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CASE AND COMMENT

THE PRINCIPLES OF DUE DILIGENCE AND PREVENTION IN INTERNATIONAL  
ENVIRONMENTAL LAW

ON 16 December 2015, the International Court of Justice (ICJ) delivered its judgment in the joined cases of *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)*, ICJ Reports 2015. These are the latest in a line of cases raising key principles of international environmental law before the ICJ, following *Pulp Mills* (2010), *Aerial Herbicide Spraying and Whaling in the Antarctic* (2014).

Costa Rica instituted proceedings in 2010, following the incursion of Nicaraguan armed forces into its territory. The media reported the incident as “the first Google Maps war” because the commander of the troops initially purported to justify the incursion by reference to Google Maps designating the area as part of Nicaragua. Later, in the course of the proceedings, Nicaragua claimed title over the disputed territory on more conventional grounds. Costa Rica complained that the digging of channels, felling of trees and military occupation by Nicaragua on part of its territory designated as protected wetlands under the Ramsar Convention violated its territorial integrity, the prohibition against the use of force and international environmental law. The case brought by Costa Rica was an atypical territorial dispute, triggered by the unilateral actions of Nicaragua in what the ICJ confirmed to be Costa Rican territory. The case raises key questions of state responsibility (Separate Opinion Judge Owada). Nicaragua responded by instituting proceedings against Costa Rica in 2011, complaining that the construction of a road by Costa Rica near the border and Ramsar-protected wetlands violated its sovereignty and caused major environmental damage to its territory. The Court joined the proceedings in 2013 as the cases shared a common factual, geographical and historical context.

The disputes involved two categories of principles: first, general principles of international law including respect for territorial integrity, sovereignty and the prohibition against the use of force; second, both parties invoked fundamental principles of environmental law, including the obligation to exercise due diligence in preventing significant transboundary harm, and the related requirements to conduct an environmental impact assessment (EIA) and to notify and consult the potentially affected state. This note focuses on the latter category, as environmental law is a relatively new and unsettled area of international law in need of further clarification.

In the dispute concerning *Certain Activities Carried out by Nicaragua*, the ICJ first ascertained Costa Rica's sovereignty over "the disputed territory", concluding that it was breached by Nicaragua's military presence and dredging of channels.

Second, the Court addressed the alleged violations of procedural environmental law. It recalled that conducting an EIA is now a requirement under general international law; it clarified that the principle applies not only in relation to industrial activities, but more generally to all activities that may have a significant adverse impact in a transboundary context. The Court also stressed that the obligation of due diligence in preventing significant transboundary harm triggers the procedural obligations to carry out an EIA and to notify and consult the potentially affected state if the EIA confirms there is a risk of significant harm (*ibid.*, at para. [104]).

Third, based on Nicaragua's environmental studies of the impact of the dredging on its own environment and on the expert evidence presented, the Court found that Nicaragua's dredging programme did not pose a risk of significant transboundary harm. In the absence of such risk, the obligations to carry out an EIA or to notify or consult Costa Rica were not triggered.

Fourth, the ICJ assessed whether Nicaragua breached the substantive obligation not to cause transboundary environmental harm. It limited the inquiry to the activities on Nicaragua's own territory, having already established Nicaragua's responsibility for the harm caused by activities in breach of Costa Rica's territorial sovereignty. The Court affirmed the customary principle of prevention, but found that there was no proof of transboundary harm.

Finally, the Court concluded that Costa Rica was entitled to compensation for the material damage caused by Nicaragua's wrongful dredging and military presence on Costa Rican territory, to be determined by negotiation between the parties or in subsequent proceedings.

The Court's clarification that the obligation of due diligence in preventing transboundary harm underlies the procedural principles of environmental law is a welcome conceptual development. Another important aspect of the judgment is the elaboration of the sequence of thresholds triggering procedural environmental obligations, starting with a preliminary assessment of whether there is a risk of significant transboundary harm which triggers

the requirement to carry out an EIA; the confirmation of such a risk following the EIA triggers in turn the duty to notify and consult the potentially affected state. It is regrettable, however, that the Court did not clarify further the relationship between the two key environmental principles at hand, namely due diligence being the procedural principle of conduct and the substantive principle of prevention, or the broader question about the relationship between procedural and substantive obligations under environmental law. Indeed, this was one of the main areas of contention in the Separate Opinions of the Judges. Judges Owada and Donoghue saw due diligence as the primary legal obligation of conduct under environmental law, with EIA and the duties to notify and consult being possible requirements for the fulfilment of this duty, rather than separate legal obligations. In contrast, Judge Dugard reasoned convincingly that the overarching principle is that of prevention and that the obligation of due diligence is a standard of conduct that flows from it, together with the independent procedural obligations of an EIA, notification and consultation. Judge Cançado Trindade adopted a middle ground, seeing an EIA as a duty in its own right, founded upon the requirement of due diligence.

The Court also left open the question of the legal status of an EIA under international law, choosing not to follow or even mention the earlier finding of the International Tribunal for the Law of the Sea that an EIA is now part of custom (*Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, at [145]). The uncertainty was manifest in the Separate Opinions, with Judges Cançado Trindade and Bhandari considering the carrying-out of an EIA as a general principle of law, Judge Dugard seeing it as custom and Judges Owada and Donoghue as a mere manifestation of the due diligence obligation. On the one hand, it is understandable that general international law in this area might not have evolved significantly in the five years following *Pulp Mills*. On the other, clarifying whether an EIA is a positive obligation under environmental law would have helped guide the actions of states in practice.

What is most regrettable, however, is that the Court did not make any findings as to whether Nicaragua breached its substantive environmental law obligations by dredging and felling trees in Costa Rica's Ramsar-protected wetlands. Instead, it was satisfied with the curt pronouncement that these activities violated Costa Rica's territorial sovereignty and that any resulting material damage should be compensated. It can be hoped that the Court will not shy away from addressing the environmental character of the wrongful acts in the reparation stage of the proceedings.

In *Construction of a Road by Costa Rica*, the Court first rejected Costa Rica's argument that there was no risk of significant transboundary harm triggering the obligation to carry out EIA. Instead, the Court took it upon itself to assess the risk at hand by reference to the nature, magnitude and

context of the project, established as relevant criteria in *Pulp Mills*. The Court found that the threshold of risk was met and accordingly that Costa Rica failed to comply with its obligation to carry out an EIA before commencing the construction of the road. Second, the Court rejected the argument that there was a state of emergency created by Nicaragua's occupation that justified this failure. Third, the Court found that it did not need to examine whether Costa Rica violated the obligation to notify and consult Nicaragua in the absence of an EIA showing a risk of significant harm. Finally, the Court dismissed as unsubstantiated all of Nicaragua's allegations of breaches of substantive environmental law, given the absence of proof of significant transboundary harm. With respect to remedies, the Court held that a declaration was the appropriate satisfaction for Costa Rica's failure to conduct an EIA.

The Court's treatment of the procedural and substantive environmental principles is an important indication that the two categories are assessed separately and that a state may violate its procedural obligations even in the absence of any resulting environmental harm. The Court's analysis is also helpful in highlighting that the assessment of the threshold of risk triggering the EIA obligation is not up to the state alone, as implied in *Pulp Mills*, but subject to international judicial scrutiny. Furthermore, the ICJ clarified that declaratory judgments are the appropriate remedy for breaches of procedural environmental law. What is less satisfactory, however, is the Court's inconsistent approach in assessing the presence of risk of significant transboundary harm triggering the obligation of carrying out an EIA vis-à-vis Nicaragua's dredging and Costa Rica's construction of the road. In the former instance, the Court established the absence of risk by cursory reference to the evidence presented. In the latter case, however, the Court took it upon itself to establish the presence of a risk by applying legal criteria to the characteristics of the project. The palpable difference in the Court's approach could be explained by reference to the fact that the Espoo Convention lists the construction of roads as one of the risky activities necessitating an EIA. In contrast, the dredging of canals is not covered by the presumption that it too might be risky. However, the Court should have been more explicit in justifying the difference in its risk-assessment approaches. The ICJ could have clarified in particular whether it considers the Espoo Convention is part of custom, given that it was not a treaty binding upon the parties.

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