Determining significance for EIA in International Environmental Law

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Following the filing of an application in 2010, Costa Rica claimed that Nicaragua had dredged the San Juan River in violation of its international obligations; in 2011, Nicaragua filed its own application arguing that major road construction works alongside the same river were in violation of international environmental law. How to determine significance as the trigger for international environmental impact assessment (EIA) is the focus of this note, as the threshold question is paramount to the initiation of the EIA process. The following matters are particularly important:

Should the threshold question lie solely in the hands of the proponent State (the ‘State of origin’)? If not, should the duty to notify and consult with the ‘affected State’ occur at an earlier stage, rather than be preempted by the decision of the origin State not to assess? In the case of any disagreement, is there a role for an independent body to decide? Furthermore, what should the threshold(s) be? Should this/these be lower in the case of particularly sensitive environments, such as internationally protected wetlands? Should potentially impacting activities be specified in a list to reduce uncertainty? Is more guidance needed on thresholds? Each of these questions will be explored in this note.

The joined cases were concluded in late 2015. The ICJ decided that Nicaragua was not in breach of any international obligations to carry out

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an EIA because the works ‘were not such as to give rise to a risk of significant transboundary harm’;³ it also concluded that there was no obligation to notify and consult with Costa Rica ‘since Nicaragua was not under an international obligation to carry out an environmental impact assessment’.⁴ Conversely, the ICJ decided that Costa Rica was in breach of the obligation to carry out an EIA because it was concluded that – in contrast to Nicaragua’s dredging programme – the Costa Rican road construction ‘carried a risk of significant transboundary harm. Therefore, the threshold for triggering the obligation to evaluate the environmental impact of the road project was met.’⁵

The Court distinguished between the procedural obligations to carry out an EIA – as stated in 2010 in Pulp Mills,⁶ and strengthened in the 2011 ITLOS Advisory Opinion⁷ – and to notify and consult. As indicated in the decisions above, it introduced a three-fold test,⁸ whereby the state alleging a breach had to satisfy the Court that first, there was a risk of significant negative transboundary environmental effects by carrying out a ‘preliminary assessment’;⁹ second, that consequent on there being such a risk in the first, an EIA had been carried out;¹⁰ and third, consequent on the completion of this in the second, that the affected state be notified and consulted in relation to any potential harm as identified.¹¹

It is argued in this note however that this test has failed to clarify international law in respect of EIA, raising more questions than it answers. One of the main reasons for this is the muddled thinking of the Court, noted in particular in the Separate Opinion of Judge ad hoc Dugard, and considered below. The Separate Opinion of Judge Bhandari furthermore offers valuable suggestions as to how the jurisprudence can

³ ibid para 105.
⁴ ibid para 108.
⁵ ibid para 156.
⁷ Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (1 February 2011) ITLOS Case No 17 (‘Sponsoring States Advisory Opinion’) para 145.
⁸ See Separate Opinion of Judge Bhandari para 31, where these tests – which are referred to as the ‘three cumulative stages’ – are summarised.
⁹ Costa Rica v Nicaragua/Nicaragua v Costa Rica (n 2) para 154. This accords with what is commonly known as the screening stage of EIA.
¹⁰ ibid para 153.
¹¹ ibid para 168.
be improved – especially with reference to the procedure of the Espoo Convention;\(^\text{12}\) Judge Donoghue provides similar valued insights in relation to the ILC 2001 Draft Articles.\(^\text{13}\) Analysis of the Espoo Convention in particular is a key part of this note, especially in relation to the way in which significance determinations are conducted under that treaty which has been considered as a potential ‘global regime for EIA’\(^\text{14}\).

Despite finding that Costa Rica was in breach of the first obligation with respect to its own works, (because of the risk of significant transboundary harm and no justifiable emergency as a means of avoiding the obligation),\(^\text{15}\) the same reasoning and fact finding approach was not applied to Nicaragua. Judge \textit{ad hoc} Dugard concludes that ‘The Court erred in its findings of fact and … failed to apply the same reasoning.’\(^\text{16}\) While the Court concluded that it was not possible to determine whether Costa Rica was also in breach of the second obligation to notify and consult with Nicaragua (because it was contingent on an EIA being carried out), Judge \textit{ad hoc} Dugard however believes ‘that the Court erred in its interpretation of the Ramsar Convention on the duty to consult.’\(^\text{17}\)


\(^{14}\) T Koivurova, ‘Could the Espoo Convention become a Global Regime for Environmental Impact Assessment and Strategic Environmental Assessment?’, in R Warner, S Marsden (eds), \textit{Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives} (Routledge 2012) 323.

\(^{15}\) \textit{Costa Rica v Nicaragua/Nicaragua v Costa Rica} (n 2) para 162. In relation to the potential for an exemption for emergencies, see paras 157-159.

\(^{16}\) Separate Opinion of \textit{ad hoc} Judge Dugard para 4.

\(^{17}\) Ibid.
The obligation to carry out an EIA is, he notes, an ‘independent obligation designed to prevent significant transboundary harm. That arises when there is a risk of such harm. It is not an obligation dependent on the obligation of a State to exercise due diligence in preventing transboundary harm.’ As such it is important to recognise that the threshold for the former is lower than the latter, and that this is enhanced by the circumstances such as the sensitivity of any receiving environment, including Ramsar listed wetlands. He highlights the evidence of EIA expert Dr William Sheate on this point in relation to Construction of a Road, and the potential application of this also to Certain Activities, stating ‘the clear implication of Dr. Sheate’s evidence is that an environmental impact assessment was without doubt required when a Ramsar-designated wetland was at risk.

Commentators since have also noted the discrepancy in the Court’s approach, and the failure to clarify the jurisprudence in international EIA. Miles states:

‘The Court elided a crucial question as to whether, when determining “a risk of significant transboundary harm,” … risk is to be judged from the perspective of the state in question or via the application of empirical, scientific criteria by an objective observer (ie, the Court). Rather, the Court seems to have adopted a diversity of approaches, subjecting Nicaragua’s assessment of risk to very little scrutiny (and appearing to rely on certain assurances provided by Nicaragua) whilst engaging in extensive consideration of the scientific basis behind Costa Rica’s assessment of the same.’

18 ibid para 9, emphasis added.
19 Convention on Wetlands of International Importance (adopted 2 February 1971, in force 21 December 1975) 996 UNTS 245 (‘Ramsar Convention’), art 3(2) in particular, which provides for notification to the Ramsar Secretariat of changes in ecological character of Ramsar listed wetlands. Note furthermore the obligation of art 5(1) of the Ramsar Convention, which Dugard argues is ‘not restricted to situations involving a risk of significant transboundary impact.’ Separate Opinion of ad hoc Judge Dugard para 39.
20 Separate Opinion of Judge ad hoc Dugard para 33; see also para 30.
21 Miles (n 13) 3, where the author notes: ‘The Court also failed to refer to the International Law Commission’s 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, which describes the concept of such risk in terms of “physical consequences”, taking into account advances in scientific knowledge and advocating an objective approach to such questions overall.’
This ICJ procedural test does not accord with international practice on EIA, particularly under the Espoo Convention.22 This contests the claim of another commentator that ‘there may be benefits to ambiguity’.23 Whether or not a list approach to screening significant environmental effects – whereby categories of activity are predetermined – is accepted by the Court in the future, clarifying general criteria as an alternative, is essential. These criteria were noted in Pulp Mills as the ‘nature’, ‘magnitude’ and ‘likely adverse impact’, but guidance is needed on their meaning generally and in different circumstances. Importantly also in the light of the 2015 joined cases, consideration needs to be given about whether these screening criteria which initiate the EIA process should be decided by the proponent, and if not, what alternatives are needed. This was not examined by the Court, which maintained its position that the decision rests entirely with the proponent State. Desierto comments:

‘[T]he Court ultimately remained opaque on the method and criteria it used to assess the degree of “risk of transboundary harm” that would be sufficient to trigger a State’s obligation to conduct an EIA. It was a regrettably lost opportunity for the Court to provide practical and conceptual guidance to States on how to assess “significant risk of transboundary harm” which triggers the international legal duty of a State to conduct an EIA before starting the proposed activity.’24

Desierto in particular highlights that ‘the Court was utterly silent on whether such an EIA was to be judged solely from the lens of the State determining the scope and content of an EIA and conducting the said EIA, or whether there are objective, empirical, or scientific criteria under international law for determining the existence of such significant risk of transboundary harm.’25 Another commentator, Yotova, notes that ‘The

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22 Another international provision for EIA considered in Costa Rica v Nicaragua/Nicaragua v Costa Rica was art 14, Convention on Biological Diversity (adopted 5 June 1992, in force 29 December 1993) 1760 UNTS 79. The Court concludes that Costa Rica was not bound by this provision. See Costa Rica v Nicaragua/Nicaragua v Costa Rica (n 2) para 164.
24 Desierto (n 13).
25 Ibid.
ICJ could have clarified in particular whether it considers the Espoo Convention is part of custom, given that it was a treaty not binding on the parties.²⁶

Both the comments of Desierto and Yotova are highly relevant in the context of the decision. The general criteria noted by the Court in Pulp Mills – in the slightly different formulation of ‘size’, ‘location’ and ‘effects’ – are elaborated under the Espoo Convention (Appendix III).²⁷

This treaty also contains a list of activities likely to require an EIA (Appendix I), which trigger the obligation to notify and consult with affected Parties, if the Party of origin deems them to be so.²⁸ If the Party of origin does not believe there are likely to be any significant environmental effects however, there are also provisions whereby states who are not notified – or who disagree with the subjective determination of the proponent – can request the establishment of an independent scientific body to objectively decide the matter.²⁹ This is known as the inquiry procedure (Appendix IV).

The Separate Opinion of Judge Bhandari in Certain Activities recommends the Espoo Convention as a means of advancing the jurisprudence of the ICJ. He emphasises that ‘public international law presently offers almost no guidance as to the specific circumstances giving rise to the need for an EIA...’³⁰ After examining the history of the context in which international legal obligations for EIA have developed, he states ‘despite the burgeoning acceptance of this obligation under international law, discerning the exact procedural … requirements of an EIA has proven elusive.’³¹ In a slightly misplaced reading of the judgment of the Court in Certain Activities, he highlights three procedural stages as: preliminary assessment of the possibility of transboundary harm, production of an environmental impact statement, and post-project assessment. This results from identifying the duty to notify and consult as part of stage two.

²⁷ Espoo Convention, Appendix III, ‘General Criteria to Assist in the Determination of the Environmental Significance of Activities Not Listed in Appendix I’; see also art 2(5).
²⁸ See Espoo Convention, art 3(1).
²⁹ Espoo Convention, art 3(7); see Craik (n 1) 138.
³⁰ Separate Opinion of Judge Bhandari para 6.
³¹ ibid para 24.
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rather than as a separate third stage; and by including post-project analysis which was emphasised in *Pulp Mills* as part of the ‘continuous monitoring’ EIA obligation.\(^{32}\)

While focusing on the specific obligations that arise in stage two – the *content* of an EIA that is decided by scoping the terms of reference for the environmental impact statement – Judge Bhandari highlights the Espoo Convention as the ‘exemplary standard for the process to be followed when conducting an EIA’\(^{33}\) – the ‘standard that nation States should strive toward’.\(^{34}\) While it may be ‘primarily a regional instrument’\(^{35}\) he also acknowledges that it is now open to accession by all UN States. Furthermore ‘…it contains novel and progressive guidelines that the community of nations would be well served to treat as persuasive authority in creating a more comprehensive global regime regarding the required content of transboundary EIAs under public international law.’\(^{36}\)

The requirement of notification to a ‘potentially affected neighbouring nation State regarding any proposed activity’ that is likely to cause ‘significant adverse transboundary impact’, is a matter around which ‘great debate [has been held] about the extent of the obligation that this phrase entails.’\(^{37}\) He draws attention to the subjective nature of implementation of the significance threshold, as ‘A country proposing a project might argue that any impact is neither significant nor adverse, and thus escape the ambit of Article 3.’\(^{38}\) The way in which screening disagreements may be decided is in accordance with the Appendix IV inquiry procedure, although this is not elaborated.\(^{39}\) Importantly however, Appendix I – the List of activities requiring an EIA – and Appendix III – guidance on deciding whether an activity falls within the list – are cited as the best approach to take ‘to avoid the possibility that countries may abuse their discretion in labelling their activities as environmentally benign.’\(^{40}\)

\(^{32}\) *Pulp Mills* (n 6) para 205.

\(^{33}\) Separate Opinion of Judge Bhandari para 32.

\(^{34}\) Ibid para 33.

\(^{35}\) Ibid para 33.

\(^{36}\) Ibid para 33.

\(^{37}\) Ibid para 36.

\(^{38}\) Ibid.

\(^{39}\) Ibid. See Espoo Convention art 3(7).

\(^{40}\) Separate Opinion of Judge Bhandari para 42.
The Separate Opinion of Judge Donoghue confirms this understanding. Emphasising the different views of the Parties in dispute as to the timing of when notification should be given by the state of origin to the affected state,\(^{41}\) she comments: ‘due diligence may call for notification of a potentially affected State at a different stage in the process. For example input from a potentially affected State may be necessary for the State of origin to make a reliable assessment of the risk of transboundary environmental harm.’\(^{42}\) She furthermore indicates the position of the Espoo Convention (Article 3), which ‘calls for notification of a potentially affected State before the environmental impact assessment takes place, thereby allowing that State to participate in that assessment.’\(^{43}\) This is of the greatest importance in pointing to the flawed sequencing of the three-fold test, which fails to recognise the potential for abuse by the proponent State, and to follow the acknowledged best practice of the Espoo Convention.

In conclusion, with respect to the threshold question focused on in this note, the ICJ decision in the joined cases Costa Rica v. Nicaragua/Nicaragua v. Costa Rica has not advanced understandings of international EIA law. Commentators alike have noted the deficiencies of the ruling, which has failed to clarify the significance question for EIA in international environmental law. The Separate Opinions of Judges Dugard, Bhandari and Donoghue in particular, raise major concerns about both the ruling, and what it means for jurisprudential development. Some of these commentators and judges also highlight the Espoo Convention as a significant precedent for the international community to follow. In suggesting how the uncertainties and potential conflicts between disputant States can be recognised and pre-empted at an early time, the Espoo Convention can help. Once the Court is satisfied of the existence of practice by a large enough number of states, an acknowledgment of the customary law status of the obligations in this treaty may well follow.

\(^{41}\) Separate Opinion of Judge Donoghue para 17.
\(^{42}\) Ibid para 21, emphasis added.
\(^{43}\) Ibid.