



Compensating Environmental Damage and the Law of the Sea: Reflections on the Border Area (*Costa Rica v Nicaragua*)(Compensation) Case, 2 Feb 2018

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the Next Frontier?  
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# Presentation Outline

1. History of Proceedings
2. Factual matters
3. Legal Principles
4. Judicial Discretion
5. Compensability
6. Determination of amount due
7. Remarks



- Photo source: UN Photo/ICJ-CIJ/Frank van Beek. Courtesy of the ICJ.

# History of Proceedings (1)

- On 18 November 2010, Costa Rica instituted proceedings against Nicaragua in respect of an alleged “incursion into, occupation of and use by Nicaragua’s Army of Costa Rican territory, as well as [alleged] breaches of Nicaragua’s obligations towards Costa Rica” under a number of international treaties and conventions, as well as for ‘**serious damage to protected rainforests and wetlands**’
- By two separate Orders dated 17 April 2013, the Court joined these proceedings with those in the case concerning Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), instituted by Nicaragua on 22 December 2011.
- 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.
- Nicaragua therefore incurred the obligation to make reparation for the damage caused by its unlawful activities (*I.C.J. Reports 2015 (II)*, p. 703, para. 93).

## History of Proceedings (2)

- The Court found that its declaration that Nicaragua had breached Costa Rica's territorial sovereignty provided adequate satisfaction for the non-material damage suffered.
- However, it held 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 (*ibid.*, pp. 717-718, paras. 139 and 142).
- Failing agreement between the Parties and at the request of Costa Rica, it fell upon the Court to determine the amount of compensation awarded for material damage
- Two further Court Orders (Feb & July 2017) on **question of compensation** and **question of the methodology adopted in the expert reports presented by the parties**
- Present Judgment concerns amount of compensation

# Factual Matters

- Disputed territory defined as “the northern part of Isla Portillos, 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” [*I.C.J. Reports 2011 (I)*, p. 19, para. 55]
- Size of the area affected by the unlawful activities was 6.19 hectares of vegetation including removal of 300 trees [paras 54, 62 76]
- Area harmed is protected under the Ramsar Convention



- Border Area (*Costa Rica v Nicaragua*)(Compensation) Case, p.11

# Legal Principles Applicable to Compensation

1. Breach of an engagement involves an obligation to make reparation in an adequate form [*Chorzów Factory*, p.21] [para 29]
2. Compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible or unduly burdensome. [Pulp Mills] [para 30]
3. Compensation should not have a punitive or exemplary character [para 30]
4. Burden of proof: On the party that alleges a particular fact (however in certain circumstances may be on respondent) [para. 33]
5. Valuation of damage: Absence of adequate evidence on extent of damage will not in all situations preclude compensation. Scope for the application of equitable considerations [*Guinea v DRC*][*Trail Smelter*] [para.35]

# Judicial Discretion

## Damage and Causation

- 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. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered.”

Border Area (*Costa Rica v Nicaragua*)(Compensation)  
Case, para. 34

# Compensability of Environmental Damage

1. 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.
2. 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.
3. 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.
4. 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

- Border Area (*Costa Rica v Nicaragua*)(Compensation) Case, paras. 42 & 43

# Determination of amount due

| Headings                        | Costa Rica   | Nicaragua  | Court   |
|---------------------------------|--|--|---|
| 1. Existence & extent of damage | <ul style="list-style-type: none"> <li>6 categories of 22 goods &amp; services               <ol style="list-style-type: none"> <li>Timber</li> <li>Fibre and energy</li> <li>Gas regulation &amp; air quality;</li> <li>Biodiversity</li> <li>Natural hazards mitigation</li> <li>Soil formation and erosion control</li> </ol> </li> </ul> | <ul style="list-style-type: none"> <li>Compensation to replace the environmental services that either have been or may be lost prior to recovery of the impacted area” [para 49]</li> </ul>  | <ol style="list-style-type: none"> <li>Timber</li> <li>Fibre and energy,</li> <li>Gas regulation &amp; air quality</li> <li>Biodiversity</li> </ol> <ul style="list-style-type: none"> <li>Not demonstrated that has lost its ability to mitigate natural hazards or impair services [para 74]</li> </ul>   |
| 2. Valuation method             | <ul style="list-style-type: none"> <li>Ecosystem services incorporate both <u>direct uses</u> of the environment (ecosystem goods) and <u>indirect uses</u> (ecosystem services)</li> <li>Reference recovery period 50 years</li> <li>Supported by the practice of the United Nations Compensation Commission</li> </ul>                     | <ul style="list-style-type: none"> <li>Replacement cost—how much would need to be paid to preserve an equivalent area [\$35,000]</li> <li>Alternative, adopts Costa Rica’s ecosystems services approach but adjusts on the basis of a “corrected analysis” and assigns a total monetary value to the damage caused to the four categories of environmental goods and services [para 84]</li> </ul> | <ul style="list-style-type: none"> <li>International law does not prescribe a particular method</li> <li>Depends on specific circumstances and characteristics of each case [para 52]</li> <li>Approaches from the ecosystem as a whole and adopts ‘overall assessment’ of the impairment or loss of environmental goods and services prior to recovery [para. 78]</li> </ul> |
| 3. Compensation claimed and due | <ul style="list-style-type: none"> <li>\$ 6.711 million, with pre-judgment interest \$ 0.5 Million</li> <li>Post-judgment interest 6 %</li> </ul>  | <ul style="list-style-type: none"> <li>Not more than \$188,504</li> </ul>  | <ul style="list-style-type: none"> <li>Impairment - \$120,000</li> <li>Restoration measures - \$2,708</li> <li>Costs and expenses - \$236,032</li> <li>Surveillance, monitoring, construction of dyke as a measure to prevent irreparable harm</li> <li>Prejudgment interest - \$20,150</li> </ul> <p>Total – \$378,890</p>   |

# Remarks (1)

- First adjudication by the Court on environmental damage and compensation
- Affirms international norms on the protection and preservation of the environment
- Court recognized **ecosystem services** as part of the compensable damage to the environment, including both direct and indirect services.
- Flexible approach to evaluation methodologies. Valuation on a case-by-case approach and the basis of 'overall assessment' of ecosystem. Not clear however how the Court reached its final evaluation.
- Accordingly, methodology not easily replicable in the absence of the scientific or factual basis for each item of damage *attributable* to the unlawful activities

# Remarks (2)

- Nonetheless, important precedent that can be followed by other dispute settlement bodies including those constituted under Part XV of the Convention
- Active restoration measures are one of the objectives of the reparation regime
- Furthermore, in electing for an ‘overall evaluation’ approach the Court were able to take into account the overall capacity of the damaged area for natural regeneration
- Could the judgment act as a catalyst in relation to the BBNJ negotiations on the subject matter of the law, practice and science of restoration?

# Restoration: Normative Basis International Law

## Hard Law

- UNCLOS [Art 61(3)] [Arts 192, 194(5), 197] [Art 235, 139(2)] ✓
- 1994 Implementation Agreement...
  - Draft mining code
  - Environmental Management and Monitoring Plan
- UNFSA [Arts 5(e), 6(4), Annex II Art 4] ✓
- CBD [Art 8(f)(e)] ✓
  - Rehabilitate and **restore** degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies
  - CBD Dec X.33, XI/21
- OSPAR Convention ✓
  - ...conserve marine ecosystems and, when practicable, **restore** marine areas which have been adversely affected... [Art 2(1)(a)] & Annex V Art 2]
- CMS Art V.1 - **restore** the migratory species concerned to a favourable conservation status

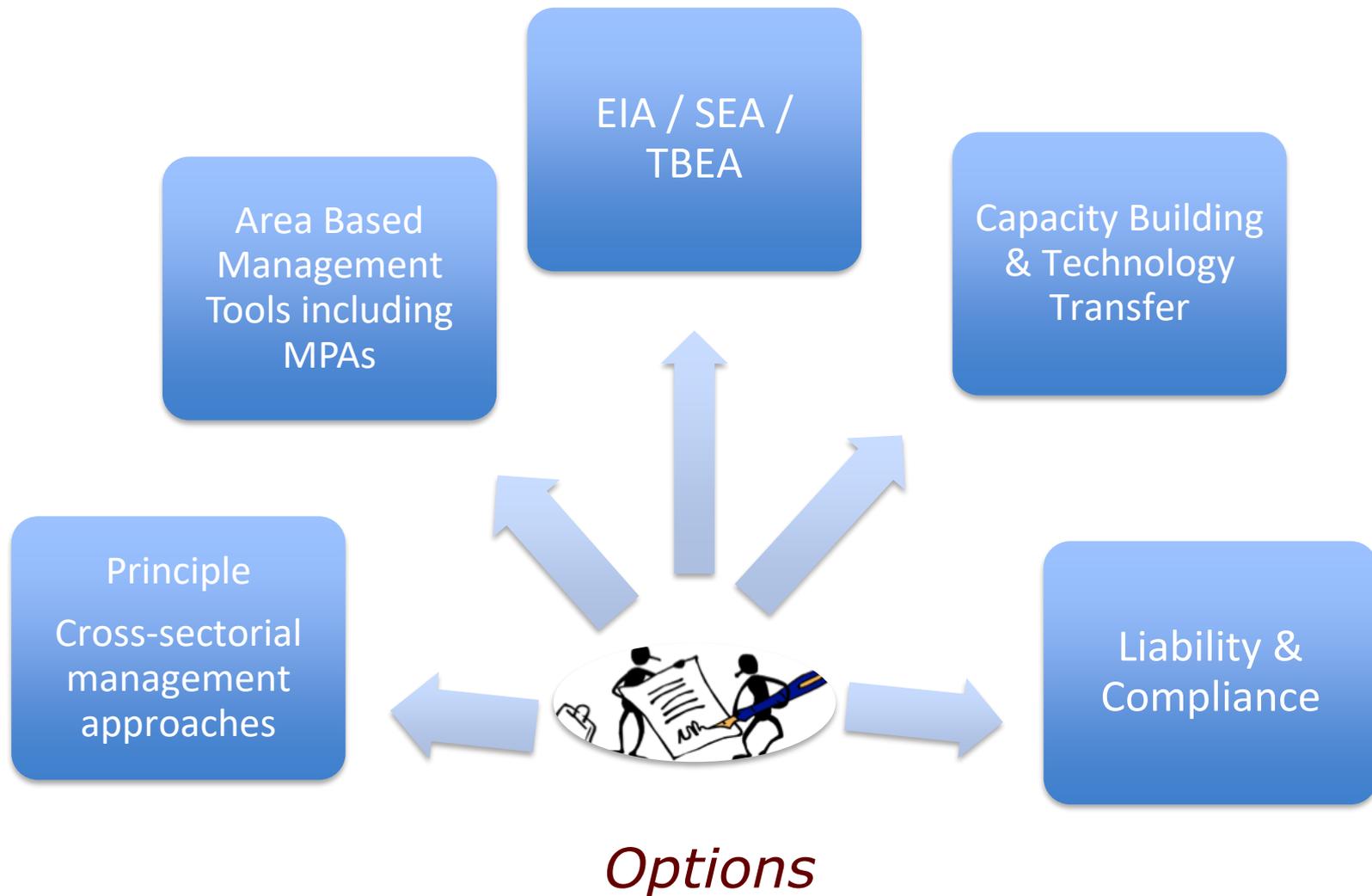
## Hard Law

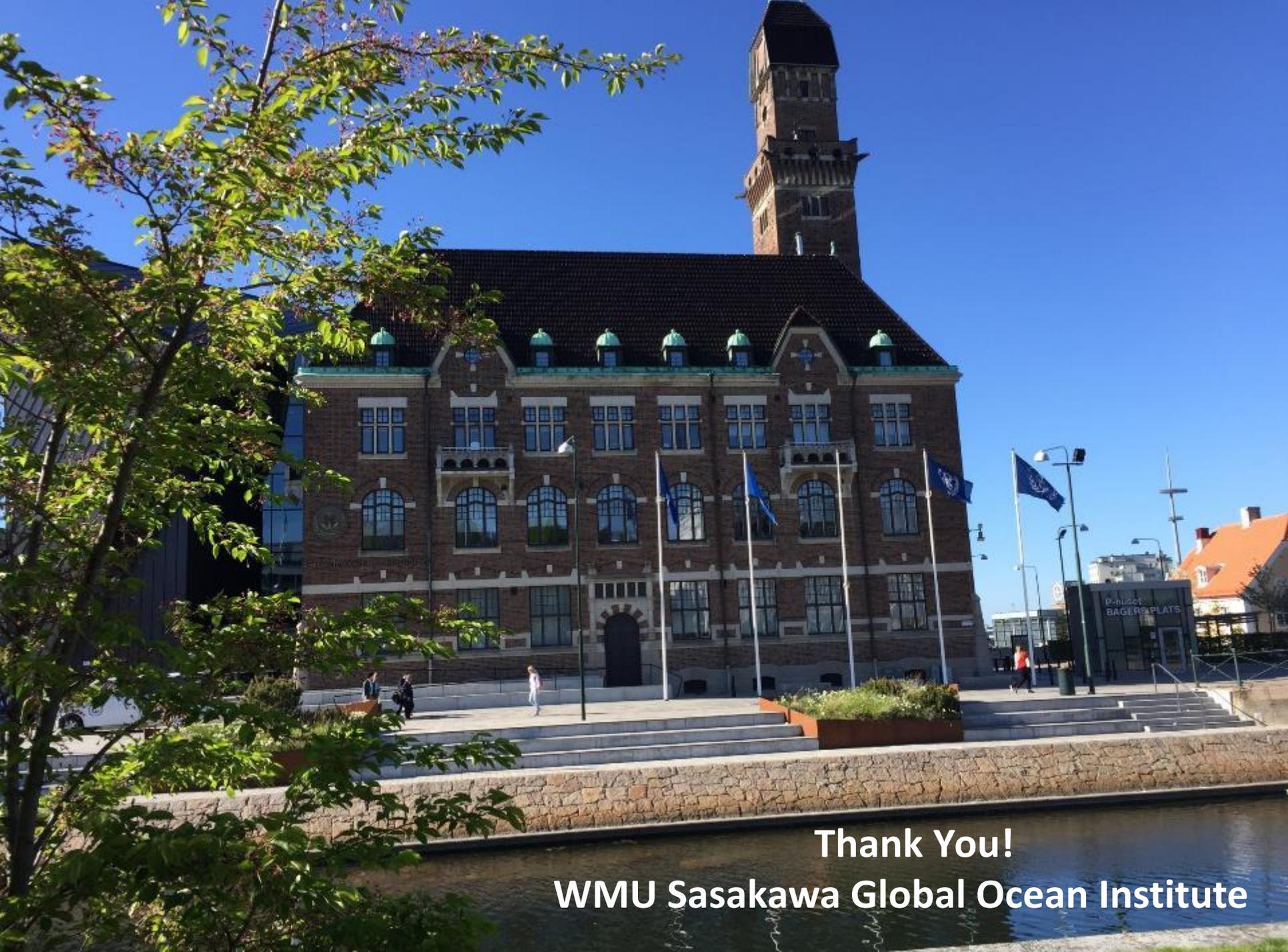
- Responsibility of States and international organizations ✓
  - Case No 17, Area Advisory Opinion (2011) ITLOS Rep 10, paras 195 and 198.
    - will depend on both actual damage and the technical **feasibility** of restoring the situation to the *status quo ante*
  - Case No 21, SRFC Advisory Opinion, Apr. 2, 2015 (para 208)
- Liability [UN Compensation Commission...development of novel approaches including abstract habitat equivalency analysis for the loss of ecological services] ✓
- Draft Articles on State Responsibility for Internationally Wrongful Acts [Arts 34 & 35 Reparations & Restitution] ✓
- State and Regional Practice [USA: Estuaries Restoration Act 2000]
- Emerging principles of non-regression and ecological integrity in Latin America



Conserve and sustainably use the oceans, seas and marine resources for sustainable development

## How can the Implementation Agreement mainstream ecological restoration?





**Thank You!**  
**WMU Sasakawa Global Ocean Institute**