The question:


Introduced by Annalisa Savaresi

The practice of Environmental Impact Assessment (EIA) has become part of environmental decision-making routine all over the world. EIAs are aimed at identifying the likely environmental, human health and welfare consequences of projects such as dams, motorways and other major infrastructure, at a stage when it can materially influence decision-making.¹

In the EU, a level playing field on this issue may be said to exist, following the adoption of the EIA Directive in 1985 and its successive iterations.² At the international level, in the Pulp Mills case the ICJ established that EIA has gained so much acceptance among States that it may now be considered a requirement under general international law ‘where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.’³ Most recently, the obligation to prepare an EIA has been also included in a draft international treaty codifying the main principles of international environmental law.⁴

¹ See eg J Holder, Environmental Assessment: The Regulation of Decision Making (OUP 2006) 34.
⁴ Global Pact for the Environment, draft art 5. The text of the draft text, released in June 2017, may be accessed at <www.iucn.org/sites/dev/files/content/documents/draft-project-of-the-
While it remains to be seen whether the latter international law-making endeavour will be successful, the Pulp Mills case has left a considerable degree of ambiguity on the scope of States’ obligations concerning EIA, and the legal basis on which these are predicated. In Pulp Mills the ICJ seemed to suggest that it is up to each State to determine ‘in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.’

The ICJ had an opportunity to look again at the content of State obligations on EIA in the Costa Rica v. Nicaragua and Nicaragua v. Costa Rica cases, jointly decided in December 2015. In these cases, the parties argued that non-compliance with the obligation to produce an EIA had resulted, respectively, in a breach of international environmental law (Costa Rica v. Nicaragua) and of general international law, as well as obligations under the 1992 Convention on Biological Diversity (CBD) (Nicaragua v. Costa Rica). At the heart of both cases were activities in a disputed border area concerning, respectively, the dredging of the San Juan River and the construction of a road along the same river. Two sites listed under the 1971 Ramsar Convention were furthermore situated in the area affected by the activities.

In its judgment, the ICJ shed some light on the scope and trigger of the obligation to carry out an EIA, highlighting its interlinkage with the obligations of due diligence and to notify and consult, as well as the importance of scientific evidence in the settlement of disputes concerning environmental matters. However, the ICJ has arguably missed an op-
portunity to further elaborate on the legal basis and scope of States’ international obligations associated with EIA, which have surfaced in subsequent disputes before other international adjudicatory bodies.

QIL has asked distinguished experts to comment on the state of play with international obligations concerning EIA, asking them to address two core questions:

1) What questions remain open concerning States’ international obligations on EIA?

2) What tools are best suited to address these questions? Should States follow Judge Bhandari’s invitation and ‘come together and develop a sound, pragmatic and comprehensive regime of EIA’? What about the role of soft law and guidance adopted under other international instruments?

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12 Separate Opinion of Judge Bhandari, para 47.