Proceedings of the 3rd International Conference on International Law and Legal Policy
DOI: 10.54254/2753-7048/69/20240160

Environmental Impact Assessment System: Case Analysis of Existing Legal Disputes

Siyuan Pang[1,a,*]

[1]*The University of Manchester, Oxford Rd, Manchester, M13 9PL, UK*
a. 15003697529@163.com
**corresponding author*

Abstract: Environmental Impact Assessment (EIA) refers to the process of assessing the possible impact of planning activities on the environment. This paper contends that the current international legal framework does not adequately delineate the activation criteria for EIA and overlooks the significance of international collaborative duties that come into play when sovereign states embark on the initiation and execution of EIA processes. Only in relation to the general principles of international law can the nature of the EIA's obligation be comprehended. When dealing with cross-border damage, the requirement for due diligence is complemented by an implicit responsibility to collaborate. This latter obligation arises under identical situations as the due diligence requirement, particularly in response to 'the likelihood of significant environmental damage,' and thus, it needs to be satisfied by the national government under equivalent circumstances. This paper argues that the court's interpretation of environmental impact assessment is incomplete which is reflected in two aspects: (1) the ambiguity in the court's grasp of the EIA threshold's unpredictability. The International Court of Justice fails to clarify the criteria for establishing a 'substantial environmental risk'. (2) The court's oversight in considering the duty to collaborate could result in an overemphasis on the material aspects of EIA-treating it merely as a technical instrument. By reintegrating the cooperation duty, a more balanced perspective on the procedural elements of EIA could be achieved. Delving into strategies to rectify these two deficiencies and obtaining a holistic insight into the International Court of Justice's approach to EIA will yield substantial implications and relevance for future EIA-related endeavors.

Keywords: Environmental Impact Assessment (EIA), EIA general principle, Due Diligence, Cooperation Obligations, Legal disputes.

1. Introduction

The Environmental Impact Assessment (EIA) has garnered significant attention from the international community as a crucial instrument for sovereign states to take preventive action and logical planning for activities that could have a major impact on the environment. The procedural rights and obligations of international treaties and documents, such as the *Espoo Convention*, *the United Nations Convention on the Law of the Sea* and the *Rio Declaration* provide for the procedural rights and obligations of Environmental Impact Assessment with respect to proposed activities between states [1]; activities need to be forecasted and evaluated in order for the state to make decisions [2].

DOI: 10.54254/2753-7048/69/20240160

Proposed inter-state activities that may have a significant potential impact on the marine environment are subject to the obligation of direct Environmental Impact Assessment compliance [3]. However, these treaties are in force only for party states. In its judicial practice, the International Court of Justice has always emphasised that legal documents must be interpreted and applied within the entire legal system prevailing at the time of interpretation [4]. The International Court of Justice has interpreted the Environmental Impact Assessment primarily in light of the precautionary principle of risk in international environmental law, which states that a state facing potential transboundary harm must take all reasonable steps to prevent or lessen the risk of its occurrence.

This conclusion can be drawn from the body of existing jurisprudence. *In Costa Rica v Nicaragua and Nicaragua v Costa Rica,* the ICJ linked the Environmental Impact Assessment to the due diligence obligation in the Precautionary Principle of Risk, arguing that the EIA needs to implement due diligence around the precautionary Principle of risk, and the conduct of EIA must be understood in light of due diligence obligations [5]. The relationship between the precautionary principle of risk and more specific customary rules, such as the duty of due diligence and the duty of notification and consultation, is the focus of the judge's debate in the case [6]. In addition, specific disputes, such as the nature of Environmental Impact Assessment in international law, the differences of triggering mechanisms under specific case facts, the criteria for defining transboundary environmental pollution, and the criteria for judging 'significant risk of transboundary harm' need to be resolved.

Through searching HeinOnline, Westlaw, CNKI and other websites with 'EAI, EIA Case' as the keywords, it can be concluded that the mainstream research focus of academia is to explain the legal nature and legal basis of the transboundary environmental impact assessment system. Regarding the optimisation of EIA rules at the enforcement level, Elisabeth Druel believes that improving the implementation mechanism of the environmental impact assessment process beyond national jurisdiction (ABNJ) is the key to filling the regulatory and governance gaps in the region [7]. In the negotiation process of the international agreement on Biological diversity in areas beyond National Jurisdiction (BBNJ), Environmental Impact Assessment is one of the four subjects of the negotiation and is stipulated as one of the 'zoning management tools' [8]. Amy Boyes believes that a new implementation agreement for EIA should be developed [9]. Boyle and Connelly et al. conducted a number of studies on the Espoo Convention and the environmental impact assessment process [10], which expounds on the application of the transboundary EIA system in the eight Arctic countries from the perspective of practice [11].

Concerns the court did not address were: (1) Does the EIA embody all of the obligation requirements in the precautionary principle of risk? (In addition to due diligence obligations) (2) Environmental issues are borderless, and many international law documents do not clearly define the concept of EIA, and there are no clear provisions on the threshold to trigger EIA [12], these problems beg the questions: how can transboundary environmental pollution be defined? What are the criteria for defining the scope of environmental damage? How does a country know which activities pose a 'risk of significant transboundary harm'?

The first part of this paper discusses the origin and content of EIA, and how the controversy over the content of EIA is related to the formation process of EIA. The principles of general international law adopted by the International Court of Justice, the Permanent Tribunal of Justice (PCA) and the Maritime Tribunal in EIA case practice are then discussed. It believes that it is based on the principle of risk prevention, and requires states to fulfil 'due diligence obligations' and 'notification and consultation obligations'. The cooperation concept places more emphasis on notifying other states and getting their opinion on actions that could impact their interests than the precautionary principle does on states' obligations to tell others of the adverse effects of their actions [13].

The second part of this paper discusses the existing problems and limitations of the ICJ approach, which mainly involves two aspects: the first is that most treaties have requirements concerning EIA

DOI: 10.54254/2753-7048/69/20240160

obligations, and this paper holds that EIA can be understood as a 'highly instrumental technology' and 'a procedural obligation' in terms of its content. These two explanations should coexist and complement each other. The court did not attach importance to the equally important duty of cooperation in the precautionary principle of risk. Ignoring the obligation to cooperate would skew international law toward the first thin, technical interpretation of the content of the EIA as described in the first part of this article. On the other hand, reintroducing the obligation to cooperate would make the 'procedural' nature of the EIA more clearly visible from a prudent perspective [13].

The second aspect is that the court has not clearly defined the threshold for triggering EIA, and there is a lot of uncertainty. This may cause significant inconvenience for EIA in practice, and studying this issue is also the key for EIA to reintroduce the obligation to cooperate. The third part of this paper is the conclusion, which summarises the future trend of EIA-the globalisation of EIA will make the application and practice of EIA beyond national jurisdiction (ABNJ) more and more widespread-and illustrates the importance of EIA in international law. Finally, the thesis concludes that a more comprehensive and full understanding of EIA and the discovery of its shortcomings from the perspective of 'principles on which court cases are based' will provide a deeper understanding of the connotation of EIA in international law, and will have important reference value for future judicial practice.

2. Overview of the Environmental Impact Assessment System

2.1. Development of EIA: from Domestic Law to International Law

The EIA system originated in the *1969 National Environmental Policy Act of the United States*, and has gradually been adopted by more than 100 countries [14], becoming an important part of domestic environmental policies [15]. Numerous cases illustrate the application of this legal instrument for conducting EIA. However, these examples typically highlight the constrained influence of domestic legislation on transboundary environmental impact assessments (TEIA) [16]. Furthermore, the *Canadian Environmental Impact Assessment Act*, which draws inspiration from the U.S. legislation, contains notable provisions in Article 19. These encompass the enhancement of alternative options within EIA reports, the inclusion of strategies to alleviate impacts for planned projects, and the requirement for the commission to produce reports on the proposed initiatives [17].

The Espoo Convention was one of the first multilateral treaties to specify the procedural rights and obligations of contracting parties (between sovereign states) with respect to the transboundary effects of proposed activities. This treaty provides for EIA when approving projects likely to have significant adverse transboundary effects, and establishes procedures for taking environmental impacts into account when making decisions in the transboundary (inter-state) context [1]. Later, according to Principle 17 of the *Rio Declaration on Environment and Development*, environmental impact assessment means that the relevant authorities of a country must predict and assess the proposed activities which are likely to cause significant adverse effects on the environment in order to make decisions [2]. This definition has been incorporated into numerous subsequent global legal instruments, albeit with differing phrasing. According to the International Law Commission's *Draft Articles on the Prevention of Cross-border Damage from Dangerous Activities*, any consent provided by a state for an endeavor that is likely to induce cross-border damage must be substantiated by an evaluation of the potential harm, which includes conducting an EIA [2].

In the area of marine ecosystems and biodiversity conservation, Regulation 206 of the UNCLOS explicitly mandates the establishment of an EIA framework for all maritime operations. It stipulates that should any activity falling under the authority or governance of a state party potentially result in considerable contamination or detrimental effects on the marine ecological sphere, the state is compelled to evaluate the prospective implications of such activity on the marine milieu [3]. The

DOI: 10.54254/2753-7048/69/20240160

advisory panel for seabed conflicts, in the 2011 Consultative Opinion rendered by ITLOS [18], distinctly highlighted that performing EIA constitutes a direct responsibility under the UNCLOS and a fundamental duty under international customary law [18].

Participants and organizations within the international legal forum for maritime law affirm that within the designated 'area', the state's accountability and advisory obligations also encompass the requirement for conducting EIA [19]. The *The Convention on Biological Diversity* delineates EIA as a methodology for evaluating the anticipated environmental repercussions of a projected venture, considering both the beneficial and detrimental socioeconomic, cultural, and public health implications [20]. The UNEP, in its guidelines for *Objectives and Principles for Environmental Impact Assessment*, characterizes EIA as the process of examining, analyzing, and appraising proposed actions to ensure that they are conducive to environmentally friendly and sustainable progression [21].

2.2. What Principle is the EIA Based on?

The founding and management of the TEIA framework are underpinned and directed by fundamental principles of global environmental legislation. Drawing from pertinent international documents, legal rulings, and scholarly insights, this study posits that the 'precautionary principle' stands as the directive in TEIA.

A comprehensive examination and grasp of the foundational principles that underlie EIA offer profound insights into the formation and structure of the EIA framework. This understanding also paves the way for enhancements in cross-border environmental impact evaluations. In *Steel Rhine case of 2005* [21], the Permanent Court of Arbitration (PCA) explicitly stated that'fundamental principles of international law'necessitate that states assume a duty to forestall, or at the very least minimize, considerable environmental harm during extensive construction projects [21]. The ICJ, for the first time, mandated that states take environmental preservation into account and perform EIA prior to initiating proposed actions in the *Gabisc-Nagymaros case* [22]. Judge Velamantelli articulated that this duty was an aspect of general international law, viewing it as'an expanded specific application of the risk-based precautionary principle'[22]. Velamantri firmly connected the duty to carry out EIA with the responsibility to avert significant environmental harm [23].

EIA was an obligation that did not exist in 1839, but the court upheld the Netherlands' claim on EIA in its interpretation of Belgium's rights and obligations under the 1839 treaty. Nevertheless, in the *Steel Rhein case*, the adjudicating body refrained from categorising the Netherlands' EIA requirement as a tenet of customary international law. Instead, it determined that the Netherlands, exercising its sovereign rights, was entitled to demand an EIA for the railway case, with the said obligation stemming from Dutch internal legislation. The court found that this request, made by the Netherlands under its own domestic law, was in accordance with international law.

Additionally, in the *United Kingdom v. Corfu Strait of Albania case* in 1949, the ICJ noted that, as 'a customary rule', the precautionary principle of risk derives from a state's duty of care in its territory: 'It is the duty of States not to deliberately permit their territories to be used for acts violating the rights of other States' [23]. This paper argues that the issue of liability for environmental damage in the *Corfu Channel case* could serve as a valuable reference for future cases of EIA violations, since both the EIA case and this case are based on the same international principle: the precautionary principle of risk, and both require states to fulfil their duty of consideration.

2.2.1. Due Diligence

The inception of the ICJ's rationale stemmed from its precedent in the *Pulp Mill case*, wherein the court was tasked with establishing whether the duty to undertake an EIA could be interpreted as a

DOI: 10.54254/2753-7048/69/20240160

contractual clause binding the signatories to 'safeguard and maintain the health of marine ecosystems' [24]. In finding that the obligation to conduct an EIA should be regarded as a principle to prevent environmental harm, the court held that parties should exercise a 'duty of due diligence' [25]. Furthermore, if the party planning works that may affect the condition of a river or its water quality does not carry out an EIA of the potential effects of such works, the due diligence and duty of vigilance and prevention implied by it will not be deemed to have been exercised [25].

The precise nature of the EIA mandate remains unclear due to the judicial interpretation of a convention in the *Pulp Mill case*, which did not distinctly set a precedent for a customary norm. Nonetheless, the ICJ alludes to the EIA requirement as an 'essential provision under the umbrella of general international law,' observing that this duty is inherent in the concept of due diligence (whereby due diligence, while a contractual obligation in this instance, is also recognised as a standard customary rule) [25].

During *2003 Johor Strait land reclamation case* [26], Malaysia contended that Singapore's actions in reclaiming land could potentially infringe upon its rights within the Johor Strait. The Malaysian government sought to halt Singapore's operations by seeking a provisional injunction from the adjudicating body. Regarding EIA, Malaysia's stance emphasized the necessity of revealing comprehensive project details, enabling Malaysia to adequately review and critique the proposed activities. Essential information was to encompass updates on the project's development, the extent of the proposed plan, construction techniques, the provenance and variety of materials used, and conservation and mitigation strategies [25]. Ultimately, the tribunal did not order Singapore to cease its activities. Nevertheless, considering Malaysia's EIA standards and the necessity for transparency, the nations were directed to collaborate on a framework for the exchange of information and prior evaluation [25].

The ICJ clarified that the specifics of an EIA are subject to each country's laws, yet they must correspond with the specifics of the case at hand and meet the standards of reasonable care [25]. The court did not distinctly confirm an obligation under'universal international law'to conduct EIA. There is ongoing debate about the interpretation of'universal international law,'which differs from the 'universal international law' [27] and is not recognized as a separate source of international legal norms in the *Statute of the International Court of Justice* [28]. This approach appears to reflect an evolving interpretation of treaty obligations to prevent harm, considering the established practice of conducting EIA [29]. The court failed to explicitly define the practice as a customary obligation in international environmental law, and it refrained from examining the nations' actions or seeking legal counsel pertinent to environmental assessment procedures [30]. Instead, it seemed to derive this duty from the principle of due diligence [30].

2.2.2. Notification and Consultation Obligations

The ICJ, presiding over the *Pulp Mill case*, delved deeper into the pivotal role of EIA in relation to the obligations of states to inform and enter into dialogue. The obligation to notify is based on an international agreement. The ICJ emphasized that in situations where it is necessary to inform an adjacent state of potential transboundary harm, the EIA provides the basis for such notification, enabling the affected state to assess the degree of its impact through the sharing of detailed evaluation information [25]. Consequently, the environmental impact assessment must be communicated before granting any consent [25]. However, the duties are defined as separate and continuous. Only if the EIA document indicates a likelihood of significant transboundary harm will the notification and consultation procedures be initiated [25].

In the main judgment for the *Certain Activities/Construction of Roads case*, the ICJ referenced the *Pulp Mill case* and once more connected the duty to carry out EIA directly to the states' due diligence obligations [25]. Although the ruling was seen as treating EIA as a kind of customary duty [31], the

DOI: 10.54254/2753-7048/69/20240160

court retained its unclear position on the customary international law status of the EIA obligation, for the same reasons as in the *Pulp Mill case*, and again failed to examine the practices of states and legal advice [5].

In *Ecuador v. Colombia Aerial Spraying of Herbicides case*, Ecuador contended that Colombia did not evaluate the potential cross-border impacts of herbicide aerial spraying and did not perform an EIA, thereby neglecting to provide adequate notification, consultation, and cooperation with neighboring states [32]. Subsequently, the two states agreed upon a new framework in 2013, and the ICJ confirmed Ecuador's request to terminate the proceedings.

In summary, it is clear that the EIA requirement compels thorough examination by addressing more specific requirements, thus the EIA requirement must be interpreted in accordance with its core fundamental tenets. In this regard, the notion of due diligence functions not only as a guiding principle for the intrinsic logic of conducting EIA but also as a more significant and influential element, establishing the criteria for assessing the sufficiency of these evaluations. It is apparent that EIA only address a fraction of the broad spectrum of damage prevention criteria; specifically, they relate to risks that may arise from proposed physical interventions and are relevant to the project's planning phase [5].

3. Controversial Issues of Environmental Impact Assessment

3.1. The Court Shall Fulfil its Outstanding Obligation to Cooperate

Taking into account the core elements of the EIA and the general principles of international legal standards that underpin it, fundamentally, EIA can be characterized as an 'extremely versatile planning technique'. This interpretation regards EIA as a stringent technical specification [33] for producing environmental information and as a 'tool' for enlightening sovereign states regarding the environmental consequences of impending and prospective projects/activities [13]. Srates that undertake EIA are compelled to perform a meticulous examination of the anticipated and possible effects on environmental factors such as aquatic systems, atmospheric conditions, terrestrial substrates, climatic patterns, vegetation, wildlife, and human demographics for prospective research initiatives [34]. Numerous scholars have acquired an in-depth grasp of this approach, viewing it as an 'administrative decision-making structure'–a notion that underscores the significance of government-sanctioned expert managers in the collection and assessment of a broad array of pivotal data relevant to policy determinations, thus guiding their discretionary powers [35].

From a process-oriented perspective, EIA is deemed a 'mandatory procedural requirement'. This interpretation elevates the concept of EIA to a more intentional and calculated term [13]. Furthermore, EIA transcends mere technical support by instituting a 'procedure' for countries that might be affected by the proposed initiatives. This system guarantees that these countries are aware of the potential impacts on their interests and encourages them to thoughtfully integrate these concerns into their policy-formulation processes [36]. In the case of the *2001 MOX Plant case* [37], Judge Mensah, in his dissenting opinion, ruled that any infringement of a procedural entitlement stemming from the obligation to collaborate or negotiate or to execute a comprehensive EIA was not irrevocable [38]. He opines that the duty to conduct EIA constitutes a procedural entitlement.

Judge Szekely determined that the British violation of Article 207 in the UNCLOS encroached upon Ireland's distinct material entitlements, and the UK neglected its duties as stipulated in Articles 204 and 205 by neglecting to furnish Ireland with the requisite EIA reports and documentation. Concurrently, Szekely connected the EIA to issues of piracy, maritime pollution, and terrestrial pollution governed by UNCLOS Articles 102, 103, 194, and 207, concluding that the UK did not fulfill its responsibilities to forestall the potential emergence of these concerns. He highlighted the court's denial of the potential for an irreversible effect on Ireland post-plant activation due to the

DOI: 10.54254/2753-7048/69/20240160

insufficiency of the EIA, asserting that Ireland possesses a significant procedural right that is more than just incidental [39].

The *Indus Waters Kishenganga arbitration* [40] underscores more rigorous procedural demands of EIA. The arbitrator in this dispute obligated India to present documentation verifying the EIA of the Kishenganga Dam [40]. Upon India submitting its 2002 EIA report as part of its responsive documentation [40], the arbitral panel deemed India's EIA deficient in establishing the Kishenganga River's minimum flow rate; this underscores the necessity for ongoing enhancement of documentation and data [40]. Consequently, the arbitral body delivered a preliminary arbitration ruling on February 18, 2013, with the conclusive award rendered on December 20, 2013, following the parties' information augmentation [40]. In the *1995 case of French Underground Nuclear Tests II* [41], New Zealand contended that France was bound by particular treaty clauses and customary international law to carry out an EIA before commencing nuclear tests [42]. This stance on the obligation for TEIA was partially endorsed by the dissenting opinion of Judge Weeramantry. Judge Velamantelli observed that the duty to conduct TEIA stood separately from treaty legislation [41].

Nonetheless, the ICJ ruled that New Zealand's assertion was not within the scope of the 1974 judgment's paragraph 63 and thus should be dismissed, opting not to provide an elaborate examination of the EIA obligation in that case [41]. Hence, it becomes evident that the EIA's intent is to legitimize the decision in the perspective of the impacted nation and its populace by confirming that the decision-maker (the state executing the EIA process) thoroughly considers broader interests [43]. From this standpoint, the EIA serves as both a preventive measure against severe damage and a procedural mechanism for ultimately validating the decision [44].

The present study provides an overview of the substantive and methodological aspects of EIA, akin to qualitative examination. It examines whether the foundational international legal precepts underlying EIA, which is the focus of this research, adequately reflect or equilibrium the interpretation of its material and methodological facets. In the context of the overarching international principles that EIA is grounded upon in the aforementioned cases, the judicial body refrained from inquiring into whether the EIA's necessity was solely to fulfill the duty of preventing harm or if it also sought to satisfy other general responsibilities concerning the proposed activity. Nonetheless, when the duty to prevent harm is activated, the identical scenario-the undertaking of a project with the potential to cause considerable cross-border damage-also activates the duty to collaborate.

Conforming to the principle of harm, when a country contemplates an action that may harm another, the obligation to collaborate is essential in order to reconcile the competing sovereign assertions of the implicated states. The imperative to prevent harm is intended to define and demarcate the confines of each state's actions: as long as the actions of neighboring states are confined to their own territory, there is no need for states to consider or accommodate the interests of others. The responsibility to participate in cooperative endeavors acknowledges cross-border harm as a mutual concern. It acknowledges that contemporary environmental challenges do not easily or tidily fall within state boundaries and encourages nations to align their individual interests with those of their neighbors: 'If due diligence is the first principle in dealing with transboundary environmental risks, then cooperation is the second principle.'[45]

International environmental law also clearly establishes the obligation to cooperate and the obligation to prevent harm. Principle 24 of the *Stockholm Declaration* [46], Principle 27 of the *Rio Declaration* [2], *UNCLOS* [3], the *Convention on Biological Diversity* [19] and the *Ozone Convention*, etc. all provide for an obligation to cooperate. The obligation to cooperate is expressed in general terms (as indicated in principle 27 of the *Rio Declaration*) [47] and its structure is open-ended; however, it also involves a thorough commitment to work together with other state members and international bodies, as well as to actively promote and engage in scientific and technological advancements [48]. A specific responsibility to collaborate emerges particularly in the context of

DOI: 10.54254/2753-7048/69/20240160

shared resources and cross-border damage, originating from the principle established in the *Lanoux case* [49] and articulated in Principle 19 of the *Rio Declaration* [2].

The requirement for mutual assistance via notification and discussion is embedded within numerous agreements pertaining to waterways [50] and the contamination that crosses borders [51], and it has been acknowledged as a standard international legal precept [49] by diverse bodies responsible for codification [52] and judicial entities [22], among them the International Court of Justice, particularly in specific cases involving activities and transportation corridors [5]. The genesis of the duty to collaborate can be found in the Lac-Lanus arbitration, which established that the initiating state is compelled to notify and enter into dialogue with states that might be affected by proposed measures, although these affected states do not have the power to flatly decline the proposal. The scenarios that call for this duty of cooperation are in synergy with the 'non-harm' doctrine. Thus, both obligations are fulfilled when there is a significant possibility of transboundary harm. The Environmental Impact Assessment procedure, which details the timeline for notification, the entities to be notified, the information to be shared, and the structure for consultation, acts as the primary conduit for fulfilling the duty of cooperation regarding the prospective actions.

The core purpose of the duty to engage in joint efforts is considered by the EIA to be the fundamental 'functional' device, intended to prevent any plausible harm [5]. Nevertheless, cooperation should not be perceived merely as the fulfillment of compulsory obligations. In the realm of environmental issues, the duty to inform arises from the duty to warn, which was established in the Corfu Channel case [53], as a method to prevent impacting the interests of other nations, and from the necessity for conjoint stewardship of shared natural assets; for instance, in the *Pulp Mill case*, cooperation is viewed as a tactic for 'collective handling of environmental degradation risks'[25]. The framework for preventing dangers seeks to define the boundaries of territorial sovereignty, while cooperative efforts emerge in contexts of mutual interest [54]. The reconciliatory function of cooperation was clear in the International Law Commission's draft articles on the *Prevention of Transboundary Harm from Hazardous Activities*, where the principles regulating international watercourses were used to shape the obligation 'to seek a solution that achieves a fair balance of interests'[55]. The implication is that determining rights in cases of transboundary damage is contingent and requires a degree of political negotiation and agreement.

The obligation to work together is intended to reconcile clashing national objectives that arise when a nation's actions could affect the environmental state of another country. In the *Mox Plant case*, Judge Wolfrum underscored the importance of cooperative efforts in shifting towards collective well-being, dependent on the following benchmarks: the requirement to cooperate represents a crucial shift in the general trajectory of the international legal structure. It balances the principles of the state, thus ensuring that the interests of the community are combined with national interests vis-a-vis individualism [37].

If the notion of working together is regarded as a reinforcement for preemptive strategies, it is clear that there is no imperative to notify or involve other countries as long as the state in question exercises due care and takes fitting steps to forestall harm. The responsibility of due diligence doesn't automatically include an obligation 'towards others,' whereas the duty to cooperate implies a proactive approach to understanding the consequences from the perspective of the affected country. The duty to collaborate is closely linked with the requirement of due diligence, and both should be seen as complementary and mutually beneficial. The responsibility that emerges when potential impacts are considered is articulated by Benvenisti in a manner that mirrors the cooperative obligation: whenever sovereign states contemplate policies that might affect either external entities or, on a broader scale, global well-being, they should afford those external and global concerns the respect they are due [56].

DOI: 10.54254/2753-7048/69/20240160

The requirement to 'pay due respect' is met by providing the relevant states with comprehensive information to understand the potential implications on their interests and by offering them an opportunity to express their viewpoints, guaranteeing their input is taken into account in the policy-making process. The need for sincerity, deemed an essential element of collaborative stewardship duties [25], is characterized as'a sincere commitment to achieving a favorable result with an intention [57] that goes beyond mere 'formality'' [49]. EIA exemplifies this integrity by facilitating a consultative process and, at times, giving reasons for responding to concerns raised [58].

The duty to engage in collaborative efforts does not directly yield an environmental impact evaluation, yet it lays the groundwork for the substance of conventional EIA regulations. Agreements that integrate environmental review mechanisms thereby create duties for disclosure and dialogue that are contingent upon the results of EIA. The specific protocols for these disclosures and discussions vary depending on the unique circumstances and the intricacy of the assessment framework. For instance, *the Espoo Convention* art. 3(1) mandates 'timely notification' of specified activities that could result in considerable cross-border effects and connects this notification to the duty to engage in consultations [58]. Article 5 says: the examination process relies on the EIA documentation, aiming to alleviate or reduce the need for the initiating country to address the pertinent issues [58]. The intent art. 6 is not merely to serve the interests of the affected nation; however, it is crucial to clarify the findings emerging from the consultation process [58]. Treaties that do not stipulate a detailed requirement for EIA (such as provisions that necessitate EIA only when there is a potential for environmental damage, without delineating the required procedures, as seen in the *Espoo Convention* or the *Antarctic (Madrid) Protocol*), still impose explicit obligations for notification and consultation.

Therefore, the duty to collaborate offers a completely different justification for conducting environmental impact assessments, one unrelated to the avoidance of damage, but rather to the entitlement of states to be afforded 'due respect'. A renewed focus on the obligation to cooperate balances the interpretation of EIA procedures and substance.

3.2. The Threshold for Triggering EIA Is Unclear

The preceding section inferred that the ICJ predominantly views EIA as an obligation rooted in customary international law. Nevertheless, to ascertain the relevance of EIA in the current context, certain issues demand elucidation: Is it mandatory to conduct EIAs for every type of planning endeavor? And if not, what are the specific conditions that necessitate states to perform EIA?

Previously highlighted, the concept of an EIA threshold originated from the *2010 Pulp Mill case* [25], wherein the ICJ declared EIA as an indispensable international legal obligation binding on all countries. This stance taken by the ICJ was subsequentially endorsed and referenced by both the Law of the Sea Tribunal and the PCA [25]. Concerning the international legal obligation of conducting EIAs, the ICJ articulated in t*he Pulp Mill case* that such assessments are imperative under general international law when the proposed industrial activity poses risks and is likely to result in significant adverse transboundary impacts, especially concerning shared resources [25]. *The Pulp Mill case* stands as a pivotal precedent in defining the principles of TEIA regulations [59] and has been recognized as'the most significant international environmental law ruling issued by an international judicial entity'[60].

In the *Boundary Activities/Roads case,* the ICJ highlighted that to fulfill the responsibility of preventing significant cross-border environmental damage, a nation is compelled to ascertain the potential for such harm prior to initiating activities that could negatively affect another country's environment, necessitating an EIA [5]. A classic instance is the Danube-Black Sea waterway project in Ukraine [61]. The Romanian Government contended that Ukraine's proposal fails to adhere to the national duties prescribed by the *Espoo Convention* for conducting transboundary environmental

DOI: 10.54254/2753-7048/69/20240160

impact assessments [62], as well as the stipulations for public involvement in environmental decision-making as outlined in the *Aarhus Convention* [63]. Romania called for the activation of the non-compliance procedure under the *Espoo Convention* to evaluate Ukraine's actions and pressed for a return to conformity [64]. The Executive Committee eventually dismissed Ukraine's stance that there would be no considerable transboundary effect, acknowledging that the Bistro Canal's construction could indeed have such an impact [65].

Following this, Ukraine revised its internal laws and carried out a joint cross-border EIA with Romania to satisfy its international treaty commitments [66]. This demonstrates that the state responsible for the planning must perform an initial risk evaluation based on tangible conditions to establish if the proposed activity could result in severe environmental damage to another state [5]. Should a risk of severe harm be identified, the state is duty-bound to perform an EIA; conversely, if it can be demonstrated that no risk is present, the requirement for an EIA is waived, a procedure referred to as screening [67]. Hence, EIA are not mandatory for every activity.

In the *boundary activities/road case*, experts on both sides agreed that there was no risk of serious transboundary environmental harm from river excavation activities, whereas it is more common in actual disputes for experts on both sides to disagree on whether the planned activities are likely to cause serious transboundary environmental harm. For example, Nicaragua and Costa Rica have clearly opposing claims regarding the risk of serious transboundary environmental harm from Costa Rican road construction activities [5]. The International Court of Justice has noted that preliminary environmental impact assessments should be carried out by the state undertaking the activity [5], but that this does not mean that the state has complete discretion; furthermore, in order to achieve the objectives of the environmental impact assessment, it is necessary to clarify the general criteria to be followed by the preliminary risk assessment to prevent the party to the planning activity from abusing its rights and circumventing the EIA obligation. On this issue, the International Court of Justice introduced part of the objective evaluation criteria in the boundary activity/road case, which indicates that in determining whether there is a risk of serious transboundary environmental harm-the EIA threshold-the court will consider the specific facts of the case [67].

Nevertheless, the court overlooked a pivotal consideration: what criteria does a state employ to identify activities that entail a 'substantial potential for cross-border damage'? The delineation of these thresholds is fraught with ambiguity, an aspect frequently subject to criticism [68]. The court provided little guidance, even less than the draft articles [69]. Upon reviewing particular actions in Nicaragua, the ICJ simply acknowledged that it had 'thoroughly inspected the evidence contained within the case records, incorporating the submitted reports and the declarations provided by the specialists summoned by the involved parties,' prior to determining that the required threshold had not been met [25]. In the *case of road construction in Costa Rica*, a number of factors were noted-the 'essence and scale of the project' and the 'context in which the project was implemented' (including its proximity to protected areas)-and the details were succinctly evaluated prior to determining that the required standard had been met [5]. The judgment scarcely touches upon the methodological approach, thus leaving ambiguity regarding the evaluation process-whether to gauge the accomplishment of the scope at the initial phase or during the EIA.

However, the court's silence may well be at the heart of the issue. The ILC has categorically rejected the suggestion to create a list of activities that carry a significant risk of transboundary harm, arguing that such a registry would likely be incomplete and rapidly become obsolete due to the rapid progression of technology [69]. Uncertainty might prompt countries to adopt a cautious approach, assuming that the criteria have been met to protect against the risk of breaching their procedural obligations. In essence, when faced with uncertainty, states may be spurred to either take or refrain from certain actions. There exists a void in legal scholarship regarding whether ambiguity is

DOI: 10.54254/2753-7048/69/20240160

advantageous, and a comprehensive grasp of this issue might necessitate a quantitative examination of the accumulation of case law.

4. Conclusion

A full understanding of the court's determination for the EIA path is important for adapting to the future trend of EIA; it also underscores the significance of EIA processes. An EIA entails evaluating the potential repercussions of proposed projects on the natural world. EIA is broadly acknowledged as a fundamental mechanism for accomplishing objectives of sustainable development, with its internationalization poised to become a pivotal movement in the times ahead [70]. Take, for instance, the incident on August 24, 2023, when Japan initiated the release of water, contaminated by nuclear waste and processed through the 'Advanced Liquid Treatment System (ALPS)'j- a relic of the 2011 Fukushima disaster-into the Pacific Ocean [71]. Yet, the Japanese authorities are proceeding with their discharge schedule expediently, bypassing the mandatory EIA; the conformity of this action with EIA requirements has become a focal point of academic debate [72].

Consequently, an exhaustive examination of EIA methodologies could yield insights into resolving such occurrences, with EIA documentation potentially serving as compelling 'proof' in future disputes over environmental degradation. Furthermore, it is evident that the discourse on EIA within the negotiations for international accords concerning the preservation and sustainable utilization of marine biodiversity beyond national boundaries, as previously mentioned, will inevitably be shaped by the International Court of Justice's precedents. The BBNJ Treaty [73], which was endorsed by the UN on June 19, 2023, has incorporated the matter of jurisdictional tools, including EIA, as a central component [74].

As a result, thorough readiness for Environmental Impact Assessment (EIA) can more effectively satisfy the criteria for future EIA endeavors beyond the domestic boundaries. Delving into the core of EIA prerequisites and their role in refining decision-making, the present EIA-related resolutions are better equipped to clarify and define the community's interests within the context of global legal benchmarks [75]. Traditionally, nations have been responsible for contemplating the well-being and rights of other countries that might be affected by their actions-a topic of significant concern to legal experts on the international stage [76]-however, there has been scant attention paid to the exact legal frameworks required to fulfill these obligations [77]. EIA evaluations act as a crucial tool, yet to fully leverage their advisory potential, a detailed scrutiny of the fundamental normative principles that are integral to the EIA procedure is essential.

In summary, this paper holds that the court's interpretation of environmental impact assessment is incomplete. This is reflected in two aspects: (1) the court's understanding of the uncertainty of EIA threshold setting. The ICJ does not specify how it determines a 'risk of significant environmental harm'. (2) The court's neglect of the obligation to cooperate may lead the court to interpret EIA too much in its substance-as a technical tool; if the cooperation obligation is reintroduced, it will balance the understanding of EIA's procedural content. Thinking deeply about the methods to deal with the above two shortcomings and comprehensively understanding the path of the ICJ's determination for EIA will have greater reference value and significance for future practice involving EIA.

References

[1] *Convention on the Environmental Impact Assessment in a Context (adopted on 25 February 1991, entered into force 10 September 1997) 1989 UNTS 310, art 1, 3.*
[2] *UNCED 'Rio Declaration on Environment and Development' (1992), 13 World Bull, Principle 17, 224.*
[3] *United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 206 (UNCLOS).*
[4] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*

DOI: 10.54254/2753-7048/69/20240160

[5] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Judgment) ICJ Rep 2015.*
[6] *Gillespie A. (2008) 'Environmental Impact Assessments in International Law' Review of European Community & International Environmental Law, (2/17, 2008) 222, paras 221–233.*
[7] *Elferink, O. 'Environmental Impact Assessments in Areas Beyond National Jurisdiction: Identification of Gaps and Possible Ways Forward' (2013) 1(13) IDDRI.*
[8] *UNGA Res 66/2319 (6 July 2017) UN Doc A/RES/66/231, Annex.*
[9] *Boyes, A. (2014) 'Environmental Impact Assessment in Areas beyond National Jurisdiction' Law of the Sea Research Paper 528.*
[10] *Boyes, A. (2011) 'Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention' Review of European Community and International Environmental Law (RECIEL) 20, 3, paras 227-231.*
[11] *Connelly, R. G. (1999) 'The UN Convention on EIA in a Transboundary Context: a Historical Perspective' Environmental Impact Assessment Review 19, 1, paras 37-46.*
[12] *Xing, S. (2011) 'Research on transboundary Environmental Impact Assessment system' Ocean University of China, PhD dissertation.*
[13] *Craik, N. (2020) 'The duty to cooperate in the customary law of environmental impact assessment' The International and Comparative Law Quarterly 69, 1, paras 239–259.*
[14] *Robinson, N. A. (1992) 'International Trends in Environmental Impact Assessment' Environmental Affairs Vol 19, 591, paras 611-616.*
[15] *Gillespie, A. (2008) 'Environmental Impact Assessments in International Law' Review of European Community & International Environmental Law, Vol 17, 221 (Issue 2).*
[16] *Tweedie, J. (2006) 'Transboundary Environmental Impact Assessment Under the North American Free Trade Agreement' Washington and Lee Law Review, Vol 63, 870.*
[17] *Canadian Environmental Assessment Agency (CEAA), Government of Canada's Kearl Decision, art 19, <http://www.ceaa.gc.ca/050/details-eng.cfm?CEAR_ID16237_ForceDecision_Y_DecisionID=20218>*
[18] *ITLOS, (2011) 'Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area' (1 February 2011) ITLOS/Advisory Opinion 50, para 145 <http://www.itlos.org/index.phpid=109_L=0> (Accessed 28 July 2024).*
[19] *UNEP 'Convention on Biodiversity' (5 June 1992) UNTS/1760/142 Art 14 (1) (a).*
[20] *UNEP (2009) 'Environmental Impact Assessments in Marine Areas Beyond National Jurisdiction' (20 November 2009) UNEP/CBD/EW-EIAMA/2, First preamble of UNEP Goals and Principles of Environmental Impact Assessment.*
[21] *Iron Rhine (Ijzeren Rijn) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands Arbitration (2007) PCA Award Series.*
[22] *Gabčíkovo-Nagymaros Project Case (Hungary v Slovakia) (Judgment) [1997] ICJ EB/OL <https://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-00-EN.pdf> (Accessed 7 August 2024).*
[23] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania) (Merits) [1949] ICJ Rep 22.*
[24] *UNTS 'Statute of the River Uruguay' (1975) UNTS No I-21425, art 41.*
[25] *Pulp Mills on the River Uruguay (Arg v Uru) (Judgment) (10 April 2010), available <http://www.icj-cij.org/docket/files/135/15877.pdf> (Accessed 8 August 2024), para 197.*
[26] *Case Concerning Land Reclamation By Singapore In and Around the Straits of Johor (Malaysia v Singapore) ITLOS Reports 2003,15*
[27] *G Tunk, 'Is General International Law Customary Law Only' (1993) EJIL 534.*
[28] *Statute of the International Court of Justice (1945) 39 AJIL Supp 215 175, art 38.*
[29] *As per the Vienna Convention on the Law of Treaties (adopted 18 April 1961, entered into force 24 April 1964) 1155 UNTS 331, art 31(3)(c).*
[30] *L-A Duvic-Paoli, The Prevention Principle in International Environmental Law (CUP 2018) 213.*
[31] *J Bendel and J Harrison, 'Determining the Legal Nature and Content of EIAs in International Environmental Law: What Does the ICJ Decision in the Joined Costa Rica v Nicaragua/Nicaragua v Costa Rica Cases Tell Us?' (2017) 42 Questions of International Law, Zoom-in, 13.*
[32] *Aerial Herbicide Spraying (Ecuador v Colombia) (Memorial of Ecuador) Vol 1, p 295, para 8.41.*
[33] *Bartlett and P Kurian, 'The Theory of Environmental Impact Assessment: Implicit Models of Policy Making' (1999) 27 Policy and Politics 415.*
[34] *Zeleňáková, M., Labant, S., Zvijáková, L., Weiss, E., Čepelová, H., Weiss, R., Fialová, J. and Minďaš, J. (2020) 'Methodology for environmental assessment of proposed activity using risk analysis'(Environmental Impact Assessment Review, 80.*

[35] Karkkainen, B. C. (2002) 'Towards a Smarter NEPA: Monitoring and Managing Governments Environmental Performance' 102 ColumL Rev 903.
[36] Serge, T. (1984) Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform (Stanford University Press)
[37] The MOX Plant Case (Ireland v the UK) (Order of 2001 ITLOS EB/OL), <http://www.itlos.org/index.php?id=102> (Accessed 9 August 2024).
[38] The MOX Plant Case (n 52), Separate Opinion of Judge Mensah, p 122.
[39] See Case above, Separate Opinion of Judge Székely, p 147, paras 16-17.
[40] Partial Award in the Matter of The Indus Waters Kishenganga Arbitration (Pakistan v India) (18 February 2013), para 451.
[41] The Nuclear Tests Case (New Zealand v France) (Judgment) [1974] ICJ EB/OL, <http://www.icj-cij.org/docket/files/59/6159.pdf> (Accessed 10 August 2024); The Nuclear Tests Case (Australia v France) (Judgment) [1974] ICJ EB/OL, http://www.icj-cij.org/docket/files/58/6093.pdf (Accessed 10 August 2024).
[42] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) [1995] ICJ Rep 290, para 5.
[43] Ibid Craik, 'Deliberation and Legitimacy in Transnational Environmental Governance: The Case of Environmental Impact Assessment' (2007) 38 Victoria University Wellington Law Review 381.
[44] Poisner Jonathan, 'A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation' (1996) 26 Envtl 53.
[45] Birnie, A., Boyle, P. and Redgwell, C. (2009) International Law and the Environment (3rd edn, Oxford University Press) 175.
[46] Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) (1972) 11 ILM 1416.
[47] Convention on the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293, art 2(2).
[48] See discussion in ILC, 'Second Report on the Protection of the Atmosphere' (2015) UN Doc A/CN.4/681, 36–47; see also discussion in Whaling in the Antarctic (Australia v Japan, New Zealand Intervening) (Merits) [2014] ICJ Rep 226, paras 83, 220–222 and 240.
[49] Lac Lanoux Arbitration, 24 ILR (1957).
[50] United Nations Convention on the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) (1997) 36 ILM 700, arts 11–19; Agreement on the Cooperation for the Sustainable Development of the Mekong River Bain (adopted 5 April 1995) (1995) 34 ILM 865; Convention on Co-operation for the Protection and Sustainable Use of the Danube River (adopted 29 June 1994, entered into force 22 October 1998), ECOLEX TRE-001207.
[51] Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979, entered into force 16 March 1998) 18 ILM 1442 art 5; Agreement between United States and Canada on Air Quality (adopted 1991 March 13) (1991) 30 ILM 676, arts V–VII.
[52] ILC, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses' (1994) 46th Session, Yearbook of the ILC, vol II, Pt Two, 89, arts 12–19; ILC, 'Draft Articles on the Law of Transboundary Aquifers' (2008) 60th Session, 2008, Yearbook of the ILC, vol II, Pt Two, 22, art 15.
[53] Corfu Channel Case (UK v Albania) (Merits) [1949] ICJ Rep 4, 22 (discussed in Draft Articles on Transboundary Harm art 8, commentary 3).
[54] Territorial Jurisdiction of the International Commission of the River Oder (Czechoslovakia, Denmark, France, Germany, Great Britain, Sweden/Poland) (1929) PCIJ Series A No 23 (referring to a 'community of interest').
[55] Draft Articles on Transboundary Harm, art 9(2).
[56] Benvenisti, E. (2013) 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' 107 AJIL 295, 314.
[57] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States) (Provisional Measures) [1984] ICJ Rep 292, 299.
[58] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo Finland (25 February 1991) 30 ILM 802 (in force 14 January 1998) (Espoo Convention), art 6 (2)
[59] McIntyre, O. (2011) The World Court's Ongoing Contribution to International Water Law: the Pulp Mills Case Between Argentina and Uruguay, Water Alternatives Vol 4, Issue 2, p 124.
[60] Boyle, A. 'Pulp Mills Case: A Commentary', <http://www.biicl.org/files/5167_pulp_mills_case.pdf> (Accessed 25 Aug. 2024).
[61] Bystroe Canal Project, <http://assets.panda.org/downloads/bystroyecanalqa.pdf> (Accessed 26 August 2024).
[62] Radio Romania International News (2023), <http://old.rri.ro/arh-art.shtml?lang=5&sec=197&art=13871> (Accessed 20 August 2024).

DOI: 10.54254/2753-7048/69/20240160

[63] Koester, V. (2007) 'The compliance committee of the Aarhus convention-an overview of procedures and jurisprudence' 37 Envtl Pol'y & L 83.
[64] Marsden Simon, Non-compliance procedures (2017) Yearbook Int Envtl vol 28, 111–115.
[65] Compliance with and implementation of the Convention Report of the 11th meeting of the Implementation Committee ECE/MP.EIA/WG.1/2007/4, para 21, 2023.
[66] Study on current situation and likely development of the Bystroe canal and Kiliya arm, Final report, (January 2016), 47, < https://mtu.gov.ua/files/31110551_dod.pdf >(Accessed 26 August 2024).
[67] United Nations Environment Programme, 'Assessing Environmental Impacts- A Global Review of Legislation' (2018), http://wedocs.unep.org/bitstream/handle/20.500.11822/22691/Environmental_Impacts_Legislation.pdf. (Accessed 26 August 2024).
[68] Cogan, J.K. (2016) 'Sovereignty over disputed territory-international environmental law-transboundary harm-due diligence-environmental impact assessment' (The American Journal of International Law 110), 320–326.
[69] Draft Articles and Commentaries, supra note 24, at 387-90 [2001] 2YB Int'L Comm'nat 152-53 (commentary to draft Article 2).
[70] Sands, P. (1994) ' International Law in the Field of Sustainable Development', 64 British Yearbook of International Law, at 357-358; and Alan Gilpin, Environmental Impact Assessment, supra note 1, at 9-10.
[71] IAEA 'Japan to release Fukushima water into ocean from Aug. 24'. Available at: https://news.un.org/en/story/2023/08/1140037 (Accessed 25 August 2024).
[72] Chen, X and Xu, Q. (2024) 'The implementation of the environmental impact assessment in Fukushima contaminated water discharge: an analysis of the international legal framework' 2 Frontiers in Marine Science Vol 11.
[73] The International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction.
[74] Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction, <https://www.un.org/bbnj/>, visited on 20 August 2024.
[75] Friedman Wolfgang, The Changing Structure of International Law (Columbia University Press 1964).
[76] Simma, B. (1994) 'From Bilateralism to Community Interest in International Law' 250 Recueildes Cours 217
[77] Benvenisti, E. and Nolte, G. (2018) Community Interests Across International Law (OUP).