Better Late Than Never? The Environmental Impact Assessment and its Timing and Function

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I. Introduction

General international law, as interpreted and applied by the International Court of Justice, ITLOS, and UNCLOS Annex VII tribunals, obliges a State to produce an environmental impact assessment (EIA) in respect of certain activities that might have adverse effects on another State or States.[1] It is an element of the obligation that the State produce the EIA *before* it commences such an activity. The timing of EIAs is not a matter which the academic literature has emphasized, even as courts and tribunals in compulsory procedures have noted timing on

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[1] Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 I.C.J. REP. p. 83 (¶ 204) [hereinafter *Pulp Mills*]; Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)/Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), 2015 I.C.J. REP. p. 665, 705 (¶ 101) (Dec. 16) [hereinafter *Border Area/San Juan River Road*].

a number of occasions,[2] and lateness in the production or delivery of EIAs has been a factor attracting international legal responsibility.[3] It might seem obvious, or at least unremarkable, that the EIA is to be produced and made available before a project that might give rise to adverse international effects is started. However, this is an area of international obligation in which the State bearing the obligation enjoys wide discretion, including as to the content of the EIA and the conduct of the inquiry on which the EIA is based.[4] The imposition of a constraint on discretion in respect of the timing of the EIA contrasts against the otherwise open texture of the rule. This relatively specific element of the EIA obligation merits a closer look.

Questions have been raised as to the precise scope and content of an obligation regarding the EIA, as well as to its existence as an autonomous rule under customary international law.[5] The questions are, in the view of the present authors, not without justification. The purpose of the present article is not, however, to consider those particular questions but, instead, to examine one element of the putative EIA rule—its timing. The article will suggest that the timing of EIAs connects with a larger objective—namely, supporting the process of international dispute settlement.

For a dispute settlement procedure to function, the parties in the procedure must have access to information on a basis of parity.[6] The settlement of international disputes cannot proceed in a satisfactory fashion in a vacuum of relevant information; nor can it function if a serious disparity exists between the parties as to access to information. The obligation to produce and make available an EIA is thus a rule that serves to enable dispute settlement procedure. The rule is relevant to negotiations at least as much as it is to third-party procedures, whether binding or consultative. Seen in this light, the seemingly unremarkable element of the EIA rule—the obligation to produce the EIA before the project starts—forms a piece of a larger apparatus of international legal relations. States, in turn, in implementing that obligation, may be expected do so with its function within the larger apparatus in mind.

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[2] Examples will be considered below in detail in Part IV.

[3] See esp. *Border Area/San Juan River Road*, *supra* note 1, at 722-723 (¶¶ 160-162), further to which see below in Part IV.

[4] Courts and tribunals have varied in their interpretations of the scope of the discretion, but, as will be seen, even where it has been interpreted at its narrowest, no very specific regime has been indicated as to the content of the EIA. See below Part IV.

[5] See, e.g., *Border Area/San Juan River Road*, *supra* note 1, Sep. Op. Judge Donoghue, at 786 (¶ 13) and, below, Part IV.

[6] This proposition follows from the general principle, reflected in the ILC Model Rules on Arbitral Procedure, that "[t]he parties shall be equal in all proceedings before the arbitral tribunal." *Preamble*, 1958 I.L.C.Y.B. Vol II p. 83. Rules and decisions relating specifically to informational disparities as such will be addressed below Part IV(A).

Disputes over water resources, more than any other kind of dispute, have occasioned international courts and tribunals to have regard to the rule requiring EIAs.[7] Water resources, which are part of a State's natural resources,[8] are an object of intensifying economic and political concern.[9] One therefore may expect States to invoke, and legal procedures to address, the EIA rule again in the future in settling water resource disputes.

International law rules addressing water resources are not however uniform in respect of all kinds of water resources.[10] Rules concerning rivers are less developed than the rules comprising the law of the sea.[11] This is visible in respect of substantive rules—and also in

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[7] ICJ cases concerning rivers in which EIAs were in issue are *Pulp Mills*, *supra* note 1, at 18, 59-60 (¶¶ 119-120), 82-84 (¶¶ 203-206); and, id., Dis. Op. Judge Ad Hoc Vinuesa, at 283 (¶ 65); *Border Area/San Juan River Road*, *supra* note 1, at 667, 705-707 (¶¶ 101-105), 708 (¶ 108), 719-725 (¶¶ 146-173), 738-739 (¶¶ 224-227) and, id., Sep. Op. Judge Owada, at 751-753 (¶¶ 13-22); id., Sep. Op. Judge Donoghue, at 785-789 (¶¶ 9-24); id., Sep. Op. Judge Bhandari, at. 791-806 (¶¶ 9-48); id., Sep. Op. Judge Ad Hoc Dugard, at 843-863 (¶¶ 4-45) (Dec. 16); *Border Area/San Juan River Road*, *supra* note 1, Request Presented by Nicaragua for the Indication of Provisional Measures, 2013 I.C.J. REP. p. 398, 403-404 (¶¶ 17-19), (Dec. 13).

Earlier, Vice-President Weeramantry, writing separately in Gabčíkovo–Nagymaros, had thought the Court should have said more about the EIA: Gabčíkovo–Nagymaros Project, Sep. Op. Vice-President Weeramantry, 1997 I.C.J. REP. p. 7, 88, 111-113 (Sept. 25); and two years before that, in connection with the environmental effects of French nuclear testing in the Pacific, to similar effect if less pointedly, see Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in Nuclear Tests (New Zealand v. France) Case, Dis. Op. Judge Weeramantry, 1995 I.C.J. REP. p. 288, 344-345 (Sept. 22); and, id., Dis. Op. Judge *Ad Hoc* Sir Geoffrey Palmer, 1995 I.C.J. REP. at 411 (¶¶ 87-88), 412 (¶ 91(c)).

The Court of Arbitration under the Indus Waters Treaty, three years after the ICJ in *Pulp Mills*, quoted the ICJ with approval: Indus Waters Kishenganga Arbitration (Pakistan v. India), Indus Waters Treaty, Court of Arbitration (Schwebel, Chairman; Berman, Wheater, Caflisch, Paulsson, Simma & Tomka, Members), Partial Award (Feb. 18, 2013), 31 REP. INT'L ARB. AWARDS 55, 216-217 (¶ 450).

Two maritime cases arbitrated under UNCLOS Annex VII have addressed the EIA: South China Sea (Philippines v. China), UNCLOS Annex VII Tribunal (Mensah, President; Cot, Pawlak, Soons, Wolfrum, Members), Award (July 12, 2016), p. 362 (¶ 911), 377-378 (¶¶ 947-948), 395-397 (¶¶ 988-989, 991); and Marine Protected Area (Republic of Mauritius v. United Kingdom), Award (Mar. 18, 2015), UNCLOS Annex VII Tribunal (Shearer, President; Greenwood, Hoffmann, Kateka & Wolfrum, Members), 31 REP. INT'L ARB. AWARDS 365, 500 (¶ 322). The EIA rule was earlier identified as belonging to customary international law in Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion (Feb. 1, 2011), 2011 ITLOS REPORTS p. 50 (¶ 145).

[8] The ICJ in *Pulp Mills* gave no cause to doubt the proposition, when it referred to the River Uruguay as a "shared resource": *Pulp Mills*, *supra* note 1, at 14, 51 (¶ 81) (Apr. 20). Cf. Affaire du Lac Lanoux, 12 REP. INT'L ARB. AWARDS 281, 305; UN Convention on the Law of the Non-navigational Uses of International Watercourses, 2998 U.N.T.S. 1, adopted May 21, 1997, entered into force August 17th, 2014, Art. 6(1)*(f)* (referring to "water resources of the watercourse").

[9] As they have been from the initiation of work on the topic, the General Assembly in G.A.R. 2669 (XXV) (Dec. 8, 1970) referring to water as an object of "the growth of population and the increasing and multiplying needs and demands of mankind." See generally U.N. Water, *Water Security & the Global Water Agenda. A UN-Water Analytical Brief* (2013); STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES (3rd edn.) (2019), at 3-26.

[10] See, e.g., in relation to environmental pollution, Katharina Kummer, *The international regulation of transboundary traffic in hazardous wastes: the 1989 Basle Convention,* 41(3) INT'L & COMP. L. Q'LY 530, at 532 (1992), observing that "[t]he quality of the different regimes varies significant."

[11] See concerning precedence of UNCLOS over other agreements Tim Stephens, *Reimagining International Water Law,* 71 MD. L. REV. ENDNOTES 20, 26 n. 53 (2011). At least one writer has observed that the lower threshold for entry into force of the 1997 Convention in comparison to UNCLOS, and the divisions among States upon the adoption of the 1997 Convention, suggest the relative scarcity of codified law in the 1997

respect of third-party dispute settlement procedures. Third-party dispute settlement forms a significant part of the law of the sea, Part XV of the UN Convention on the Law of the Sea having widespread applicability. No apparatus of third-party settlement applies to rivers on such a scale.[12] Even sea areas, which some say are subject to a "constitution for the oceans,"[13] are in many instances regulated through negotiation rather than general rules; more disputes over maritime delimitations, to give the main example, are settled through negotiation than through third party procedure.[14] UNCLOS Article 283 in any event obliges parties to a dispute to exchange views before they institute a third party procedure.[15] Negotiation thus is potentially important in respect of all international water disputes.[16] In light of the relative paucity of third-party procedures, negotiation is particularly important in respect of disputes over international rivers.

Negotiation is a dispute settlement procedure that has no judge, arbitrator, mediator, conciliator, or other such third party to exercise authority or control over the parties,[17] and thus

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Convention: Zewei Yang, *United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses: Problems, Improvements and Potential Influence on China*, 47 HONG KONG L. J. 243, 253-54 (2017). The point is also visible in the suggestion in a UNITAR study that the law of the non-navigational uses of international watercourses was not a "traditional" international law topic: Mohamed El Baradei, Thomas M. Franck, Robert Trachtenberg, THE INTERNATIONAL LAW COMMISSION: THE NEED FOR A NEW DIRECTION (1981), at 13. Cf. the relative ease of securing support for UNCLOS Art. 235(2) in comparison to draft article 3 on non-navigational uses of international watercourses, as to which see McCaffrey, *Background and Overview of the International Law Commission's Study of the Non-Navigational Uses of International Watercourses*, 3 COLO. J. INT'L ENVT'L L. & POL'Y 17, 26-27 (1992).

[12] The UN Convention on the Non-Navigational Uses of International Watercourses 1997, Art. 33(10), gives parties the option of agreeing to compulsory jurisdiction of the I.C.J. or arbitration on a reciprocal basis. As of August 2021, Hungary, Montenegro, and the Netherlands had declarations on record accepting the dispute settlement mechanisms indicated in Art. 33(10): https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&clang=_en#1 (last visited August 17th, 2021).

[13] Report of the Secretary-General, *Oceans and the Law of the Sea,* A/73/368 p 18 (¶ 8) (Sept. 5, 2018); UNCLOS, Report of the thirteenth Meeting of States Parties, SPLOS/103 p. 4 (¶ 7) (June 24, 2003). Cf. Territorial and Maritime Dispute (Nicaragua v. Colombia), 2012 I.C.J. REP. 2012 p.624, 708, 716 (¶¶ 230, 244) (Nov. 19), identifying "public order" of the oceans as a consideration in the application of the rules of maritime delimitation; and United States v. Kun Yun Jho, 465 F.Supp. 2d 618, 628.

[14] See the reports on maritime claims and boundaries in the successive papers of the Office of the Geographer and Bureau of Intelligence and Research (United States) published as the series LIMITS IN THE SEAS (from No. 1 of Jan. 21, 1970 to No. 143 of Dec. 5, 2014): most of the settled maritime boundaries therein, where they are between overlapping potential entitlements, resulted from negotiation and agreement rather than third-party decision.

[15] See Philippines v. China, *supra* note 7, Award on Jurisdiction and Admissibility, ¶¶ 322 *ff* (Oct. 29, 2015).

[16] See further below as to the analogous role of negotiation in the law of the sea and the law of the non-navigational uses of international watercourses, in Part II of this paper.

[17] It is true that a negotiation might take place in the frame of some procedure, even a standing procedure such as that of a diplomatic conference or international assembly: see South West Africa (Ethiopia v. South Africa/Liberia v. South Africa), Preliminary Objections, 1962 I.C.J. REP. p. 346. However, where parties to a dispute have engaged in negotiation through exchanges of view in such a setting, the procedure of the body does not oblige them to reach a result; any result reached is subject to the political discretion of the States parties to the dispute. By contrast, where a body has the power to reach a decision in respect of their dispute (whether or

no result necessarily emerges from a negotiation except to the extent that the parties agree the result.[18] Negotiation therefore relies to a special degree on the conduct of the States that are parties to the dispute they seek to settle. Good faith has long been identified as a central requirement in the conduct of parties in a negotiation.[19] It is to be asked whether there are other rules or principles of international law that similarly serve to support the negotiating process. The present article will suggest that the EIA rule is such a rule. In fulfilling its obligation under the EIA rule, the party contemplating a project that might adversely affect another party equips the other party with information. Without information, it would be difficult or impossible to participate meaningfully in a negotiation. In other words, a party must have information by the time the dispute settlement procedure begins, or else the procedure will fall short its goal. Timing of the EIA therefore is to be understood as one of the underpinnings of pacific settlement of disputes in general. It is a requirement, like the obligation of good faith, that applies to the conduct of parties in order to assure the effectiveness of negotiation in particular.

While specially relevant in the negotiation setting, the EIA is relevant in other settings too. Transmittal of the EIA in good time is indispensable in all forms of dispute settlement where a proposed project has international impact and regardless of the kind of project involved. This obligation is likely to come into play all the more in an age of water projects with increasing international impact.

This Article will proceed, first, with a general overview of sources of international law wherein rules might be found that place constraints on a State's sovereign right to develop its watercourses (Part II). It then will consider the customary international law rule, as identified in the *Pulp Mills* case and elsewhere, that obliges a State to furnish an EIA to any other State or States that might be adversely affected by a project that the former State contemplates implementing on a river (Part III). It then turns to the element of *timing*. This is considered firstly from the perspective of a State's obligations to notify and consult with affected parties when undertaking an EIA; secondly from the perspective of negotiation and other forms of

not binding)—as the Security Council does under Chapter VI of the Charter—the body, if it exercises the power, is not merely providing a forum for negotiation; it is, instead, a third party dispute settlement machinery.

[18] Deadlock is understood to be a possibility in negotiations, whereas third party dispute mechanisms are designed to produce a result (binding in adjudication or arbitration, consultative under other mechanisms such as conciliation). As to the possibility of deadlock, see Mavrommatis Palestine Concessions, Judgment No. 2, 1924 P.C.I.J. Ser. A No. 2 p. 13. See also Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Joint Decl. Judges Gaja and Crawford, 2017 I.C.J. REP. at p. 64, ¶ 5 (Feb. 2). By contrast, questions properly placed before, e.g., the International Court of Justice shall be answered (see in that example Art. 55 of the Statute of the ICJ).

[19] Lac Lanoux Arbitration *supra* note 8, at 281.

dispute settlement; and thirdly in relation to the concept of due diligence, the relation being a matter of some difference among jurists and, perhaps, suggestive in a general way of how an EIA rule might connect to other rules or principles of international law (Part IV).

II. A sovereign resource and its regulation under international law

Water resources being part of a State's natural resources, a State has a right to develop them. The ILC, in its drafting work on the non-navigational uses of international watercourses, said the following:

> There is no doubt that a watercourse State is entitled to make use of the waters of an international watercourse within its territory. This right is an attribute of sovereignty and is enjoyed by every State whose territory is traversed or bordered by an international watercourse.[20]

The right to develop a river is not, however, in all cases unlimited. Treaty commitments may affect the right.[21] General international law may affect the right as well. The rule requiring an EIA, which the International Court of Justice (ICJ) and other tribunals have indicated belongs to general international law, has been invoked in a number of disputes concerning rivers. Because the rule applies to all States, it applies to watercourse States, including upstream States in respect of projects that they plan to undertake on a shared river where those projects might have an adverse impact on a downstream State or States. The situations where the rule might apply are numerous.

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[20] I.L.C. Draft articles on the non-navigational uses of international watercourse, draft article 5, comment (8): 1994 I.L.C.Y.B. Vol II(2) p 98. Cf. Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, Sept. 25, 1997, Sep. Op. Vice-President Weeramantry, 1997 I.C.J. REP. p. 7 at 89; Case concerning East Timor (Portugal v. Australia), Judgment, June 30, 1995, Dis. Op. Judge Weeramantry, 1995 I.C.J. REP. at p. 199. The "right to development" is sometimes invoked as well by parties in maritime delimitation disputes, e.g, by Nicaragua in Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, Oct. 8, 2007, 2007 I.C.J. REP. p. 661, 747 (para. 290); it was mentioned at least once by an arbitration tribunal in a maritime delimitation, Guinea-Guinea(Bissau) (1985): Decision, Feb. 14, 1985 (Lachs, president; Mbaye, Bedjaoui, members; Pillepich, registrar): XIX REP. INT'L ARB. AWARDS 149, 193-4 (para. 122); 77 INT'L L. REP. 635, 688-9. Cf. 1986 Declaration on the Right to Development, Art. 1(1) ("[t]he right to development is an inalienable human right." GA res. 41/128, Dec. 4, 1986, Annex. See also 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992); 1993 Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (1993) ; Millennium Declaration, GA Res. 55/2, UN Doc A/RES/55/2 (2000); 2002 Monterrey Consensus, UN Doc A/CONF.198/11 (2002); 2005 World Summit Outcome, GA Res. 60/1 UN Doc. A/RES/60/1 (2005).

[21] Thus, e.g., the Tribunal in *Lac Lanoux* interpreted the restrictions on State sovereignty under Art. 8 of the 1866 Agreement between France and Spain as not necessarily having a narrow scope, Lac Lanoux Arbitration, *supra* note 8, at 300-301 (¶ 1).

Though a substantial international trade exists in a number of vital commodities, such as oil and iron, we do not speak, at least for the time being, of an international trade in water. Water nevertheless moves across borders as well. Because rivers and other natural features, like aquifers, run across or beneath international borders, water is a transboundary resource.[22] The United Nations, in the framework of the Decade of Water for Life, indicates that there are 263 transboundary lakes and river basins.[23] Some 145 States have territory comprising international river basins. Most of these river basins are shared by two States alone.[24] So most transboundary rivers involve bilateral relations only. Thirteen river basins are shared by between 5 and 8 States: the Amazon, Ganges-Brahmaputra-Meghna, Lake Chad, Tarim, Aral Sea, Jordan, Kura-Araks, Mekong, Tigris-Euphrates, Volga, La Plata, Neman, and Vistula (Wista).[25] Another five river basins are shared by between 9 and 11 States. These are the basins of the Rivers Congo, Niger, Nile, Rhine and Zambezi. The river basin with the largest number of States is that of the Danube, which includes territory of 18 States.[26] The interest of States in developing rivers is considerable. In respect of the Danube, it was freedom of navigation that, in 1856 following the Crimean War, motivated one of the first intergovernmental organizations, but the constitutive provisions for the Danube European Commission also envisaged certain dredging works in the river which, though environmental impact was not a significant concern at the time, well might have entailed adverse effects on the environment.[27] Disputes concerning new industrial activities affecting rivers—not least of all, irrigation projects—long have had the potential to complicate bilateral and multilateral relationships. In fact, in recent years, a number of inter-State disputes that have resulted in proceedings before courts and tribunals have been disputes concerning rivers. Some of these disputes will be addressed below in connection with the EIA rule.

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[22] See generally: F SINDICO, INTERNATIONAL LAW AND TRANSBOUNDARY AQUIFERS (Cheltenham, UK; Northampton, MA: Edward Elgar 2020).
[23] See UNDESA, Transboundary Waters http://www.un.org/waterforlifedecade/transboundary_waters.shtml (last visited August 17th, 2021).
[24] *Id*.
[25] *Id*. Cf. TwinBasin, International River Basins of the World, http://www.cawater-info.net/twinbasinxn/summary_e.htm (last visited August 17th, 2021).
[26] UNDESA, *supra* note 23.
[27] In regard to dredging of "sands and other impediments" at the Mouths of the Danube, see Art. XVI, General Treaty of Peace between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey (March 30, 1856). The PCIJ's advisory opinion on Jurisdiction of the European Commission of the Danube Between Galatz and Braila, Advisory Opinion, PCIJ 1927 Ser. B. No. 14 (Dec. 8) addressed navigational freedom rather than river development. As to river organizations generally, see Rüdiger Wolfrum, *International Administrative Unions*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Sept. 2006) (¶¶ 7-14), which, incidentally, identifies the *L'Administration générale de l'octroi de navigation du Rhin* as the first such body (id. at ¶ 10).

Given the number of international rivers and the issues to which their use and development give rise, it is unsurprising that States have sought to regulate such rivers by treaty. A database compiled by Oregon State University in the U.S. contains more than 600 international agreements relating to fresh water concluded since the year 1820.[28] The UN Food and Agriculture Organization estimates that there have been over 3,600 treaties related to international water resources since 805 AD.[29] In modern times, as with many areas of concern, States have addressed cross-boundary water resources with multilateral treaties. There are a number of multilateral instruments at regional level. Under the UN Economic Commission for Europe, to give one of the main examples, there was adopted in 1992 a Convention on Protection and Use of Transboundary Watercourses and International Lakes[30]; this was open at first only to parties in a European area, including the former USSR, that area being defined in Article 23 of the Convention.[31] There are also treaties (and attempted treaties) to regulate particular basins. For example, the downstream States of the Mekong Basin in 1995 concluded an Agreement on Cooperation for the Sustainable Development of the Mekong River Basin.[32] Under a Nile Basin Initiative, the States of the Nile Basin negotiated from the late 1990s onward with a view to concluding a Cooperative Framework Agreement, but differences between upstream and downstream States led to significant difficulties.[33]

The main multilateral treaty in this field drafted with general application in mind is the 1997 UN Convention on the Non-Navigational Uses of International Watercourses.[34] The 1997

[28] See OSU, International Freshwater Treaty Database, http://transboundarywaters.science.oregonstate.edu/content/international-freshwater-treaties-database (last visited August 17th, 2021).
[29] See UNDESA, *supra* note 23.
[30] Convention on Protection and Use of Transboundary Watercourses and International Lakes, adopted Mar. 17, 1992; entered into force Oct. 6, 1996: 1936 U.N.T.S. 269.
[31] *Id.*
[32] Agreement on Cooperation for the Sustainable Development of the Mekong River Basin, adopted Apr. 5, 1995: 34 INT'L LEGAL MATERIALS 864.
[33] See, e.g., Tadesse Kassa Woldestsadik, *The Nile Basin Initiative and the Cooperative Framework Agreement: Failing institutional enterprises? A script in legal history of the Diplomatic Confront (1993-2016)* 11 Mizan Law Review (2017) https://www.ajol.info/index.php/mlr/article/view/161611 (last visited August 17th, 2021).
[34] One of the regional conventions just noted—the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes—was opened from March 1, 2016 to accession by States outside the region designated in its Article 23 and, thus, from that time onward has been potentially a universal water treaty as well. For the history of the ECE Water Convention, see McCaffrey, *supra* note 9, at 414-421. As of August 2021, the 1992 Convention had as parties forty-four States and the European Community. Chad (from May 23, 2018), Senegal (from Nov. 29, 2018), and Guinea-Bissau (from June 14, 2021) are parties outside the original area. See https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280044685&clang=_en (last visited August 17th, 2021).

UN Convention took some 26 years to draft[35] and 17 years after adoption to enter into force.[36] The goal of the drafters that this instrument would supply a framework for river law at global level was ambitious; subscription remains limited. The Convention has 37 States parties as of August 2021. As noted above, only three States parties have registered their acceptance of the compulsory dispute settlement provision which is optional under Article 33.[37]

Treaties however are not the only source of international obligation in respect of rivers. Certain provisions of the 1997 UN Convention, which have been incorporated in whole or in part in other treaties, are often said to embody rules of customary international law.[38] Noteworthy here are Article 5, paragraph 1, of the UN Convention and Article 7, paragraph 1. Article 5, paragraph 1, provides that watercourse States "in their respective territories shall utilize an international watercourse in an *equitable and reasonable manner*."[39] Article 7, paragraph 1, provides that watercourse States "shall… take *all appropriate measures* to prevent the causing of *significant harm* to other watercourse States."[40] Analogous provisions are found in other (but not all) river basin treaties. The Mekong Basin Agreement, for example, makes provision in Article 5 for "Reasonable and Equitable Utilization."[41] The 1929 and 1959 agreements concerning the Nile, by contrast, refer to "acquired rights" of States parties.[42]

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[35] The General Assembly by G.A.R. 2669 (XXV) (Dec. 8, 1970) recommended that the ILC take up the study of the law of non-navigational uses of international watercourses; the ILC recommended draft articles on the topic to the General Assembly in 1994 (1994 I.L.C.Y.B. vol. II pt. 2 pp. 88-89 (¶ 219); the General Assembly adopted the Convention by G.A.R. 51/229 (May 21, 1997).

[36] UN Convention on the Non-Navigational Uses of International Watercourses, Concluded May 21, 1997 (by General Assembly adoption); entered into force Aug. 17, 2014: 2998 U.N.T.S. 1.

[37] Further to the dispute settlement provision, see Ruth Lapidoth, *Dispute Settlement under the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses*, 75 INT'L L. STUD. SER. US NAVAL WAR COL. 231, 236-41 (2000).

[38] As to the relation between the 1997 UN Convention and customary international law generally, see Stephen McCaffrey, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls* in SALMAN M.A. SALMAN & LAURENCE BOISSON DE CHAZOURNES, EDS, INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING CONFLICT. PROCEEDINGS OF A WORLD BANK SEMINAR, World Bank Technical Paper No. 141 (1998), at 17-28; Attila Tanzi, *The UN Convention on International Watercourses as a Framework for the Avoidance and Settlement of Waterlaw Disputes*, 11 LEIDEN J. INT'L L. 441, at 442-43 (1998); Aaron Schwabach, *The United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians*, 33 TEX. INT'L L. J. 257-279 (1998); MCCAFFREY, *supra* note 9, at 415, 421-22, 441. For a critical view, see Yang, *supra* note 11, at 253-54.

[39] Emphasis added.

[40] Emphasis added.

[41] Article 5 of the Mekong Basin Agreement provides that the States Parties are "[t]o utilize the waters of the Mekong River system in a reasonable and equitable manner… pursuant to all relevant factors and circumstances…"

[42] Agreement between the Republic of Sudan and the United Arab Republic for the full utilization of the Nile waters (Nov. 8, 1959), first para. ("The Present Acquired Rights"); Nile Waters Agreement of 1929 by Exchange of Notes between the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes (May 7, 1929) (stipulating no irrigation or hydroelectric

International dispute settlement practice, to a degree and in particular settings, has recognized rules requiring an equitable and reasonable approach to river development and mitigation of significant harm. The ICJ in the *Gabčíkovo-Nagymaros* case referred to Hungary's "right to an equitable and reasonable share of the natural resources of the Danube" and to "the proportionality which is required by international law."[43] Judge Koroma, writing separately, and Judge Herczegh and Judge Skubiszewski in dissenting opinions, thought equitable and reasonable use to be a rule of general international law.[44] Judge Kooijmans, writing separately in *Kasikili/Sedudu Island (Botswana/Namibia),* referred to the rule as "widely accepted both for the navigational and the non-navigational uses of international watercourses"[45] and urged the parties, though the rule did not determine on which side of the island their boundary runs, to observe the rule in the use of resources of the Chobe River around the island.[46] The ICJ in the *Pulp Mills case* between Argentina and Uruguay understood "equitable and reasonable utilization of a shared resource" to be connected as a matter of obligation to balancing economic development and environmental protection.[47]

Considering mitigation of significant harm, which is the concern addressed in Article 7 of the UN Convention, the ICJ in *Pulp Mills* said as follows:

> [a] State is… obliged to use all the means at its disposal in order to avoid activities which take place in its territory… causing significant damage to the environment of another State.[48]

Earlier, after a dispute had arisen between Belgium and the Netherlands over the proposed re-activation of the 19th century Iron Rhine Railway, the parties constituted an arbitral tribunal by agreement, and the tribunal, in similar fashion to the ICJ, indicated that general international law contains a duty in respect of environmental harm. Unlike the ICJ, however, the tribunal did not indicate that the State under the duty must necessarily do everything in its ability to prevent the harm:

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projects without Egypt's prior consent "which could jeopardize the interests of Egypt either by reducing the quantity of water flowing into Egypt or appreciably changing the date of its flow or causing its level to drop").

[43] Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. REP. p. 7, 56 (¶ 85) (Sept. 25).

[44] Id., Sep. Op. Judge Koroma, at 149-150; Dis. Op. Judge Herczegh, at 202; Dis. Op. Judge Skubiszewski, at 237 (¶ 11).

[45] Case concerning Kasikili/Sedudu Island (Botswana/Namibia), 1999 I.C.J. REP. p. 1045, 1151-1152 (¶ 37) (Dec. 13).

[46] Id. at 1151 (¶ 36).

[47] *Pulp Mills, supra* note 1, at 74-75 (¶ 177) (Apr. 20).

[48] *Pulp Mills, supra* note 1, at 56, para. 101; quoted at Border Area/San Juan River, Judgment, Dec. 16, 2015, para. 118.

> [W]here development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm... This duty, in the opinion of the Tribunal, has now become a principle of general international law.[49]

True, the State, in the opinion of the *Iron Rhine* tribunal, *might* be obliged to "prevent... such harm," but the tribunal left open the possibility that mitigation would suffice to fulfil the duty thus expressed. The Tribunal said nothing about the scope or magnitude of the means that the State is obliged to employ. The ICJ re-iterated its "all the means" statement from *Pulp Mills* in the *Border Area/San Juan River Road* case between Nicaragua and Costa Rica.[50]

A point of comparison is in order between the ICJ's expression of the rule and the text of Article 7 of the UN Watercourses Convention. The rule as stated by the Court would appear to be in stronger terms than Article 7 of the UN Convention. Article 7 requires "all *appropriate* measures to prevent the causing of significant harm." The rule under general international law, at least as stated by the Court, requires a State to use "*all the means* at its disposal." This obligation would seem to entail more than is expressed in Article 7. States have "means" at their disposal which, under other rules (consider proportionality under international humanitarian law), are not "appropriate" in every circumstance. Moreover, there are "means at its disposal" that are far in excess of any benefit that their employment by the State might bring. A plausible reading of the Court's Judgment in *Border Area/San Juan River Road* is that limitations on the conduct of a State found in other rules implicitly apply to the State in respect of the "means" that it employs to address potential significant harm, and, thus, the Court is not inviting a State to use "all the means at its disposal" without regard to the legality of the means it uses or to the balance between costs and benefits. McCaffrey sees the provision, where it calls for "appropriate means," as "having much in common with" another rule already set out in the Convention—namely, that of Article 5 requiring reasonable and equitable utilization.[51]

Whatever the precise relation among the rules involved, and however precisely one articulates them, this much at least can be said: a body of opinion, including as expressed in decided cases, holds that customary international law contains rules applicable to international

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[49] *Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award (May 24, 2005) (Higgins, President; Schrans, Simma, Soons & Tomka, Arbitrators), 27 REP. INT'L ARB. AWARDS 35, at 66-67 (¶ 59).
[50] *Border Area/San Juan River Road*, *supra* note 1, at para. 118.
[51] MCCAFFREY, *supra* note 9, at 478.

rivers *(i)* concerning equitable and reasonable use; and *(ii)* concerning at least *appropriate* measures to prevent the causing of significant harm.

As suggested above, these obligations are not the entire customary international law of shared water resources as indicated in international dispute settlement practice. Courts and tribunals also have indicated customary international law to contain an obligation to undertake an environmental impact assessment, and, as noted, the obligation is of particular relevance to rivers. It now falls to consider the EIA rule in more detail.

III. The EIA rule: its existence, scope and content

In the main cases in which an EIA obligation has been invoked, the dispute between the parties in respect of that obligation has concerned a number of issues. Issues of particular concern have been whether an obligation exists at all; who has the discretion to decide whether to undertake the impact assessment; how is the impact study to be conducted; what should be the content of the EIA; and how, if at all, should the EIA be transmitted or published. There is a further issue that drew attention in at least one recent case and, as we have suggested already, it is an issue of some importance. This is the issue of *timing*, which will be the focus of Part IV.

The present Part, in subpart (A), will consider the jurisprudence concerning the existence of the EIA rule, which can be dealt with briefly. Subpart (B) will turn to the scope and content of the rule.

A. Existence of an obligation

The existence of an obligation to produce an EIA under certain circumstances has been indicated by a number of courts and tribunals. The International Law Commission (ILC) has posited it as well. As we noted in the Introduction to this article, legal authorities are not unanimous as to the existence of an EIA rule. Doubts as to its existence as a rule of customary international law in large part concern its relation to a more general principle—that of due diligence in respect of the prevention of transboundary environmental harm. The relation between the EIA rule and due diligence will be taken up in more detail in Part IV(C) below. Here, however, we will start with the threshold question—i.e., whether an EIA rule exists.

The jurisprudence, it quickly comes to light, suggests that, indeed, an EIA rule exists. The International Court of Justice, in what became a sort of instant *locus classicus*, stated the rule in 2010 in *Pulp Mills* as follows:

> [I]t may now be considered a requirement under general international law to undertake an environmental impact assessment 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.[52]

The Court stated the rule again in 2015 in the *Border Area/San Juan River Road* Judgment, adding that while the Court in *Pulp Mills* was referring to industrial activities, "the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context."[53]

The rule has been affirmed elsewhere, for instance as a matter of customary international law in respect of maritime development.[54]

B. Scope and content of the EIA rule

It now falls to consider the lineaments of the EIA rule as propounded.

It is well-established that where there is a risk of significant transboundary harm, the preparation of an EIA is required under customary international law, but it is less clear what, concretely, that requirement entails. This section will show that, while courts and tribunals have thus far avoided prescribing in any detailed way the content of the requirement, judicial and ILC guidance on the elements of an EIA is not entirely lacking. From the practice to date, broad agreement is visible on the basic procedural architecture of an EIA.

Craik observes that "[e]nvironmental assessment requirements for planned activities can be found in every region of the world, across vastly different political and economic systems and across all ranges of development levels."[55] He further notes that, "[v]iewed comparatively, EIA has taken on a remarkably similar architecture regardless of the implementing institutions."[56]

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[52] *Pulp Mills*, *supra* note 1, at 83, ¶ 204.
[53] *Border Area/San Juan River Road*, *supra* note 1, at ¶ 104. But see the Separate Opinion of Judge Donoghue, who states she is "not confident, however, that State practice and opinio juris would support the existence of such a specific rule": *Border Area/San Juan River Road*, *supra* note 1, Sep. Op. Judge Donoghue, at 786 (¶ 13).
[54] See Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, *supra* note 7, at 50 (¶ 145): "It should be stressed that the obligation to conduct and environmental impact assessment is a direct obligation under the Convention *and a general obligation under customary international law*" (emphasis added); Philippines v. China, *supra* note 7 , at 377 (¶ 948) (July 12, 2016).
[55] Neil Craik, *The Assessment of Environmental Impact* in EMMA LEES AND JORGE VIÑUALES (EDS), THE OXFORD HANDBOOK OF COMPARATIVE ENVIRONMENTAL LAW (2019) 876.
[56] *Id.*, at 880. He adds: "One striking feature of the global development of EA is the degree of isomorphism across different institutional settings." *Id.*, at 895.

This convergence appears to be driven by States wanting to adhere to international standards of best practice laid down by international organizations, for essentially pragmatic reasons. As Hironaka puts it, "States adopt these neat, standardized packages more easily than taking the messy, expensive, and time-consuming alternative of tailoring an environmental protection program to the varied environmental problems and conditions of their particular ecosystems."[57]

Yang similarly describes a process of "legal transplantation" of EIAs in numerous jurisdictions, attributing it to "environmental governance capacity-building and law reform programs promoted and supported by the development aid arms of governments and intergovernmental organizations as well as the work of NGOs and academics. In such initiatives, the environmental governance and regulatory mechanism that is promoted with overwhelming frequency is EIA."[58] Some scholars might discern here at least an echo of the "socializing states" thesis posited some time ago in regard to human rights.[59] Convergence around particular forms, norms and practicestakes place through acculturation, persuasion and some levels of coercion.

In most jurisdictions, the requirement to undertake an EIA includes the following elements:[60]

1) screening, i.e. the identification of activities or projects to be assessed;

2) scoping, i.e. the identification of the environmental issues to be examined. Alternatives will also be evaluated at this stage;

3) the preparation of the study behind the assessment;

4) public participation and consultations;

5) a decision on whether and how the activity or project will be approved; and

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[57] Ann Hironaka, *The globalization of environmental protection: The case of environmental impact assessment* 43(1) INTERNATIONAL JOURNAL OF COMPARATIVE SOCIOLOGY 65, 67-68 (2002).
[58] Tseming Yang, *The emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law* 70 HASTINGS L.J. 525, 540 (2019).
[59] RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATE: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2013).
[60] Craik *supra* note 55 at 880-881. Craik explains that the Eastern European/former Soviet countries follow a different model. Hironaka describes roughly the same steps but groups them in three categories (Hironaka *supra* note 57, at 66);Yang identifies the same steps, albeit by grouping them in five stages (see Yang, *supra* note58, at 546, and Donelly et al describe, broadly, a similar process, divided into 14 steps, Annie Donelly et al. A DIRECTORY OF IMPACT ASSESSMENT GUIDELINES (IIED, WRI, IUCN 1998), at 9-13.

6) follow-up and monitoring, after approval of the project.

Beyond these "general steps," when it comes to the specific content of an EIA in a given situation, it is more difficult to identify points of convergence across jurisdictions.[61] Even the requirements surrounding the preparation of the study, beyond obvious matters such as the need to undertake on-site observations and draw up plans, are difficult to articulate with any degree of precision. One reason for this uncertainty is that an ever-broadening "suite of different techniques" is being brought to bear on the assessment of "impact," and this has in turn resulted in the emergence of special types of EIA, like Environmental Health Impact Assessments and Biodiversity Impact Assessments.[62] While the trend is therefore in the direction of convergence as far as the basic architecture of EIAs is concerned, specific requirements as to the content of EIAs are becoming increasingly complex and context-dependent.

Against this evolving backdrop, it is no surprise that, when discerning the elements of the obligation to undertake an EIA under customary international law, the ICJ in *Pulp Mills* did not wish to be drawn into detail:

> … it is the view of the Court that it is for 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. […][63]

In other words, while the content of an EIA is not, strictly speaking, prescribed by customary international law, a State that engages in activities that may have a significant adverse

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[61] Yang, *supra* note 58, at 546. See also Alan Boyle, 'Developments in International Law of EIA and their Relation to the Espoo Convention' (2011) <https://unece.org/fileadmin/DAM/env/eia/documents/mop5/Seminar_Boyle.pdf> (last visited August 17th, 2021), at 3.

[62] See Donelly et al, *supra* note 60, at 8: "Impact assessment now includes a broad suite of different techniques, including environmental impact assessment (EIA), social impact assessment (SIA), cumulative effects assessment (CEA), environmental health impact assessment (EHIA), risk assessment, strategic environmental assessment (SEA) and biodiversity impact assessment (BIA)." See also, RM Warner, "Conserving Marine Biodiversity in Areas Beyond National Jurisdiction: Co-Evolution and Interaction with the Law of the Sea", 752, at 773-6 (on adapting the EIA process for the purpose of assessing the impact of activities on biodiversity in areas beyond national jurisdiction); also, Convention on Biological Diversity, Commission for Environmental Assessment, Biodiversity in EIA and SEA: Background Document to COP 8 Decision VIII/28: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment (2006), available at: https://www.cbd.int/decision/cop/?id=11042#_Toc124570465 (last visited August 17th, 2021).

[63] *Pulp Mills*, *supra* note 1, at ¶ 205.

transboundary impact operates within certain constraints when designing an EIA. The State must pay heed to the specific characteristics of any proposed project and its potential impact on the environment,[64] and it must exercise "due diligence" in conducting the assessment. In *Border Area/San Juan River Road* the Court reiterated its view that the content of EIAs was to be determined by national laws, but that it was nevertheless subject to "the specific circumstances of each case."[65]

In his Separate Opinion, Judge ad hoc Dugard expounded on what this might entail in practice. Domestic laws, in his view, can address matters such as "the identity of the authority responsible for conducting the examination, the format of the assessment, the time frame and the procedures to be employed."[66] On the other hand, he explains:

> … there are certain matters inherent in the nature of an environmental impact assessment that must be considered if it is to qualify as an environmental impact assessment and to satisfy the obligation of due diligence in the preparation of an environmental impact assessment.[…] an environmental impact assessment should relate the risk involved in an activity "to the possible harm to which the risk could lead", contain "an evaluation of the possible transboundary harmful impact of the activity", and include an assessment of the "effects of the activity not only on persons and property, but also on the environment of other States" (YILC, 2001, Vol. II, Part Two, pp. 158-159, paras. 6-8).[67]

The ILC's Commentary on its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, to which Judge ad hoc Dugard refers, repeatedly stresses that the Articles do "not specify what the content of the risk assessment should be"[68] but, that disclaimer notwithstanding, they arguably go a good deal further than a bare sketch. The Commentary refers, *inter alia*, to an obligation to assess the impact on other states;[69] a requirement to assess harm to the environment independently from damages to individuals or property;[70] and a duty to notify and consult other affected countries.[71]

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[64] Boyle, *supra* note 61.
[65] *Border Area/San Juan River Road*, *supra* note 1, ¶ 104.
[66] *Id.* Separate Opinion, Judge Dugard, ¶ 18.
[67] *Id.* Separate Opinion, Judge Dugard, ¶ 18.
[68] ILC, Yearbook of the International Law Commission, (2001)II(2), at 158, ¶ 6, and again at ¶ 7.
[69] *Id.* 159, ¶ 8.
[70] *Id.*
[71] *Id.*, ¶ 7, and more directly Article 8.

Not immediately evident in Judge ad hoc Dugard's overview of the EIA is a requirement in regard to timing. Judge ad hoc Dugard identifies "the time frame" as a matter that domestic law might address; he does not single out that factor as a distinct element in the international law relevant to EIAs. As we will show in the next section, however, temporal considerations are key to the conduct of an EIA under international law as courts and tribunals have interpreted it.

VI. The element of timing

The temporal element of the EIA rule is not restricted to projects on rivers,[72] and it contains subtleties not reflected in a simple statement that the EIA must be undertaken "*prior* to commencement of the construction works" (as the ICJ expressed it in *Border Area/San Juan River Road*).[73] Alan Boyle has observed that fulfilment of the EIA may take place over several steps:

> An EIA will normally take place before authorisation is granted, but it may occur in several stages, for example in schemes which require an "initial environmental examination" followed by a full EIA only if a likelihood of significant harm is then identified. In cases involving complex projects, where the time between initial authorisation and eventual operation is prolonged, it may be necessary to conduct several EIAs - or at least to review and revise the initial EIA - before a plant is authorised to commence operations.[74]

Boyle thus describes a range of possibilities as to the form and sequencing of assessments. Does this suggest that practice remains at present equivocal? Or does it reflect a relatively settled position under which States retain considerable liberty in fulfilling the EIA obligation?

Rather than consensus as to a broad discretion in regard to timing, dispute settlement practice suggests that States simply do not agree. Whether the obligation operates before an EIA is prepared, or after the EIA has determined that there is a significant risk of transboundary environmental harm, has been a particular contested question. Parties in dispute have taken conflicting views on the matter, the parties in *Border Area/San Juan River Road* supplying a salient example.

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[72] The Annex VII Tribunal in Mauritius v. United Kingdom expressed the matter like this: "the general international law requirement to carry out an environmental impact assessment [is] *in advance of* large scale construction projects": Chagos Marine Protected Area, *supra* note 7, at para. 322 (emphasis added).
[73] *Border Area/San Juan River Road*, *supra* note 1, at 722 (¶ 159) (emphasis added).
[74] Boyle *supra* note 61.

In the *Border Area/San Juan River Road* Judgment, the Court stated that where the EIA predicts transboundary harm, the State is under an obligation "to notify, and consult with, the potentially affected State in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk."[75] In the first subsection below we will consider the temporal questions that arise in connection with this duty to notify and consult in good faith, before examining the central importance of timing to negotiations and other forms of dispute settlement which the EIA process supports.

A. Notification and consultation

As just noted, the Court in its Judgment in the *Border Area/San Juan River Road* case, was clear that an obligation exists to notify and consult, at least in circumstances such as those that the parties there called on the Court to consider. However, questions remained open as to timing. In her Separate Opinion, Judge Donoghue criticizes the lack of clarity regarding the content of the obligation to notify and consult.[76] Judge Donoghue notes that the parties differed in their understanding of what is the correct timing for issuing a notification: while Costa Rica maintained that the duty to notify/consult arises *before* the EIA is prepared, Nicaragua asserted that the duty arises only if and when the EIA indicates that transboundary environmental harm is likely.

Judge Donoghue explains that no evidence of State practice was provided in this regard, and that therefore no conclusion as to the timing of the notification could be drawn.[77] She further expresses concern, however, that the ICJ's judgment in the *Border Area/San Juan River Road* Judgment could be understood as implying that Nicaragua's interpretation is correct:

> … the Judgment could be read to suggest that there is only one circumstance in which the State of origin must notify potentially affected States — when the State of origin's environmental impact assessment confirms that there is a risk of significant transboundary harm. […] However, 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 in order for the State of origin to make a reliable assessment of the risk of transboundary environmental harm. The Espoo

[75] *Border Area/San Juan River Road*, *supra* note 1, at para 168, see also at ¶ 104.
[76] Judge Donoghue's Separate Opinion in *Border Area/San Juan River Road*, *supra* note 1, at ¶¶ 16-19.
[77] *Id.*, at ¶¶ 19-20.

> Convention (Art. 3) calls for notification of a potentially affected State before the environmental impact assessment takes place, thereby allowing that State to participate in that assessment."[78]

The Espoo Convention, to which Judge Donoghue refers, the ICJ expressly declined to consider as a source informing the content of the customary international rules on EIAs, that instrument being a regional instrument only.[79] The Convention Guidance is nevertheless instructive, even if not formally authoritative, on matters of timing and best practice:

> The notification must be sent at the latest when the public in the Party of origin is being informed of the national EIA process. It is recommendable to send the notification as early as possible, favourably before the scoping, if such a phase is being carried out (see paragraphs 37 to 39 above). All Parties that have been identified to be potentially affected should receive a notification.[80]

Such a requirement could be viewed as a logically necessary feature of the process, in the sense that the input of potentially affected countries will, in most cases, be indispensable when assessing the significance of the risk of environmental impact in their territories. As Judge Donoghue put it in *Border Area/San Juan River Road*, "it is difficult to see how Costa Rica could conduct a sufficient assessment of the impact on the river without seeking input from its neighbour."[81] The Espoo Convention Guidance goes further:[82]

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[78] *Id.*, at ¶ 21. Paragraph 168 of the Judgement indeed states: "The Court reiterates its conclusion that, if the environmental impact assessment confirms that there is a risk of significant transboundary harm, a State planning an activity that carries such a risk is required, in order to fulfil its obligation to exercise due diligence in preventing significant transboundary harm, to notify, and consult with, the potentially affected State in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk (see paragraph 104 above). However, the duty to notify and consult does not call for examination by the Court in the present case, since the Court has established that Costa Rica has not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road."

[79] *Pulp Mills*, *supra* note 1, at paras 205 and 210.

[80] Economic Commission for Europe, GUIDANCE FOR THE PRACTICAL IMPLEMENTATION OF THE ESPOO CONVENTION (UN 2006), at 13, para. 41. The same document stresses that "[c]lear rules on timing", and "the allocation of time for each step" are important when it comes to "responding to the notification", "in public consultation and participation", and "in informing of the final decision" (*id*. para. 39).

[81] Judge Donoghue's Separate Opinion in *Border Area/San Juan River Road*, *supra* note 1, para 22. The ILC's commentary on its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities adds in this respect (addressing the wider context of cooperation): "More specific forms of cooperation are stipulated in subsequent articles. They envisage the participation of the State likely to be affected in any preventive action, which is indispensable to enhance the effectiveness of any such action. The latter State may know better than anybody else, for instance, which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem." ILC Draft Articles, *supra* note 68, at 155.

[82] Economic Commission for Europe, *supra* note 80, 11.

> It may be advisable to notify neighbouring Parties also of activities that appear to have a low likelihood of significant transboundary impacts. It is better to inform potentially affected Parties and let them decide on their participation instead of taking the risk of ending up in an embarrassing situation in which other Parties demand information on activities that have already progressed past the EIA phase. There are several cases where the affected Party has wished only to be kept informed.

In short, according to the Guidance, the affected Party should be given the chance to decide for itself. Notification and consultation are not mere "box checking" exercises; they require the transfer of information in good faith.[83] A notification pursuant to an EIA that is accompanied by relevant, but insufficient, information is at best unhelpful, and at worst useless, as it does not furnish an adequate basis for transboundary consultation; it does not give the affected Party the information it needs in order to decide. The same could be said for information that is not furnished in a timely fashion. The obligation to notify and consult with potentially affected states necessarily operates prior to the completion of an EIA, but more than that, it must allow sufficient time for the receiving state to scrutinize and react to the information before a risk of significant harm materializes. This is also relevant to the conduct of negotiations, which will be considered further in subsection (b). If a receiving State is presented with a *fait accompli*, this would negate the underlying purpose of a requirement to notify, consult or negotiate.[84]

The timing of a notification must also afford an opportunity for a rational assessment of less harmful alternatives to the proposed activity or project. The assessment of alternatives as part of the EIA assessment was discussed in *Pulp Mills.* Argentina had argued that Uruguay's EIA was incomplete, as it had not assessed alternative, less harmful sites for the mills.[85] Argentina based its argument on wider international law instruments such as the Espoo Convention, the UNEP Goals and Principles, and the IFC Operational Policy 4.01. While it did not say so explicitly, Argentina's reliance on these sources appeared to be an attempt to

[83] Maki Tanaka observes that the obligation to transfer information is recognized in almost all of the legal instruments that address EIAs in a transboundary context: 'Lessons from the Protracted Mox Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea' (2004)25(2) Michigan Journal of International Law 337, 408. On the concept of "information exchange" in international environmental law more generally, see PHILIPPE SANDS ET AL. PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (4th edn 2018) 685.
[84] See further at Part IV below.
[85] *Pulp Mills, supra* note 1, at ¶ 118.

establish the existence of a customary rule requiring the assessment of less harmful alternatives when carrying out an EIA.

In its Judgment in *Pulp Mills*, the ICJ avoided the question of whether or not such a requirement exists under customary international law. However, having decided that the sources adduced by Argentina were not to be relied upon, the Court proceeded to examine whether Uruguay had indeed assessed possible alternatives as part of its EIA, and concluded that it had.[86] If the assessment of alternatives is to be regarded as an inherent characteristic of a properly conducted EIA, the Court's approach leaves open the question of whether it is possible in practice to perform such an assessment unilaterally, or whether the involvement of potentially affected parties is an indispensable part of the process. If cooperation is part of the process, then the informational purpose served by timing the EIA to precede the project would seem at least, in part, already to have been served—by cooperation:[87] if the concerned States are engaged jointly in carrying out the EIA, then the transmission of information among them would take place through that joint effort, and transmission of the finished product might seem more a formal than practical act. The better view, we submit, however, is that timing even where the EIA is carried out jointly still is important: the affected States would be deprived of information, if the joint effort in preparing the EIA started too late—i.e., after the project had begun or proceeded to a significant extent. Timing would retain its importance as well, in view of the possible interests of third States not invited to cooperate. States in that position would need the information contained in the EIA, in order to form a view as to what steps, if any, to take in regard to the project; and such steps would be to best effect, if taken before the project started or was far along.

Another matter that connects with the element of timing is the obligation to consult affected populations, which the parties to the *Pulp Mills* dispute agreed was included within the duty to conduct an EIA[88] (although the Court did not confirm the existence of such a requirement under customary international law). The Court decided that the Espoo Convention and the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities could not be relied on by Argentina, but concluded as a matter of fact that "consultation by

[86] *Id.* at ¶l 210.
[87] See discussion on the link between the customary international law duty to cooperate and the obligation to conduct EIAs in Neil Craik, *The duty to cooperate in the customary law of environmental impact assessment* 69 INT'L & COMP. L. Q'LY 239 (2019). See further review of the content of the duty to cooperate under Customary International Law at Sands et al. *supra* note 83, at 216-217.
[88] Sands et al. *supra* note 83, 215.

Uruguay of the affected populations did indeed take place."[89] Reflecting on this part of the Judgment, Alan Boyle expresses surprise at the Court's silence concerning the existence of an obligation to enable public consultations in the process of EIAs:[90]

> Properly argued there should have been no difficulty persuading the court of the general principle that public consultation is a necessary element of the EIA process, as it is under Article 2(6) of the Espoo Convention. For me this is the only surprise in the entire judgment.

Given the growing importance attached to the principle of public participation in international environmental law,[91] it would not be surprising if a requirement to engage in public consultations is eventually recognized judicially as an element of EIAs, at least where the areas at risk of significant transboundary harm are inhabited by significant populations.

On the subject of public engagement, Charles Kersten observes that

> … transboundary EIA treaties give people this information before any final decision has been made. The comprehensive transboundary EIA regimes typically require the acting party to notify the affected country as soon as possible, and in any event no later than when it notifies its own population. Their provisions ensure that the affected public is given ample time to organize.[92]

The importance of this point cannot be overemphasized. For public consultation to be meaningful, it must allow sufficient time – *before a project materializes* – for information to be scrutinized, discussed and if necessary acted upon by affected members of the public who might not have easy access to technical expertise, and who lack bureaucratic mechanisms for converting their deliberations into actions and proposals and thus who likely have less leverage than governments and corporations engaged in, and affected by, the EIA process. It is hard to see any reason of principle that the information needs of well-organized institutions would be more exacting than those of diffuse constituencies or the individuals who comprise them.

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[89] *Id.* at 219.
[90] Boyle *supra* note 61, 8-9.
[91] See for example the effective duplication of the Aarhus Convention 1998 via the conclusion of its Latin "twin", the The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean. See also the approach of the European Court of Human Rights in the context of hazardous activities: Guerra and others v Italy, Case No. 14967/89, Feb. 19, 1998.
[92] CM Kersten, *Rethinking Transboundary Environmental Impact Assessment*, 34 YALE J. INT'L L. 173, 186-7 (2009).

The considerations that we have set out here in respect of the timing requirement for EIAs connect, therefore, with the so-called "right to information" under international law—a disputed concept but one advanced in earnest in recent dispute settlement proceedings. To give the main example, the right to information was a point of dispute in the *Ghana/Côte d'Ivoire* maritime boundary case. Ghana asserted in that case that international law contains no "right to information."[93] Côte d'Ivoire said, in effect, it did. Côte d'Ivoire's reasoning on this point is instructive:

> [t]he past and ongoing collection of information relating to the natural resources of the disputed area by Ghana and by private oil companies is a serious infringement of the disputed rights of Côte d'Ivoire

and the damage caused by the infringement is

> irreversible insofar as a return to the situation *ex ante* will be impossible owing to the fact that information will have circulated and that, unlike a living resource, bargaining power cannot regenerate on its own.[94]

As for Côte d'Ivoire's specific assertion—that there exists a "right to access to information about the resources of the continental shelf"—the ITLOS Special Chamber concluded that such a right is "plausibly among those rights" that are "necessary" for the enjoyment of the coastal State's other rights.[95] Indeed, in its provisional measures, the Special Chamber obliged Ghana to "prevent information... that is not already in the public domain from being used *in any way whatsoever* to the detriment of Côte d'Ivoire."[96] Also noteworthy here—and a point to which we shall return—is that Côte d'Ivoire connected the plausible right to information to "bargaining power," an asset directly relevant to negotiation as a dispute settlement process.

It should finally be noted that the rules concerning EIAs do not end with the preparation of the EIA, nor with the completion of the project. The ICJ has stipulated that a State must follow certain steps upon the completion of the EIA. In *Pulp Mills*, the Court stated that after the State has implemented its project, "continuous monitoring of its effects on the environment

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[93] Delimination of the Maritime Boundary Between Ghana and Côte d'Ivoire (Ghana/Côte d'Ivoire), Provisional Measures (Apr. 25, 2015), ITLOS REPORTS 2015 p. 146, 158 (¶ 55).
[94] *Id.* at 162 (¶ 79).
[95] *Id.* at 164 (¶ 94).
[96] *Id.* at 166 (¶ 108(1)(b)) (emphasis added).

shall be undertaken."[97] The timeline, therefore, does not necessarily reach its end when the State transmits its EIA.

There is however little judicial guidance concerning what continuous monitoring is to entail. A number of questions may be posed in that regard. For example, does the duty to notify and consult identified in the *Border Area/San Juan River Road* Judgment[98] apply with respect to the results of *post-EIA* continuous monitoring? Or is the post-EIA situation in some respect different, such that the elements of the monitoring duty are not quite the same as the elements of the EIA? The preceding discussion regarding the function and elements of transboundary EIAs points towards an affirmative answer. After all, the utility of an EIA is by no means limited in time to the period before a project starts, and a failure to supply information concerning environmental impact during the course of a project has been held to constitute a breach of international legal obligation.[99] An assessment of environmental impact may also be relevant in the determination of compensation due from a state responsible for injury to another state.[100] There is no obvious rationale for the application of a more restrictive approach to the sharing of relevant information after the completion of a project whose transboundary effects are subject to continuous monitoring. Again, if we see the transmittal and sharing of information to be a required concomitant to a legal process, then there would be little principled reason—or functional logic—in the content of the obligation differing significantly between different phases of a development project.

B. Negotiation and other forms of dispute settlement

The importance of questions of timing when undertaking an EIA is brought into sharp relief when one considers the centrality of negotiation in dispute settlement under the international law of watercourses and the function of the EIA process in supporting the peaceful settlement of disputes.

Article 33, paragraph 10, of the 1997 UN Watercourses Convention invites State parties to accept compulsory jurisdiction of the ICJ and/or arbitration. The 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes has a similar

[97] *Pulp Mills*, *supra* note 1, at ¶ 205.
[98] *Border Area/San Juan River Road*, *supra* note 1, at ¶ 168, see also ¶ 104.
[99] See, e.g. Article 12 of the ILC Draft Draft Articles on Prevention of Transboundary Harm from Hazardous Activities; Principle 19 of the Rio Declaration (which, as explained by Sands and Peel, "many states have recognized as required practice in terms that reflect an obligation of customary international law", Sands et al. *supra* note 83, at 695; MOX plant case, *infra* note 117.
[100] See, e.g., Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, 2018 I.C.J. REP. at p. 27 (¶ 98) (Feb. 2).

dispute settlement mechanism, inviting the parties to accept compulsory jurisdiction of the ICJ or of an arbitral tribunal. These provisions remain optional; they only *invite* the parties to accept compulsory jurisdiction. As we noted above, very few States have done so.[101]

The situation is similar with regard to a number of treaties addressing particular river basins. To take a salient example, the Mekong River Basin Agreement under its Articles 34 and 35 addresses differences and disputes between the parties. Article 34 requires that the Mekong River Commission "first make every effort to resolve the issue…". However, the upstream States are not parties to the Mekong Basin Agreement. Those States include China, whose dam operations were reported in January 2021 to have caused the river to drop by over one meter in less than 48 hours, "[w]ith zero notification to downstream."[102]

Non-participation in treaty regimes does not mean, however, that we live in a vacuum of substantive rules. As the preceding discussion has shown, certain substantive rules apply to States generally, as part of customary international law. The more significant omission is the lack of binding and compulsory procedure. It is in the treaties that we find a variety of such procedures. There is no such thing however as a general international procedure for dispute settlement. No general jurisdiction exists in international law. The prospects for binding and compulsory dispute settlement under the international law of watercourses therefore remain limited.

There is however one process that is relevant in respect of watercourses. That process is negotiation. At least from the time of the *Lake Lanoux* arbitration, general international law has entailed an obligation to negotiate when a project might affect an international watercourse, including both the quantity and quality of water therein.[103] The centrality of negotiation to the settlement of disputes concerning watercourses was on the mind of the ILC Members during drafting work on the non-navigational uses of international watercourses. Stephen M. Schwebel, as Special Rapporteur, in his Second Report on the topic drew attention to the law

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[101] Three states (Hungary, Montenegro and Netherlands) have done have accepted compulsory jurisdiction under the 1997 Convention: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&clang=_en#1 (last visited August 4th, 2021); five (Austria, Liechtenstein, Lithuania, Netherlands and Serbia) have accepted compulsory jurisdiction under the 1992 Convention: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-5&chapter=27&clang=_en (last visited August 4th, 2021).

[102] See tweet dated January 4th, 2021 by the Mekong Dam Monitor, which "uses remote sensing, satellite imagers & GIS to provide weekly monitoring of previously unreported indicators in the Mekong Basin": https://twitter.com/MekongMonitor/status/1346206870919376903 (last visited August 17th, 2021).

[103] Lake Lanoux Arbitration (France v Spain), Award of Nov. 16, 1957 (Petrén, President; Bolla, De Luna, Reuter, De Visscher, Members): 24 INT'L L. REP. 101, 128 (¶ 11), 129-130 (¶ 13). See also 1997 Convention, Art. 6(1) and Art. 8.

of the sea, as that topic stood at the time, and in particular the obligation to negotiate which the ICJ had indicated recently in the *North Sea Continental Shelf* cases applied to delimitation of the continental shelf.[104] The Special Rapporteur asked, "Does international law impose a similar obligation upon States as regards the apportionment of the use of that most vital of natural resources, water?"[105] Noting that a watercourse has a unitary character at least as pronounced as that of a continental shelf area,[106] the Special Rapporteur concluded on this question that "[t]he nature of the two situations is sufficiently analogous... that, if there is an obligation of international law to negotiate continental shelf boundaries taking the unity of resource deposits into account, there is equally an obligation under international law to negotiate with respect to the apportionment of the use of water. In each case, the legal regime responds to unique physical conditions."[107] Negotiation does not necessarily entail a settlement of the dispute that the parties have negotiated about; but the existence of a dispute concerning the international watercourse does entail an obligation to negotiate about the dispute.[108]

In the typical bilateral setting, when it comes to a dispute or a difference concerning the development of a shared watercourse, negotiation is much more likely to be the modality for dealing with the matter than a third-party process.[109] This, in turn, means that obligations of the upstream State – *including the obligation to undertake an EIA* – are likely to be raised in particular in the negotiation setting.

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104 North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969 I.C.J. REP. p. 3, 46-47 (¶ 85) (Feb. 20).

105 Stephen M. Schwebel, Second report on the non-navigational uses of international watercourses, 1980 I.L.C.Y.B. vol II pt. 1, at 171 (¶ 77). More generally, see Schwebel, First Report, 1979 I.L.C.Y.B. vol II pt. 1, at 145-46 (¶¶ 6-7), where the Special Rapporteur drew attention to the shared features between the ILC's earlier, and at the time on-going, work on the law of the sea and the topic at hand.

106 *Id*. at 171 (¶ 79).

107 *Id*. at 171 (¶ 80). The correspondence that Schwebel noted of "legal regime" to "unique physical conditions," and the emphasis that he placed on the unitary aspect of the geophysical space concerned, bring to mind other situations in which the legal result has turned on whether or not an area is to be treated as a whole or in parts. See, famously, Island of Palmas case (Netherlands, USA), II REP. INT'L ARB. AWARDS 829, 855 (Apr. 4, 1928):

> "As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit... Here, however, we must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory, and, on the other hand, the display of sovereignty... which must make itself felt through the whole territory."

Thus, a range of factors affect how the law treats a geophysical space, not all of them derived from the geography itself, but the geography evidently is always a critical factor.

108 For critical comment in regard to unequal bargaining positions when States negotiate under relatively imprecise equitable principles in the law of the sea and the law of non-navigational uses of international watercourses, see Iain Scobbie, *Tom Franck's Fairness,* 13(4) EUR'N J. INT'L L. 909, 924-35 (2002).

109 There are exceptions—namely, those situations where both the upstream and the downstream State have committed to compulsory third party procedures (Pakistan and India being the most significant example).

It is often said that the obligation to negotiate, like the duty to exercise due diligence, is not an obligation of result: it is an obligation of "best efforts." However, when a party enters a negotiation, the conduct of the party prior to the commencement of negotiation *must not prejudice the result*.

If a party has done something, or failed to do something, and the act or the omission prejudices the negotiation result, then this conduct is not in accord with the obligation of good faith. Another way of putting this is that States are not to present their negotiating partners with *faits accomplis*. To this extent, the obligation to negotiate *is* a result-oriented obligation, if only in a negative or residual way: a State must *not* enter a negotiation already having decided the result by its own acts or omissions.

This once again serves to underline the crucial importance of *timing*. The International Law Commission in Comment (4) to draft Article 12 of the 1997 UN Convention – which addresses "Notification concerning planned measures with possible adverse effects" – said the following:

> The term 'timely' [as used in draft art. 12] is intended to require notification sufficiently early in the planning stages to permit meaningful consultations and negotiations… if such prove necessary.[110]

Timeliness, as defined in Article 12, thus would mean at a time before the measures began; notification is to take place before the plan has turned into a project in train. Timeliness must also entail a requirement to factor in *sufficient* time for affected parties to scrutinize and react to the plan; the more complex the proposed activity, and the more far-reaching its impact, the more time will be required.[111]

The ILC linked this requirement of timing expressly in Comment (4) to *consultations* and *negotiations*. The function of the time element of notification, in the ILC's commentary, is to assure that consultations and negotiations are "meaningful." This point, we submit, is at the heart of the matter.

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[110] 1994 I.L.C.Y.B., Vol. II, Part Two, at 111.

[111] On this point, Craik argues: "From a practical perspective, questions regarding who receives notice and a determination of whether notice was given in a timely fashion will be impacted by whether the impact is domestic, transboundary or in the global commons." (N CRAIK THE INTERNATIONAL LAW OF ENVIRONMENTAL IMPACT ASSESSMENT: PROCESS, SUBSTANCE AND INTEGRATION (2010) 59).

The sharing of information in good faith, which we have already noted is indispensable when discharging a procedural requirement to notify or consult when conducting an EIA, is essential as well when conducting a negotiation. Unsurprisingly, information sharing is an issue that frequently arises in international disputes over resources.

As we noted above, information sharing was an issue in direct contention between the parties in *Ghana/Côte d'Ivoire*. Côte d'Ivoire, in order to obtain provisional measures, needed to show that the conduct that it sought to bar would, if not barred, cause irreversible damage preventing a return to the *status quo ante*. The conduct was Ghana's possession and use of data in regard to offshore hydrocarbon deposits. Côte d'Ivoire's position was that it would be injured if deprived of that data, because, without the data, it would suffer a diminution of its "bargaining power."[112] Loss of bargaining power, in Côte d'Ivoire's view, thus is an irreversible harm, and deprivation of data, in Côte d'Ivoire's view, is tantamount to a loss of bargaining power. Côte d'Ivoire thus linked *information* to *bargaining*. It is not a significant further step to link bargaining to *negotiation;* it is hard to see how a negotiation can take place without bargaining. Where an obligation to negotiate applies to two or more international parties, Côte d'Ivoire's view concerning information suggests that to supply information is an element of the obligation to negotiate, and, so, no party would be entitled to withhold information, to the extent that the information is relevant to the negotiation. True, the *Ghana/Côte d'Ivoire case* addressed information in the particular setting of a dispute over oil exploration and exploitation on the continental shelf, a matter regulated by the terms of UNCLOS, and so any conclusions drawn from it about a more general relation between information and negotiation must be tempered. Nevertheless, the linkage between negotiation and information was once again posited in an international resource dispute.[113]

The relationship between access to information and the integrity of negotiations was at the forefront of the *Timor-Leste v. Australia* case as well. The ICJ held in its provisional measures order in that case that:

> … the right of Timor-Leste to conduct arbitral proceedings and negotiations without interference could suffer irreparable harm if Australia failed to immediately safeguard the confidentiality of the material seized by its agents on 3 December 2013 from the

[112] Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire (Ghana/Côte d'Ivoire), Provisional Measures (Apr. 25, 2015), ITLOS Reports 2015 p. 146, 162 (¶ 79).
[113] As to Côte d'Ivoire's specific assertion—that there exists a "right to access to information about the resources of the continental shelf" and the Special Chamber's provisional measures, see *Id.*

> office of a legal adviser to the Government of Timor-Leste. In particular, the Court considers that there could be a very serious detrimental effect on Timor-Leste's position in the Timor Sea Treaty Arbitration and in future maritime negotiations with Australia should the seized material be divulged to any person or persons involved or likely to be involved in that arbitration or in negotiations on behalf of Australia. Any breach of confidentiality may not be capable of remedy or reparation as it might not be possible to revert to the *status quo ante* following disclosure of the confidential information.[114]

The difficulty in *Timor-Leste* v. *Australia* differed from that in situations where a party withheld information, such as the information contained in an EIA. Instead of *withholding* information which it was obliged to transmit, Australia took hold information which it had no right to have. The different valence notwithstanding, the case suggests a point similar to that which emerges in *Ghana/Côte d'Ivoire*: information is vital to dispute settlement processes, and, at least to a degree, information is subject to legal rules.

In another Provisional Measures Order, the Court in *Land Reclamation by Singapore* required the parties, *inter alia*, to "exchange, on a regular basis, information on, and assess risks or effects of, Singapore's land reclamation works."[115] The Agreement settling the dispute includes a commitment to "exchange information on and discuss matters affecting their respective environments in the Straits of Johor."[116] This provision, while terse, again links information to inter-governmental contacts over substantive issues, for it associates an obligation to exchange information with on-going discussions concerning the subject matter about which information is to be exchanged. The Agreement does not say that the obligation to "exchange information" is subordinate to or derivative from the obligation to "discuss," but an association between the two is nevertheless again suggested.

The scope and application of an obligation to exchange or share information also gave rise to a dispute between the United Kingdom and the Republic of Ireland in respect of the *Mox Plant*.[117] The obligation arose in this instance under a treaty, namely Article 37 of the Treaty

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[114] Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v. Australia), Request for the Indication of Provisional Measures, Order of March 3, 2014, 2014 I.C.J. REP., ¶ 42.
[115] Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order (Oct. 8, 2003), ITLOS Reports 2003 p. 10, 27 (¶ 106(1)(b)).
[116] Settlement Agreement, § 9, for which see Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore), Award on Agreed Terms (Sept. 1, 2005), UNCLOS Annex VII Tribunal/PCA (Pinto, President; Hossain, Oxman, Shearer & Watts, Arbitrators), Annex, 27 REP. INT'L ARB. AWARDS 133, 143.
[117] Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland, Final Award (July 2, 2003) (Reisman, Chairman; Griffith & Mustill, Members), 23 REP. INT'L ARB. AWARDS 59.

Establishing the European Atomic Energy Community. Article 37 is an information provision. It sets out an obligation concerning "general data relating to any plan for the disposal of radioactive waste..." The Tribunal considered that the United Kingdom had discharged its Article 37 obligation.[118] It called this "a critical part of the United Kingdom's international legal obligations."[119]

A connection is visible between the timely transmission of information and the dispute function in the *Guyana/Suriname* arbitration as well. There, Suriname took the position that Guyana had failed to carry out negotiations in good faith, and Guyana's failure consisted, in part, in the withholding of information essential to the conduct of the negotiations. According to Suriname, "Guyana withheld information regarding its oil concessions in bad faith."[120] The Tribunal agreed that there was a breach of obligation, at least to the extent that "Guyana should have sought to engage Suriname in discussions concerning the drilling at a much earlier stage" and "notification in the press by way of [the foreign concession-holder's] public announcements was not sufficient for Guyana to meet its obligation."[121]

The *Guyana/Suriname* arbitration addressed contested maritime development activities pending settlement of a delimitation dispute. The Tribunal was sensitive to concerns that a complete freeze over development pending settlement could be deleterious to either or both parties. The Tribunal held accordingly:

> It should not be permissible for a party to a dispute to undertake any unilateral activity that might affect the other party's rights in a permanent manner. However, international courts and tribunals should also be careful not to stifle the parties' ability to pursue economic development in a disputed area during a boundary dispute, as the resolution of such disputes will typically be a time-consuming process. This Tribunal's interpretation of the obligation to make every effort not to hamper or jeopardise the reaching of a final agreement must reflect this delicate balance. It is the Tribunal's opinion that drawing a distinction between activities having a permanent physical

[118] *Id.* at 71-72 (¶ 17).
[119] *Id.* at 73 (¶ 18).
[120] Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname, Award (Sept. 17, 2007) (Nelson, President; Franck, Hossain, Shearer & Smit, Arbitrators), UNCLOS Annex VII/PCA, 30 REP. INT'L ARB. AWARDS 1, 46 (¶ 184). See also *id.* p. 75 (¶ 277).
[121] *Id.* at 136 (¶ 477).

> impact on the marine environment and those that do not, accomplishes this and is consistent with other aspects of the law of the sea and international law.[122]

While not quite spelled out, the connection emerges here in a logical way between a party's duty to supply information and the development interests that the Award seeks to safeguard. The Tribunal recognized that *some* development activities might harm the environment permanently; others might not. And, moreover, the parties' interest in development is a present interest, not one that only vests at some indefinite future date. A dispute therefore does not foreclose *all* development activities pending its settlement. The connection to the informational duty is that, if the parties to the dispute are to "draw[...] a distinction between activities having a permanent physical impact on the marine environment and those that do not," then they must have enough information to assess proposed activities, and this means assessing them in good time—not after the fact, and not after extreme delay. Information here too must be timely.

All these authorities point in a similar direction. International disputes over resources, especially those where there exists a significant risk of transboundary harm, require a delicate balancing of interests. International legal rules have developed to dissuade States from taking unilateral action with irreversible adverse consequences for their neighbors. The EIA rule is one such rule, which should be viewed not as a mere procedural checklist exercise, but as an important tool in facilitating the peaceful settlement of international disputes over resources.[123] It is bound up not only with the obligation to negotiate in good faith, but also, as we will now submit, with the duty of States to exercise due diligence.

C. Relation of EIA rule to due diligence

The concept of "due diligence" is frequently linked to the EIA rule,[124] and could even be said to underpin it. A 2016 report by the International Law Association concluded as follows:

> Due diligence has a significant pedigree in international law, recognising the long-standing desirability that States adhere to certain behavioural standards, or to seek to

[122] *Id*. at 133 (¶ 470).
[123] It should nevertheless be noted that it is not always the EIA that creates space for a meaningful negotiation; sometimes it is the other way around. For instance, it was in connection with inter-governmental discussions on the return to use of the Iron Rhine railway that Belgium and the Netherlands agreed to carry out environmental impact studies: Iron Rhine, *supra* note 49, at 49 (¶ 21).
[124] Including by the ICJ in *Pulp Mills*, *supra* note 1, at ¶ 204, and *Border Area/San Juan River Road supra* note 1, at ¶ 104.

> achieve certain outcomes, but without prescribing either the precise result or timeframe by which this is to occur. [….]
>
> … new global challenges – presenting new areas of transnational and global regulation – are (at least in the absence of specific primary rules) often finding in the standard of due diligence a useful yardstick by which to hold all States (to varying degrees) to a minimum standard of conduct.[125]

The basic principle is not new. The ICJ articulated it in the *Corfu Channel* case, when it held that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[126]

The "tri-partite core" of the principle is defined in the ILA Report as follows:

- A sovereign State is obligated to ensure;
- That in its jurisdiction (which includes all those spaces where the sovereign exercises formal jurisdiction or effective control)
- Other States' rights and interests (including those with respect to the protection of their citizens and companies) are not violated.

A State's obligation to exercise due diligence is one of "best efforts" rather than outcome, and while there is some uncertainty as to what exactly the principle entails, it is widely accepted that it is the appropriate standard to apply when managing the risk of significant transboundary environmental harm.[127] The ILC has elaborated on what the principle entails in that context:

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[125] ILA Study Group on Due Diligence in International Law, Second Report, Johannesburg, July 2016, 46-47.
[126] Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), 1949 I.C.J. REP. 4. Cited with approval in *Pulp Mills*, *supra* note 1, at para 101. Earlier iterations of the principle include the finding of the tribunal in the Trail Smelter case that: "No State has the right to use or permit the use of its territory in such a manner as to cause injury by the emission of fumes in or transported to the territory of another or the properties or persons therein, when the case is of serious consequence and injury is established by clear and convincing evidence": Trail Smelter case (United States v Canada), Vol III REP. INT'L ARB. AWARDS (1938) 1905, at 1965.
[127] M SHAW, INTERNATIONAL LAW (9th ed 2021), at 748.

> … due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them.[128]

The standard of due diligence against which the best efforts of states are to be assessed in this context is necessarily flexible. The standard should be, in the words of the ILC, "appropriate and proportional to the degree of risk of transboundary harm in the particular instance":

> For example, activities which may be considered ultrahazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location, special climate conditions, materials used in the activity, and whether the conclusions drawn from the application of these factors in a specific case are reasonable, are among the factors to be considered in determining the due diligence requirement in each instance.[129]

When articulating the content of due diligence obligations, the ITLOS Seabed Disputes Chamber took a similar approach, describing due diligence as a "variable concept," subject to change "in light, for instance, of new scientific or technological knowledge" and also "in relation to the risks involved in the activity."[130]

Analogous considerations emerge in provisional measures practice. In the *Great Belt* case, which involved a maritime strait, the Court made clear that it was possible that Denmark's bridge over the Great Belt would have to be modified or dismantled if it turned out that the bridge constituted a breach of obligation by Denmark to Finland. In his Separate Opinion, Judge Oda recognized that the Court in this way had issued a "warning" to Denmark.[131] The warning, Judge Oda said, "adds an extremely important element of balance" to the Court's decision.[132] Denmark might build the bridge—but, if Denmark built it, Denmark did so at its own risk. That is to say, if Denmark was impatient, and Denmark decided not to wait for the

[128] ILC Draft Articles, *supra* note 68, at 154.
[129] *Id*.
[130] ITLOS, Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, *supra* note 8, at ¶ 117. The Chamber also referred in its Advisory Opinion to the obligation to conduct an EIA as a "general obligation under customary international law" (¶ 145).
[131] ICJ, Passage through the Great Belt (Finland v. Denmark), Sep. Op. Judge Oda, 1991 I.C.J. REP. at 25.
[132] *Id*.

result of the judicial process, and to build the bridge in any event, then that course of action would expose Denmark to the possibility of international responsibility. If in the end it turned out that the bridge constituted a breach of obligation to Finland, then Denmark would have the obligation to make reparation.

The principle that emerges here is the "at-own-risk" principle. If a State proceeds with a project *before* the appropriate and obligatory process is completed, then the risk belongs to that State. Failing to produce an environmental impact assessment before going forward with a project is in itself a breach where there is a risk of significant transboundary harm. In a judicial or arbitral proceeding, the situation is somewhat different: failing to await the outcome of the judicial or arbitral proceeding *might* not constitute a breach; but that depends on the outcome of the process (and assuming the absence of a provisional measure). If the court or tribunal eventually concludes that the project constitutes a breach of obligation, then to the impatient State that began the project before the judgment or award attaches the duty to make reparation. What is similar in these situations is this: going forward before the required process is completed, whether the EIA or the contentious proceeding, exposes the State to legal jeopardy.

In the *Kishenganga* dispute, which took place under the Indus Waters Treaty, Pakistan and India both accepted that the "at-own-risk" principle belongs to general international law. Pakistan was "particularly concerned that the ongoing work on the [dam] [would] render certain remedies technically unfeasible or [would] supply India with additional arguments to the effect that it would be 'inequitable' to halt the project in light of sunk costs."[133] The fact that both Pakistan and India eventually accepted the "at-own-risk" principle made clear that going forward with the dam would supply the upstream State no "additional arguments" to entrench its position. If the upstream State builds an illegal dam, then that is a breach that the upstream State will be obliged in any case to remedy, including by means of restitution.

The "at-own-risk" principle does not tell the parties what their obligations are in respect of the final physical configuration of a river project. The principle does not tell the parties what a legal, or illegal, dam looks like. The principle does however tell the State undertaking the project that the fact of its completion does not change the legal consequences of a breach. This holds, regardless of what the underlying obligation might be. You do not change the law by

[133] Pakistan v. India, PCA 2011-01, Order on Interim Measures, Sept. 23, 2011, para. 105 (Pakistan's argument as paraphrased by the Court of Arbitration).

breaking it. You might change the course of a river; but that does not change the course of the law.

V. Conclusion

The EIA rule, although often referred to as a rule of procedure, cannot be divorced in practice from its substantive purpose.[134] That is to say, it is not an obligation that a State fulfils simply by performing the assessment and delivering it to the affected parties. A State's compliance with the rule must be assessed by reference to its conduct before, during and after the assessment. As we have argued throughout this article, the discharge by a notifying State of its obligations under the EIA rule depends in large part on how it approaches the sharing of information with affected parties.

It is here that one may appreciate the pervasive significance of *timeliness* during the EIA process. At the most basic level, there is a logically necessary obligation to deliver an EIA *before* the project begins. Beyond this basic requirement, a notifying State must share information with a receiving State and other stakeholders in a timely fashion *throughout* the EIA process, including, we have argued, during any process of post-EIA monitoring. Affected parties must not only be furnished with relevant and sufficient information; they must be afforded an adequate opportunity to scrutinize and respond to that information, and to engage with any process of consultation or negotiations in a meaningful manner.

In disputes surrounding watercourses, negotiation has all the more significance in view of the scarcity of other mechanisms for dispute settlement, and the integrity of a negotiation (and potentially the durability of a negotiated outcome) is similarly dependent on the timely sharing of information in good faith, and on the parties refraining from practical measures that would effectively predetermine the outcome of a negotiation. A State that presents its negotiating counterpart with a *fait accompli* will have failed to discharge its obligations of due diligence and good faith. While the obligation to negotiate is not an obligation to reach a particular result, it does entail approaching the process with a genuinely open mind about the result. This of course works both ways—the receiving State must take due account of the

[134] More generally, it may be submitted that, to divorce a procedural requirement from the substantive purpose behind it, would be to misconstrue, or at best to incompletely apply, the requirement itself. See, e.g., assertions by China as to the accordance of its insular baseline declaration for the Paracel islands with UNCLOS: A/69/645, Letter dated 8 December 2014 from the Permanent Representative of China addressed to the Secretary-General, Annex (Position Paper), sec. 2.

notifying State's right to economic development, just as the notifying State must seek to mitigate the risk of an adverse environmental impact on its neighbors.[135]

As competition over scarce resources intensifies, and the scale of construction projects increases , transboundary disputes over resources are only likely to increase in frequency and severity during the coming years. In the face of such challenges, the EIA mechanism could have a significant role to play in promoting cooperation between States and reducing the possibility of conflict. The substantive purpose of an EIA process is only served, however, if it entails the timely exchange of information in good faith, such as to afford parties a meaningful opportunity to air and resolve their differences before any irreversible damage is caused.

[135] On the EIA as a mechanism for facilitating "the integration of environmental consideration with economic and social considerations", see generally Craik *The International Law of Environmental Impact Assessment*, in particular Ch. 8, at 257 et seq, and in particular p. 263.