlands of International Importance.[33] Nevertheless, the Court determined the method of appropriate reparation by using general rules on state responsibility. The ICJ did not make clear what criteria it considered in choosing compensation as the sole remedy for material damage and what standards were used to determine the amount. Costa Rica presented an "ecosystem services approach" and Nicaragua a replacement cost approach to compensation. The Court adopted a combination of both methods.[34]

The ecosystem services approach considers that "the value of an environment is comprised of goods and services that may or may not be traded on the market."[35] Consequently, "the valuation of environmental damage must take into account both the direct and indirect use values of environmental goods and services."[36] The assessment of damage is based on comparisons between ecosystems that have similar conditions.[37] By contrast, Nicaragua claims that the compensation due to Costa Rica is only "to replace the environmental services that either have been or may be lost prior to recovery of the impacted area."[38] It is not entirely clear how the Court combined these approaches, but by using its own methodology, the Court reduced the compensation due to Costa Rica to a fraction of what that State requested.[39]

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32. Costa Rica v. Nicar., 2015 I.C.J. ¶¶ 224–28.

33. Costa Rica v. Nicar., Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica, ¶ 45.

34. *Id.* ¶ 52

35. *Id.* ¶ 47.

36. *Id.* ¶ 47.

37. *Id.* ¶ 47.

38. *Id.* ¶ 49.

39. *See* Diane Desierto, *Environmental Damages, Environmental Reparations, and the Right to a Healthy Environment: The ICJ Compensation Judgment in Costa*

In his separate opinion, Judge Cançado Trindade criticizes the Court's restrictive approach. He argues that the reparation cannot be dissociated from the breach[40] and must not only remediate the damage but provide incentives to prevent future harm. He claims that "reparations – including compensation – *can and do have an exemplary character*. And exemplary reparations gain in importance within regimes of protection (of human beings and of the environment) and in face of environmental damages, as in the *cas d'espèce*."[41]

Judge Cançado Trindade also argues that all means of reparation should be taken into account when determining the adequate remedy. He writes that "*there is no hierarchy* between them: they intermingle among each other, and the form of reparation to be ordered by the international tribunal concerned will be the one most suitable to remedy the situation at issue, and this will depend on the circumstances of each case."[42] Citing precedents of the Inter-American Court of Human Rights, he concludes that "one should also keep in mind, besides *restitutio in integrum* and compensation, distinct *forms* of reparation, such as satisfaction, rehabilitation, and guarantee of non-repetition of the wrongful acts."[43]

Judge Bhandari's separate opinion discusses the role of the precautionary principle in international environmental law and the possibility of awarding punitive damages as a measure of deterrence of future harm. He states that "[t]he 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."[44]

Rica v. Nicaragua and the IACtHR Advisory Opinion on Marine Protection for the Greater Caribbean, EJIL: TALK! (Feb. 14, 2018), https://www.ejiltalk.org/environmental-damages-environmental-reparations-and-the-right-to-a-healthy-environment-the-icj-compensation-judgment-in-costa-rica-v-nicaragua-and-the-iacthr-advisory-opinion-on-marine-protection/ (providing details on the grounds for the definition on the amount of the compensation).

40. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Separate Opinion of Judge Cançado Trindade, ¶ 12 (Feb. 2, 2018), http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-01-EN.pdf.

41. *Id.* ¶ 19.

42. *Id.* ¶ 36.

43. *Id.* ¶ 37.

44. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Separate Opinion of Judge Bhandari, ¶ 13 (Feb. 2,

Judge Bhandari does not dispute that compensation is an adequate remedy in the case and acknowledges that punitive damages have not been awarded by the Court before.[45] Nevertheless, he claims that:

> [A]n extraordinary situation warrants a remedy that is correspondingly extraordinary. 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 include awards of punitive or exemplary damages in cases where it is proven that a State has caused serious harm to the environment.[46]

Ad Hoc Judge Dugard's dissenting opinion objects to the Court's methodology for assessing the damage. He claims that the Court should take into account equitable considerations, such as environmental protection, climate change, and the gravity of Nicaragua's conduct when determining the amount of compensation.[47] Given that precise quantification of the damage is impossible, he argues, the Court should consider that Nicaragua's conduct:

> [I]rresponsibly disturbed the biodiversity of the wetland and contributed, albeit minimally, to global warming by damaging carbon sequestration. These are serious violations. In making its award the Court should have reflected that seriousness by placing a higher monetary sum on the valuation of the environmental goods and services impaired by Nicaragua and the impact of Nicaragua's actions on an internationally protected wetland.[48]

In the *Burlington* case, the Tribunal also granted compensation for the harm, and the discussion focused on technical specificities regarding the extent of the damage, how to assess

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2018), http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-03-EN.pdf.

45. *Id.* ¶ 16.

46. *Id.* ¶ 18.

47. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Separate Opinion of Judge *ad hoc* Dugard, ¶ 29 (Feb. 2, 2018), http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-06-EN.pdf.

48. *Id.* ¶ 47.

the harm, and the liability of the parties. As Ecuadorian law has rules on liability for environmental harm, the Tribunal had a clear source of law to determine the content of the obligation of the parties. It could focus on the details of the matter—in particular, to what extent the investor is liable for the damage it caused, whether the investor has an obligation to remediate pre-existing damage, and how to recover the damaged area. For instance, after concluding that the company had an obligation to remediate the harm caused only during the concession period, the Tribunal determined whether the compensation should be based on international or domestic prices and what the adequate technology for the recovery process would be.[49] The Tribunal relied on site visits, expert testimony and evidence collected in each concerned area.[50]

These two examples demonstrate that compensation is the main method for environmental damage reparation in international dispute settlement. Although the Costa Rica decision was the first time the ICJ granted compensation for environmental damage, the Court treated this type of damage as any other material harm. The ICSID Tribunal in the *Burlington* case also considered only compensation. Nevertheless, as the ICJ separate opinions suggest, there are disagreements about the adequacy of compensation as the sole remedy in cases of environmental damage and to what extent the violating party is liable for the caused harm.

IV. Conclusion

As environmental concerns become increasingly important for the international community, international dispute resolution bodies will have to address the challenge of preserving sensitive ecosystems and biodiversity. This Comment contrasts two recent decisions regarding reparations for environmental harm in international law. Since this is an incipient area of international law, this Comment aims to present issues that are still subject to debate and the limitations of two relevant decisions.

The source of substantive law is different in both cases. While in the *Costa Rica* case, the environmental protection ob-

49. Burlington v. Ecuador, Counterclaims, ¶ 423.
50. *See id.*

ligations were found in international law, the ICSID Tribunal in *Burlington* applied constitutional and statutory law of the hosting state to determine the extent of harm and the liability regime. This difference in approach shows that international environmental obligations may have multiple sources and the content of these obligations will depend on the jurisdiction of the dispute resolution institution.

The ICJ reaffirmed the existence under international law of procedural obligations—such as the obligation to conduct an environmental impact assessment and to notify and consult the potentially affected states—and substantive obligations of avoiding transboundary harm. In the *Burlington* case, the protective nature of the domestic law resonated throughout the Tribunal's decision. This shows that constitutional principles of States may be used to inform the outcome of international dispute settlement cases.

Regarding reparations, both the ICJ and the ICSID Tribunal granted compensation to remedy the environmental damage. The ICJ decision is a landmark because it is the first time the Court issued compensation as a remedy for transboundary environmental harm. The ICSID decision is also remarkable because of its in-depth discussion about the extent of the liability of the investor, the required evidence to evaluate the damage, and the adequate method to recover the affected ecosystem. Both decisions are a step forward because they acknowledge that environmental harm demands reparation. Future case law, however, still needs to discuss questions about how to properly assess the extent of the harm, how to incorporate the precautionary principle on the reparation stage, and whether compensation is the sole adequate remedy for this type of injury.

The separate and dissenting opinions in the *Costa Rica* case express concerns about how environmental damage should be remediated. Despite this being the first decision granting remedies for material environmental damage, the Court missed an opportunity to explore a combination of reparation mechanisms when resolving the issue. In these separate opinions, the judges highlighted that the Court should have considered punitive damages and other methods of reparation, such as rehabilitation, satisfaction, and non-repetition obligations.

The challenges for international courts and tribunals in environmental protection cases are complex. There are widespread scientific concerns and disagreements about the consequences of human activity on the preservation of the environment and sensitive ecosystems. When judging these disputes, international courts and arbitral tribunals should not approach environmental harm as a mere material harm. Instead, future case law needs to consider the relevant science, and consider how to help ecosystems recover and prevent irremediable damage to nature.