THE DUTY TO COOPERATE IN THE CUSTOMARY LAW OF ENVIRONMENTAL IMPACT ASSESSMENT

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Abstract This article argues that the International Court of Justice's (ICJ) account of the customary law of environmental impact assessment (EIA) is incomplete. While acknowledging the role of the harm prevention principle in formulating the customary obligation to conduct EIAs, the ICJ has ignored the duty to cooperate, notwithstanding the latter duty's equally strong standing in international environmental law. Ignoring the duty to cooperate pushes the court towards a formal and sequential understanding of EIA, which undervalues the centrality of notice and consultation in EIA. In effect, viewed through the harm prevention lens alone, EIA is largely understood in instrumental and technical terms; whereas, if the duty to cooperate is brought back in, EIA's deliberative and 'other-regarding' nature is more clearly seen. This, in turn, recognises the normative and political role of EIA in structuring State interactions respecting environmental disputes.

Keywords: public international law, international environmental law, customary international law, duty to cooperate, community interests in international law, environmental impact assessment.

I. INTRODUCTION

Environmental impact assessment (EIA) is widely heralded as a central pillar in the protection of the environment in international law. The obligation to conduct EIAs is found in a wide range of multilateral treaties, as well as forming part of the environmental practices of international organisations.[1] The obligation to conduct EIAs has been identified as a 'general' or customary obligation by the International Court of Justice (ICJ),[2] the International Tribunal for the

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[1] See discussion below. For a recent discussion of the status of EIA in international law, see International Law Commission (ILC) 'Third Report on the Protection of the Atmosphere' (25 February 2016) UN Doc A/CN.4/692, 20–33; see also N Craik, 'Principle 17: Environmental Impact Assessment' in J Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 451.

[2] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) *(Pulp Mills case)* [2010] ICJ Rep 14, para 204; *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)* (Merits) (*Certain Activities/Construction of a Road Case*) [2015] ICJ Rep 665, paras 104 and 153.

[*ICLQ* vol 69, January 2020 pp 239–259] doi:10.1017/S0020589319000459

Law of the Sea (ITLOS),[3] and the International Law Commission (ILC).[4] Despite its pedigree as a firmly established requirement in international law, the obligation to conduct EIAs remains controversial as both a conceptual and methodological matter.

Conceptually, EIAs can be viewed in a highly instrumental manner. They are planning tools that are intended to inform decision-makers of the environmental consequences of planned activities. EIA obligations, on this view, are understood as narrow and technical requirements to produce environmental information.[5] The obligation is procedural in the sense that the EIA process itself does not determine outcomes, but rests on the assumption that decision makers, if fully informed of the environmental consequences of their proposed activities, will arrive at decisions consistent with environmental goals. EIAs can also be understood in much more deliberative terms.[6] In addition to generating knowledge about impacts, EIAs also provide a process for those potentially affected by the proposal to understand how their interests may be impacted and have their interests accounted for within the decision-making process. This understanding has a less instrumental posture in that the aim of EIAs is to legitimise decisions impacting the environment in the eyes of those impacted and the public more generally by ensuring that decision-makers have appropriately accounted for a wide range of interests. EIA is, on this view, both a means to an end—harm avoidance, but also an end in itself—legitimation.

How EIAs are understood has important practical implications for how EIAs are carried out. For example, a more technical view of EIA is more likely to view consultation and participation narrowly, emphasising expertise over

[3] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) ITLOS Reports, 10, para 145.

[4] ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (and Commentaries)' in 'Report of the International Law Commission on the Work of its 53rd Session' (23 April–1 June 2001 and 2 July–10 August 2001) UN Doc A/56/10, art 7 (including a general obligation to assess transboundary risks); see also Murase (n 1).

[5] This view of EIA is often referred to as the comprehensive rationality model, as it is rooted in administrative decision-making models that focuses on expert managers gathering and analysing a wide range of salient information about a policy decision to direct their discretion. The predominant assumption is that optimal decisions are possible, with sufficient information and expertise. In relation to EIA, see discussion by B Karkkainen, 'Towards a Smarter NEPA: Monitoring and Managing Governments Environmental Performance' (2002) 102 ColumLRev 903. See also R Bartlett and P Kurian, 'The Theory of Environmental Impact Assessment: Implicit Models of Policy Making' (1999) 27 Policy and Politics 415.

[6] There remain different understandings of the political models that may underpin EIA processes. See eg S Taylor, *Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative* Reform (Stanford University Press 1984) (viewing EIA as a process for facilitating political bargaining within pluralist democratic structures). EIA has also often been viewed in more deliberative terms; see N Craik, 'Deliberation and Legitimacy in Transnational Environmental Governance: The Case of Environmental Impact Assessment' (2007) 38 Victoria University Wellington Law Review 381; and J Poisner, 'A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation' (1996) 26 EnvLaw 53.

representation. Consultation focuses on the results of the assessment, not the assessment itself. The scope of consultation is likely to be oriented towards those who are directly impacted, constructing a narrow understanding of the nature of interests at stake in the process. A more deliberative view of EIA understands scientific knowledge and its creation as being more open to contestation, requiring input into how the assessment is undertaken. Moreover, whereas the instrumental understanding of EIA rests on an assumption of normative consensus respecting the balancing of environmental and economic goals, the alternative model accepts a more pluralistic understanding of the normative landscape in which decisions respecting planned activities occur. EIA, in its more deliberative conceptualisation, envisages a dialogical process, as opposed to a one-way conveyance of information from the source State to the affected State.

The conceptual debate has methodological links relating to how EIA obligations are formed in international law. As a State duty, EIA implements other general rules and principles of international environmental law by providing a greater degree of specificity respecting the precise actions a State is required to undertake in the face of potential transboundary harm. For example, in the linked disputes between Nicaragua and Costa Rica that were adjudicated before the ICJ in 2015 (referred to collectively here as the *Certain Activities/Construction of a Road Case*), the Court drew a link between EIA and a State's due diligence obligations to prevent transboundary harm.[7] This link was also clearly identified by the Court in its earlier decision in the *Pulp Mills Case*.[8] While the precise nature of the relationship between the general obligation and more specific customary rules was the source of some debate among the Judges in the *Certain Activities/Construction of a Road Case*, the underlying idea that EIA obligations implement due diligence, and that the obligation to conduct an EIA must be understand in light of that obligation, was not called into question.

The question the Court does not address is whether EIA implements harm prevention alone or whether the more specific requirements of EIA are responding to other general duties in international law. In addressing this question, this article argues that the ICJ's analysis of EIA obligations is incomplete because it has ignored EIA's role in implementing the duty to cooperate, notwithstanding the latter duty's equally strong standing in international environmental law. The duty to cooperate is triggered by the same condition that triggers the duty to prevent harm; namely, the risk of significant environmental harm, and thus, must also be implemented by States in the same circumstances. Whereas prevention focuses on the obligation of a State to inform itself of the consequences of its activities,

[7] *Certain Activities/Construction of a Road Case* (n 2); as the Judgment in this case joins two claims involving different factual circumstances, where relevant, I refer to the separate disputes as the *Certain Activities* and *Construction of a Road*, respectively. [8] *Pulp Mills Case* (n 2).

https://doi.org/10.1017/S0020589319000459 Published online by Cambridge University Press

cooperation focuses on the obligation to inform other States and to seek their perspectives on an activity that has the potential to affect their interests. It is further argued that ignoring the duty to cooperate pushes international law towards a thin and technical version of EIA, whereas if the duty to cooperate is brought back in, EIA's deliberative and 'other-regarding' nature is more clearly seen. Understanding EIA as implementing both the duty of prevention and the duty to cooperate provides a more coherent understanding of the nature of EIA in international law.

This has important implications for the substance of EIA obligations, and provides a basis for further elaboration of the customary duty. The relationship between EIA and cooperation also provides a more conceptually sound basis for developing new EIA obligations in international treaties by treating more seriously the epistemic and normative challenges that face States in their determination of whether to pursue environmentally risky activities.

This article proceeds from the understanding that the content of the EIA obligation can only be understood in light of the general rules it serves. The critical point here is that in the context of transboundary harm, due diligence is accompanied by the duty to cooperate, and a determination of EIA obligations that proceeds without regard to cooperation, as has been the case in the ICJ, is necessarily incomplete.

To address this point, the article first examines in greater detail the duty to cooperate in the context of transboundary harm, which requires States to notify and consult in good faith potentially affected States. While both general obligations are engaged when States propose to undertake environmentally risky activities—and in this regard, both must necessarily mediate between a source State's sovereign right to engage in economic activities within its territory and an affected State's sovereign right to be free from environmental harm—each employs a distinct logic. The duty to prevent harm seeks to identify and delineate the extent of each State's sphere of activity: States do not have to account for or accommodate the interests of other States so long as their activities remain confined to their sovereign domain; they must simply determine the extent of their own rights. The duty to cooperate treats the problem of transboundary harm as a shared problem. It recognises that modern environmental problems are not easily and neatly allocated between States, and instead invites States to balance their interests in light of the interests of others.

The next section explores the implications of the duty to cooperate for the legal construction of the customary obligation to conduct EIAs. Interpreting EIA in light of the duty to cooperate allows for a further refinement, and in some cases reconsideration, of a number of aspects of EIA procedures, including the obligations of States when they disagree over whether an activity raises a risk of significant harm, the timing of notification, the duty to

give reasons for decisions respecting planned activities and the potential remedy for a breach of the obligation to conduct an EIA.

The conclusion returns to the nature of EIA obligations themselves and the potential for EIA obligations to promote decisions that better account for and help construct community interests in international law. The 'other-regarding' obligation of States to account for the rights and interests of those States affected by their activities has been an issue of long-standing interest to international lawyers,[9] but less attention has been paid to specific legal processes that implement these obligations. EIA is one such tool, but realising EIA's deliberative potential requires careful attention to its normative antecedents.

II. THE PRINCIPLES UNDERLYING THE DUTY TO CONDUCT AN EIA

The *Certain Activities/Construction of a Road Case* illustrates some of the difficulties associated with identifying a customary obligation to conduct EIAs. The issue of a duty to conduct an EIA arose in both disputes. In the *Certain Activities* case, the activity in question was the dredging of a channel by Nicaragua in a disputed area that was subsequently determined to be Costa Rican territory. In the *Road Case*, the activity was the construction of a road by Costa Rica in their territory, but running along the San Juan River, which forms the border between the States. In both cases, it was alleged that a transboundary EIA was required and was not conducted. There was no existing treaty obligation between the parties that addressed transboundary EIA, so the ICJ was required to determine whether a customary rule existed.

The starting point for the ICJ was its earlier decision in the *Pulp Mills* case, where the Court was required to determine whether an obligation to conduct EIAs ought to be read into a treaty provision obligating the parties 'to protect and preserve the aquatic environment'.[10] In finding that an EIA obligation ought to be read into the duty to prevent environmental harm, which the Court characterises as 'an obligation to act with due diligence',[11] the Court noted that:

> … the obligation to protect and preserve, under Article 41(a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it 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. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would

[9] W Friedman, *The Changing Structure of International Law* (Columbia University Press 1964); B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours 217. More recently the issue of community interests in international law has been explored in a collection of essays; see E Benvenisti and G Nolte, *Community Interests Across International Law* (Oxford University Press 2018).

[10] *Statute of the River Uruguay*, (1975) UNTS, v 1295, No I-21425, art 41.

[11] *Pulp Mills Case* (n 2) para 197.

https://doi.org/10.1017/S0020589319000459 Published online by Cambridge University Press

> not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.[12]

The precise status of the EIA obligation is ambiguous due to the fact that the Court in *Pulp Mills* was interpreting a treaty, not expressly determining a customary rule. Nevertheless, the ICJ refers to the EIA duty as a 'requirement under general international law' and states that such a duty is implied by due diligence (which, in this case, was a treaty obligation but was also recognised as a customary rule).[13]

In elaborating on the substance of an EIA duty, the Court maintained that the specific content is a matter for domestic law but ought to be responsive to the facts of the specific case and the requirement for due diligence.[14] The Court is not explicit about its methodology for arriving at the conclusion that there exists in 'general international law' a duty to conduct EIAs.[15] The approach appears to be one of evolutionary interpretation, whereby the treaty obligation to prevent harm is read in light of a subsequent practice respecting EIAs.[16] The Court does not specify that this subsequent practice amounts to a customary obligation, and does not examine State practice and *opinio juris* in relation to EIA, but rather seems to derive the obligation from due diligence.[17] In effect, Uruguay is required as a matter of due diligence to protect the environment, this necessitates that it must inform itself of the consequences of its activities, and EIA is the manner by which this is done.

The court in *Pulp Mills* also elaborates on the role of EIA in the context of a State's duty to notify and consult. Here again, this duty (to notify) was treaty-based. On this point, the Court notes that where there is an obligation to notify another State respecting potential transboundary harm, the EIA forms the basis of the notification, since only by conveying the full details of the assessment can the affected State assess how it is impacted.[18] As such, the EIA must be conveyed prior to any approval.[19] The duties, however, are presented as being independent and sequential. Notification and consultation are only triggered where an EIA discloses a risk of significant transboundary harm,

[12] ibid, para 204.

[13] ibid, para 101 (citing *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 26, para 29).

[14] ibid, para 205.

[15] There is some debate over the meaning of 'general international law', as the term is distinct from 'general principles of international law' and is not otherwise mentioned as an independent source of international law under the *Statute of the International Court of Justice* (1945) 39 AJIL Supp 215 175, art 38. For discussion, see G Tunk, 'Is General International Law Customary Law Only' (1993) EJIL 534.

[16] 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).

[17] But see L-A Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press 2018) 213 (noting that the wording of the Judgment implies customary law through its reference to both elements of customary law ('practice' and 'acceptance') in the sentence identifying EIA as an obligation of general international law).

[18] *Pulp Mills Case* (n 2) para 119.

[19] ibid, para 121.

although in the *Pulp Mills Case*, Uruguay was under an additional treaty obligation to notify the river commission, CARU, once it had some preliminary basis to believe its activity might cause significant harm to another State.[20]

The ICJ in the main judgment of the *Certain Activities/Construction of a Road Case* cites its reasoning from *Pulp Mills*, and again links the duty to conduct EIAs directly to a State's due diligence obligations.[21] While the decision has certainly been interpreted as treating EIA as custom,[22] the Court maintains its ambiguity respecting the customary status of EIA duties, and again does not examine State practice and *opinio juris*. The reasoning is almost identical to that employed in Pulp Mills:

> Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an EIA.[23]

There was disagreement among the Judges of the Court as to the precise nature of the EIA obligation, with Donoghue and Owada viewing EIA simply as evidence of due diligence, but not forming the basis of an independent obligation, while Dugard was more emphatic that EIA obligations were independent and supported by State practice and *opinio juris*. Despite their methodological differences, the various judges arrived at the same basic set of requirements. Because EIA obligations implement the requirement for due diligence by responding to the need for greater specificity, construction of the obligation must be made with recourse to the underlying principle. In this regard, due diligence plays an interpretive role in providing the underlying purpose for conducting EIAs, but it also plays a deeper, more substantive role by providing the standard by which the adequacy of EIAs will be assessed. Very clearly EIA only addresses certain aspects of the broader requirement to prevent harm; namely, it applies to the possible harms that may arise from planned physical undertakings, and it applies to the planning stages of a project.[24]

What the Court does not turn its attention to, however, is whether EIA requirements only implement the duty to prevent harm or whether EIA also is intended to implement other general duties that arise in relation to planned activities. If, however, the duty to prevent harm is triggered, those same

[20] ibid, para 105.
[21] *Certain Activities/Construction of a Road Case* (n 2) paras 104 and 153.
[22] See 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.
[23] *Certain Activities/Construction of a Road Case* (n 2) para 104.
[24] ibid, Donoghue, para 9.

https://doi.org/10.1017/S0020589319000459 Published online by Cambridge University Press

conditions—the decision to undertake a project that has a risk of causing significant transboundary harm—also trigger the duty to cooperate. Like the harm principle, the duty to cooperate is central to mediating the competing sovereign interests of States when one State proposes an activity that can harm another. Birnie, Boyle and Redgwell note, 'if due diligence is the first rule of transboundary environmental risk, cooperation is the second'.[25]

The duty to cooperate is equally well established in international environmental law as the duty to prevent harm. The duty is present in Principle 24 of the Stockholm Declaration,[26] and subsequently in Principle 27 of the *Rio Declaration*,[27] as well as numerous treaties, including the United Nations Convention on the Law of the Sea (UNCLOS),[28] the Convention on Biological Diversity[29] and the Ozone Convention.[30] The duty to cooperate has both a general formulation (as seen in Principle 27 of the *Rio Declaration*), which is open-ended in its structure, but includes matters such as general obligations to cooperate with other parties and international organisations, and to promote and cooperate in scientific and technical matters.[31] There is also a more specific obligation to cooperate in the context of shared resources and transboundary harm, which follows the dictum in the *Lac Lanoux* case[32] and is set out in Principle 19 of the *Rio Declaration*:

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.[33]

The obligation to cooperate through notification and consultation is enshrined in numerous treaties involving watercourses[34] and transboundary

[25] A Birnie, P Boyle and C Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 175.

[26] Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) (1972) 11 ILM 1416.

[27] Declaration of the United Nations Conference on Environment and Development (adopted 14 June 1992) (1992) 31 ILM 874.

[28] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 197.

[29] United Nations Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, art 5.

[30] Convention on the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293, art 2(2).

[31] 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.

[32] *Lac Lanoux Arbitration*, 24 ILR (1957).

[33] Declaration on Environment and Development (n 27).

[34] 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

pollution,[35] and has been accepted as a customary rule of international law by various codification bodies[36] and tribunals,[37] including the ICJ in the *Certain Activities/Road Case*.[38]

The structure of the duty to cooperate, which originates in the *Lac Lanoux* arbitration, is that a source State is obligated to notify and consult a State potentially affected by a proposed activity, but the affected State does not have a right to exercise a veto over the proposal.[39] The obligation requires the source State to take the interests of the affected State into consideration. The trigger for the duty to cooperate is the same as the no-harm principle. As such, both duties are engaged when there is a risk of significant transboundary harm. EIA processes, which govern when notification should occur, who should be notified, what information should be exchanged and structures the consultations themselves, are the primary means of implementing the duty to cooperate in relation to planned activities.

The purpose of the duty to cooperate is instrumental in the sense that it is oriented towards the prevention of harm.[40] But cooperation should not be viewed as merely implementing due diligence. In the environmental context, the duty to notify arises out of the duty to warn, identified in the *Corfu Channel Case* as a means to avoid affecting the interests of other States, and the need to jointly manage shared natural resources.[41] Thus, for example, in the *Pulp Mills Case*, cooperation was identified as a means to 'jointly manage the risks of damage to the environment'.[42] Whereas the structure of harm prevention is directed towards delineating spheres of territorial integrity, cooperation arises from circumstances involving shared interests.[43] The mediating role of cooperation is evident in the ILC's *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, which draws on the law of transboundary watercourses in identifying an obligation to

Sustainable Use of the Danube River (adopted 29 June 1994, entered into force 22 October 1998), ECOLEX TRE-001207.

[35] 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.

[36] Draft Articles (n 4) art 8; 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.

[37] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7; *Pulp Mills Case* (n 2).

[38] *Certain Activities/Construction of a Road Case* (n 2) para 106 ('the Parties concur on the existence in general international law of an obligation to notify, and consult with, the potentially affected State in respect of activities which carry a risk of significant transboundary harm').

[39] *Lac Lanoux Arbitration* (n 32).

[40] See eg *Certain Activities/Construction of a Road Case* (n 2), Donoghue, para 9.

[41] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22 (discussed in *Draft Articles on Transboundary Harm* (n 4) art 8, commentary 3).

[42] *Pulp Mills* (n 2) para 77.

[43] *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').

'seek solutions based on an equitable balance of interests'.[44] The implication being that the determination of rights in the context of transboundary harm is contingent and involves a degree of political give and take.

Fundamentally, the duty to cooperate is oriented towards reconciling the competing sovereign interests that arise when one State potentially impacts the environment of another. Judge Wolfrum, in the *Mox Plant Case*, emphasised the shift towards community interests that cooperation entails in these terms:

> The duty to cooperate denotes an important shift in the general orientation of the international legal order. It balances the principle of sovereignty of States and thus ensures that community interests are taken into account vis-à-vis individualistic State interests.[45]

If cooperation is understood as a handmaiden to prevention, it may be too easily argued that States acting reasonably are not required to notify and consult other States, so long as they take reasonable steps to avoid the harm. Due diligence is not necessarily 'other-regarding', whereas the duty to cooperate necessitates taking steps to understand the impacts from the perspective of the affected State. Since the duty to cooperate operates alongside due diligence, the two duties ought to be interpreted in a manner that is complementary and mutually reinforcing.

The obligations that arise in the face of potential impacts is framed by Benvenisti in terms that very much match the structure of the duty to cooperate:

> The obligation to weigh the interests of foreign stakeholders does not necessarily imply an obligation to succumb to those interests, and does not even require full legal responsibility for ultimately preferring domestic interests in balancing various opposing claims. It does not necessarily imply that sovereign discretion should be subject to review by third parties such as foreign or international courts, ones that would replace the sovereign's discretion with their own. What it does imply as a minimum, however, is that sovereigns—whenever they are considering the adoption and pursuit of policies that potentially affect foreign stakeholders or, more generally, global welfare—give due respect to those foreign and global interests.[46]

The obligation to 'give due respect' is operationalised by providing potentially affected States with sufficient information to enable them to understand how their interests may be affected and to provide them with an opportunity to express their views and have them accounted for in the decision-making process. The requirement for good faith, which has been identified as governing the duty to cooperate,[47] has been described as entailing 'a genuine

[44] *Draft Articles on Transboundary Harm* (n 4) art 9(2).

[45] *Mox Plant Case (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 95, Separate Opinion of Judge Wolfrum.

[46] E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 AJIL 295, 314.

[47] *Pulp Mills Case* (n 2) para 145.

intention to achieve a positive result'[48] and as requiring something more than 'mere formalities'.[49] EIA addresses good faith by providing processes for consultation and, in some circumstances, the provisions of reasons that are responsive to the concerns raised.[50]

The duty to cooperate on its own does not give rise to EIA, but it does provide a further basis from which a customary EIA rule derives its content. As such, treaties containing EIA instruments contain requirements to notify and consult on the basis of the EIA. The particular modalities of notice and consultation vary depending upon the context and the degree of specificity in the instrument. The *Espoo Convention*, for example, requires notification of listed activities that are likely to cause a significant transboundary impact 'as early as possible' and links notification to the obligation to consult.[51] Consultation occurs on the basis of the EIA documentation and is aimed at the elimination or reduction of the impacts.[52] The source State is not required to resolve the concerns or necessarily accommodate the affected State, but it must account for the outcome of the consultations.[53] Even those treaties that contain unelaborated obligations to conduct EIAs (that is, the requirement simply requires an EIA be conducted where there is a likelihood of environmental harm, but does not provide details of the required procedures in the same manner as the *Espoo Convention* or the *Antarctic (Madrid) Protocol*), contain explicit requirements to notify and consult.[54]

If EIAs are the central mechanism by which the duty to cooperate is implemented, then the relationship between EIA and the duty to cooperate should be viewed in a similar manner as the relationship between EIA and due diligence. From an interpretive standpoint, the duty to cooperate supplies a quite different rationale for conducting EIA that relates not to harm prevention, but to the right of States to be treated with 'due respect'. Bringing cooperation back into the EIA obligation provides further insights into several key areas of continuing controversy and ought to provoke some reconsideration of the existing rules in order to satisfy the requirements of cooperation.

III. REASSESSING CUSTOMARY LAW IN LIGHT OF THE DUTY TO COOPERATE

Since the relationship of the duty to cooperate to EIA is similar in its structure to due diligence, the approach to reassessing the customary rule follows the same

[48] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)* (Provisional Measures) [1984] ICJ Rep 292, 299. [49] *Lac Lanoux Arbitration* (n 32) 119.
[50] For example, *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); *Protocol on Environmental Protection to the Antarctic Treaty*, Madrid (4 October 1991) 30 ILM 1461 (in force 14 January 1998), Annex 1, art 3(6). [51] *Espoo Convention*, ibid, art 3(1).
[52] ibid, art 5. [53] ibid, art 6.
[54] For example, *Convention on Biological Diversity* (n 29), art 14(1)(c); *UNCLOS* (n 28) art 205.

approach. At a minimum, customary EIA rules ought to be interpreted so as to give effect to the more general requirements of cooperation (and harm prevention). Treaty-based EIA obligations similarly provide instantiations of the international community's understanding of how the duty to cooperate ought to be implemented in the context of planned activities, and thus, while not binding, still retain interpretive relevance.

A. The Threshold

A fundamental difficulty with EIA is that the threshold condition to trigger the obligation to conduct an EIA—the risk of significant environmental harm—must itself be determined through some form of assessment—thus, the very process that determines the level of harm is only triggered when that level is exceeded. The difficulty is compounded by the fact that the threshold, while intended to provide an objective standard,[55] is notoriously vague, and because the determination is a function of risk, it involves a level of subjectivity. Unsurprisingly, whether a proposed activity triggers an obligation to conduct an EIA is at the root of many interstate disputes respecting EIA. For example, both disputes in the *Certain Activities/Road Case* involved disagreements over whether the threshold of a risk of transboundary harm had been met.

On the facts of the *Certain Activities* dispute, the Court found that the conditions to trigger an EIA were not present, whereas in the *Road Dispute*, those conditions were present. The complication in both disputes was that the obligation requires an *ex ante* consideration of risk, but the case arose after the projects in both cases had been constructed. Thus, the parties tended to offer evidence of no actual harm as proof that the risk was not present. The distinguishing feature between the disputes is the Court's finding of evidence that Nicaragua turned its mind to whether a risk was present (by conducting a domestic impact assessment, which disclosed no risk), while Costa Rica had undertaken no such preliminary inquiry. But the Court is not clear whether a lower threshold than risk of significant transboundary, which the EIA in intended to assess, is required.

Where States disagree over whether an activity presents a risk of significant harm, due diligence imposes no additional obligation on the parties. In order to avoid such an impasse, the *Espoo Convention* identifies a set of listed activities, for which a potentially affected State may trigger a third party inquiry process in the event that they disagree with the source State's determination that the activity does not present a risk.[56] The process, conducted by an inquiry commission, investigates and advises the parties on whether the significance threshold is met.[57] Even for unlisted activities, a State remains under an

[55] See eg *Draft Articles on Transboundary Harm* (n 4), art 2, commentary 4.
[56] *Espoo Convention* (n 50) art 2(2).
[57] ibid, art 3(7).

https://doi.org/10.1017/S0020589319000459 Published online by Cambridge University Press

obligation to 'enter into discussion' with a potentially affected State on whether an activity requires a transboundary EIA.[58] In other words, in the absence of agreement over whether an activity triggers an assessment, a source State must still cooperate in good faith to resolve disagreements over whether transboundary EIAs must be undertaken. The approach of the ILC similarly requires a source State to provide a 'documented explanation setting forth the reasons for such finding' of no significant impact and, if that response fails to satisfy, to enter into consultations, during which the source State should take steps to minimise any potential harm to the affected State.[59] However, the ILC also makes it clear that an affected State must have a 'serious and substantiated' belief that significant harm may arise before a duty to consult arises.[60] The approach gives effect to the idea of 'due respect' by imposing obligations of justification on both sides.

These obligations in the face of disagreement over the presence of risk are further supported by the practice of ITLOS, which, in the context for requests for provisional measures, has required Parties to cooperate by continuing to exchange information and consult with one another, notwithstanding that the threshold requirement for harm had not been proven.[61]

The significance of these examples is not that the duty to cooperate lowers the threshold for EIAs or notification, but rather that the duty to cooperate is engaged when the source State has knowledge that its proposed activities may affect another State. That knowledge may arise by virtue of its own investigations or by being informed of a potential impact by an affected State. However, once the source State has this knowledge, it cannot simply ignore the affected State's claim, as to do so would not be to act in good faith. (Good faith is, of course, reciprocal, which explains why the affected State is bound to only raise 'serious and substantiated' claims.) Whereas due diligence, which is rooted in the presence of a bio-physical threat, triggers obligations in an all or nothing fashion (either the threat exists or it does not), the duty to cooperate, which is rooted in mutual respect, informs the relations between States throughout their engagement on the issue.

It is important to recognise at a stage prior to an EIA being conducted, neither the source State nor the affected State has full evidentiary basis to determine the presence of a risk of significant harm. There is no compelling reason why the source State's determination of risk should prevail in the absence of an assessment. If they have evidence that the activity poses no threat, then it ought to be shared. And if they do not have evidence, it is in keeping with their obligations to treat other States with respect, to hear and weigh the concerns raised by a potentially affected neighbour.

[58] ibid, art 2(5). [59] *Draft Articles on Prevention of Transboundary Harm* (n 4) art 11.
[60] ibid, art 11, commentary 3.
[61] *Mox Plant Case* (n 45); *Land Reclamation by Singapore in and around the Straits of Johar (Malaysia v Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003, 10.

B. Timing of Notification

EIA, as practised in domestic and many international contexts, is conducted as a collaborative exercise between the proponent and affected stakeholders. To this end, notification of intent to undertake an EIA is provided at the start of the project, and consultations are engaged in during the early phases of the EIA when the scope of the study is being determined. Providing for input during the scoping stage recognises that affected or interested persons ought to have an opportunity to express their views respecting the scope and design of the study.[62] Early consultation can promote acceptance of the study's approach and substance by providing those affected with a degree of authorship over the process. More generally, early consultation during the scoping stage is understood as a best practice.[63]

EIA, when understood as a function of due diligence alone, leads to a sequential relationship between assessment and notification and consultation. This point is made at several junctures in the *Certain Activities/Road Case*. In the *Certain Activities* dispute, the ICJ held that because Nicaragua was not under an obligation to carry out an EIA (due to the absence of a risk of significant harm), it was not required to notify or consult with Costa Rica.[64] In the *Road Case* dispute, the ICJ is explicit about the sequential nature of the obligations:

> 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.[65]

Here a clearer picture of the relationship between due diligence and notification arises. Notification serves the obligation to prevent harm insofar as when the risk is confirmed and measures must be taken to avoid the harm, and these measures ought to be determined collectively. The effect of this sequential understanding of EIA and notice and consultation is that the EIA process remains entirely source-State driven. The source State determines the scope of the study, whether and which alternatives are assessed and even how the project itself may be identified. The affected State has no role in the EIA until it is complete.

[62] Within the EIA literature, there is a long history in EIA of proponents defining projects in a piecemeal fashion to avoid greater scrutiny or triggering more onerous requirements. See eg *Earth Island Institute v US Forest Service* (2003) 351 F.3d 1291 (9th Cir); *Friends of the West Country Assn v Canada (Minister of Fisheries and Oceans)*, [2000] 2 FC 263 (Canada).

[63] P André *et al.*, *Public Participation: International Best Practice Principles* in Special Publication Series No 4 (International Association for Impact Assessment 2006).

[64] *Certain Activities/Construction of a Road Case* (n 2) para 108.

[65] ibid, para 168.

https://doi.org/10.1017/S0020589319000459 Published online by Cambridge University Press

However, the duty to cooperate shares the same trigger as the duty to conduct an EIA. On that basis, the obligations that flow from cooperation should be engaged at the same time the EIA commences. The importance of cooperation at the early stages of a potential impact upon another State's interests is recognised in Principle 19 of the *Rio Declaration*, which requires notification and consultation 'at an early stage and in good faith'.[66] The *Espoo Convention* adopts an approach consistent with Principle 19, whereby it is anticipated that notification will be undertaken by the source State 'as early as possible and no later than when informing its own public'.[67] The source State is required to provide relevant information to the affected State and clearly anticipate that the notice is intended to allow the affected State to determine whether they wish to participate in the EIA.[68]

Judge Donoghue acknowledges that there may be circumstances where notification at a stage prior to the completion of the EIA may be beneficial, such as where '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'.[69] Donoghue goes on to note that such a circumstance arose on the facts of the *Construction of a Road* dispute, since only the affected State, Nicaragua, had access to the San Juan River, the main ecosystem component of concern.[70]

Donoghue's point here is that the flexibility of locating the obligation in due diligence, not in EIA, is preferable given the contextual demands of assessment, notification and consultation. However, looking at the reasons for early notification from a due diligence perspective may limit that right to instances, such as the *Construction of a Road Case*, where involving the affected State facilitates some informational deficit. As a function of cooperation, the purpose of early notification is broader and less instrumental. EIA processes typically provide the flexibility that due diligence and cooperation require, but are likely better able to signal more clearly how those discretionary decisions ought to be exercised and, therefore, create more predictable and stable expectations.

Donoghue identifies a further reason why affected State participation in the EIA process may be desirable, noting that it may be important to receive the affected State's views on the sensitivity of the environment or procedural details of the EIA. Here her portrayal of EIA more closely fits how the process tends to unfold in domestic settings. The substantive requirement, avoidance of significant environmental harm, is contested due to the ambiguity of the standard and the presence of uncertainty, particularly in

[66] Quoted in full above at n 33.

[67] *Espoo Convention* (n 50) art 3(1).

[68] ibid, art 3(3). In the *Pulp Mills Case*, the duty to cooperate is facilitated by the (treaty) obligation to notify CARU at an early stage to enable an assessment of whether the proposal might cause significant harm, *Pulp Mills* (n 2), paras 104–105.

[69] *Certain Activities/Construction of a Road Case* (n 2), Donoghue, para 21.

[70] ibid, para 22.

https://doi.org/10.1017/S0020589319000459 Published online by Cambridge University Press

predictive processes. There is no 'right' outcome, except at the poles, where significant harm is clearly found to be present or not. Instead, decision-makers must balance the competing perspectives, which will be informed by the respective interests of the parties. Participation by affected States in EIAs facilitates this more dialogical process. It acknowledges that decisions must account for the perspectives and interests of affected States.[71] This justification, as Donoghue herself notes, is not rooted in due diligence, but rather flows from the demands to due respect.[72]

C. *The Duty to Give Reasons*

The obligations on source States once an EIA (including consultations) is completed are not clear. Ultimately, a decision must be made and conveyed to the affected State. The procedural nature of EIAs does not require that the source State mitigate harm to the satisfaction of the affected State. But is the affected State entitled to receive reasons that are responsive to its concerns? As a due diligence obligation, such a right is doubtful, as giving reasons will only indirectly influence whether harm occurs or not. As a function of due diligence, EIA is not oriented towards justification. The requirement of reasonableness that inheres in due diligence relates to reasonable steps to avoid harm, as opposed to reasonable steps to account for and treat seriously the views of other States.

Nonetheless, international EIA obligations often require the provision of reasons. For example, the *UNEP EIA Goals and Principles* require that final decisions be given in writing and provide reasons.[73] The *Espoo Convention* requires not only reasons, but that those reasons take 'due account' of the EIA report and the comments received on the report by affected persons and States.[74] As noted, reasons are central to good faith as the responsiveness and adequacy of reasons are the basis by which an affected State can assess whether their concerns were taken seriously.[75] The duty to give reasons arises where a State is required to account for the position of another State in a non-arbitrary way. For example, the Appellate Body in the *Shrimp/Turtle* case identified the US government's failure to give reasons for its

[71] The clearest example of this approach is found in the *Draft Articles on Transboundary* Harm (n 4) art 9(3) (requiring the source State to take into account the interests of the affected State where consultations fail to produce an agreed solution).

[72] *Certain Activities/Construction of a Road Case* (n 2), Donoghue, para 23 (noting, 'there are topics other than measures to prevent or to mitigate the risk of significant transboundary harm as to which consultations could play a role in meeting the State of origin's due diligence obligation').

[73] UNEP Res GC14/25 (1987) 14th Session endorsed by UNGA Res 42/184 (1987) GAOR 42nd Session, Principle 9.

[74] *Espoo Convention* (n 50) art 6.

[75] See J Hepburn, 'The Duty to Give Reasons for Administrative Decisions in International Law' (2012) 61 ICLQ 641, 644 ('Under this "respect rationale", the focus of reasons is not on what their provision might help to achieve but rather on treating the subject of the decision with the appropriate respect for their personhood').

certification scheme as contributing to their finding that the scheme amounted to 'arbitrary discrimination'.[76]

A fundamental concern in EIA practice is the potential for the entity conducting the EIA to pay lip-service to the concerns raised by affected persons or States. Good faith stands at the centre of cooperation because in order for consultations to be meaningful, the parties must engage one another with a genuine intention to achieve a mutually satisfying result. Nevertheless, because the source State retains a high degree of discretion to proceed with a project in the face of objections, reasons provide the basis upon which an affected State (and third parties) can police genuineness.

The duty to give reasons aligns the international requirement to conduct EIAs with recognition that discretionary decisions in the international legal system must attend to due process considerations.[77] In domestic EIA jurisprudence, US Courts have emphasised that the obligation on decision-makers in EIA processes to demonstrate, through 'sufficient discussion of relevant issues and opposing viewpoints', that they have arrived at a 'reasoned decision'.[78] Similarly, in domestic administrative law contexts, citizens are often entitled to decisions from administrative officials that adhere to minimum requirements of rationality.[79] The point here is not that domestic standards of administrative law ought to be transplanted into international practice, but that the contexts share a common rationale in ensuring that the views of those affected by discretionary decisions are properly accounted for.[80] The obligation to give reasons guards against arbitrariness, which goes to the heart to 'due respect'. While procedural protections are less entrenched in general rules of international law, responsiveness to legal criteria is central to the legitimation of decisions governed by international law.[81]

[76] *United States–Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, paras 180–184 (discussed in ibid).

[77] B Kingsbury, N Krisch and R Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15.

[78] *Natural Resources Defence Council Inc v Hodel,* 865 F 2d 288, 294 (DC Cir 1988) (quoting *Izaak Walton League of Americas v Marsh*, 655 F 2d 346, 371 (DC Cir 1981)).

[79] The common law approach is nicely captured in *Baker v Canada (Minister of Citizen and Immigration),* [1999] 2 SCR 817.

[80] For example, Judge Lauterpacht references the responsibility of States to give reasons in relation to their failure to accept certain consequential recommendations from treaty partners: 'the State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision', *Concerning Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa* (Advisory Opinion) [1955] ICJ Rep 67, 119.

[81] See eg J Brunnée and S Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010).

D. Remedy for Breach

One challenging aspect of the decisions in *Pulp Mills* and the *Certain Activities/ Road Case* was the question of what remedy to provide in the face of a breach of procedural obligation. In *Pulp Mills*, the Court found that Uruguay had in fact breached its obligation to notify and engage in good faith negotiations with Argentina. Argentina sought the dismantling of the mill, which had been constructed by the time the matter came before the ICJ. Argentina based this request on its entitlement to restitution for the unlawful act, which in its view required the flawed decision to proceed with the project to be voided, placing Argentina in the position they would have been in had the breach not occurred. The Court in denying this request notes that the breach was procedural in nature and did not result in substantive harm to Argentina. On that basis, Argentina was not entitled to a remedy beyond the declaration of the wrongful conduct by Uruguay. In the *Road Case* dispute, the Court relies on this reasoning to deny a substantive remedy to Nicaragua for Costa Rica's failure to conduct an EIA.

The assumption that underlies the Court's approach is that, as long as the substantive rights of a State remain unassailed, then the aggrieved party has lost nothing, or at least very little. If process is simply a means to an end, then so long as the end is maintained, the importance of the means falls away.[82]

In their separate reasons in the *Pulp Mills* case, Judges Al-Khasawneh and Simma, provide a more nuanced understanding of the relationship between process and substance:

> A final observation: in matters related to the use of shared natural resources and the possibility of transboundary harm, the most notable feature that one observes is the extreme elasticity and generality of the substantive principles involved. Permanent sovereignty over natural resources, equitable and rational utilization of these resources, the duty not to cause significant or appreciable harm, the principle of sustainable development, etc., all reflect this generality. The problem is further compounded by the fact that these principles are frequently, where there is a dispute, in a state of tension with each other. Clearly in such situations, respect for procedural obligations assumes considerable importance and comes to the forefront as being an essential indicator of whether, in a concrete case, substantive obligations were or were not breached. Thus, the conclusion whereby non-compliance with the pertinent procedural obligations has eventually had no effect on compliance with the substantive obligations is a proposition that cannot be easily accepted. For example, had there been compliance with the steps laid down in Articles 7 to 12 of the 1975 Statute, this could have led to the choice of a more suitable site for the pulp mills. Conversely, in the absence of such compliance, the situation that was obtained was obviously no different from a *fait accompli*.[83]

[82] *Pulp Mills Case* (n 2) para 275.
[83] ibid, separate reasons of Judges Al-Khasawneh and Simma, para 26.

As a matter of due diligence, the approach of the main judgments is logically sound. In the absence of harm, there is no material loss, and therefore no basis for reparations. However, understood as a breach of the duty to cooperate, loss of the affected State looks slightly differently. The loss may be characterised as a deliberative one—in the sense that where a State fails to be notified and consulted, then it has lost an important right to understand how its interests might be affected, to have its views accounted for, and to affect the outcome. Second, it follows that the affected State also loses the opportunity to have the project proceed as it might have done had it been properly consulted. To assess the loss, a court must actually look at the degree or quality of the procedural breaches to assess the counterfactual. The absence of good faith in the dealings between the parties ought to influence this assessment.

Under a due diligence standard, the loss of a better outcome is not relevant as the affected State is only entitled to be free from harm, as objectively determined. But the duty to cooperate treats the ambiguity and subjectivity of the substantive right seriously. Not by accepting the affected State's position, but by treating the determination of harm as a matter to be determined collectively, or at least not without due regard for each side's understanding.

The problem is that courts cannot easily undo what has been done, particularly in cases where the activity in question has already been undertaken. Argentina's suggested remedy of dismantling the mill is not without precedent. The ICJ had opportunity to note in another case that:

> if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled.[84]

Dismantling, however, suffers from a proportionality problem, a consideration in granting restitution, particularly because the loss is difficult to quantify. The Court has acknowledged in other proceedings that reparations must be determined in light of the particular circumstances of the case.[85] In this regard, the lack of substantive harm is one factor to be considered but should not be determinative of the issue of adequate reparation.

The difficulty in remedying procedural breaches places considerable importance on the granting of provisional measures. In this case, provisional measures were denied on the basis that the procedural or substantive breaches would not result in irreparable harm since physical harm to the environment is potentially compensable.[86] But viewed as a matter of cooperation, the harm that

[84] *Passage through the Great Belt (Finland v Denmark)* (Request for the Indication of Provisional Measures: Order) [1991] ICJ Rep 12, para 31.

[85] *Avena and Other Mexican Nationals (Mexico v United States of America)* (Merits) [2004] ICJ Rep 12, para 119.

[86] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Request for the Indication of Provisional Measures: Order) [2006] ICJ Rep 113, paras 70–78.

arises if a planned activity proceeds in the face of inadequate consultation may be viewed as a substantive loss that is much harder to cure through compensation, militating in favour of the application of provisional measures to preserve the affected State's right to be treated with due respect.

IV. CONCLUSION

The shift in international law, identified by Judge Wolfrum, towards community interests,[87] is perhaps best seen as an extension of an existing approach that governs shared resources to issues, such as transboundary harm, traditionally governed with reference to sovereign interests. The shift, however, is a modest one. Instead of requiring States to abandon self-interest in favour of international solidarity, it simply requires that they take steps to understand and account for the interests of those States potentially affected by their activities. EIA is best understood as a procedural mechanism that both reflects and gives effect to this shift.

Viewing EIA solely through the lens of harm prevention provides an incomplete, and out-of-date, understanding of the role and structure of EIA in international law. Out-of-date in the sense that an international EIA obligation rooted in harm prevention alone holds on to epistemic and normative presumptions that no longer hold sway in either domestic or international settings. Determining spheres of sovereignty with reference to vague standards such as a 'significant harm' has proven difficult, especially in light of the high degree of scientific uncertainty that characterise complex ecological systems. As such, the harm principle's more formal and deterministic approach of delineating areas of unfettered State autonomy has given way to reconciling competing interests through reasoned consultation. The point here is not that it is futile to assess activities and determine whether they will cause significant environmental impacts, but rather to recognise that those determinations often involve a measure of political choice, in the sense that science and law cannot provide a complete answer.[88]

In order to legitimise decisions on planned activities made by one State that may impact the interests on another, the duty to cooperate requires, at a minimum, that those interests be taken into account. The solution is not perfect by any stretch. Adherence to the procedural requirements of cooperation will not in and of itself render the underlying decision acceptable to the affected State. Moreover, the duty to cooperate, which is an obligation owed to States, does not address the extent to which obligations of

[87] Text accompanying *Mox Plant case* (n 45).

[88] The indeterminacy associated with resolving transboundary environmental disputes and their essential political nature has long been recognised; see eg M Koskenniemi, 'Peaceful Settlement of Environmental Disputes' (1991) 60 Nordic Journal of International Law 73.

consultation may extend to the public of the affected State or, indeed, elsewhere.[89]

But if we are to take the idea of community interests—which are by their very nature socially determined—seriously, this entails a commitment to construct those interests dialogically. Bringing cooperation back into EIA processes provides more specific procedural protections to give effect to both harm prevention and due respect of affected State interests.

[89] Whether international law provides for public participation in EIA processes is beyond the scope of the present article, but EIA processes are viewed as important mechanisms for implementing Principle 10 of the *Rio Declaration* (n 27). See eg Inter-American Court of Human Rights *Advisory Opinion OC-23/17* (2017); *Saramaka People v Suriname*, Series C No 172 Inter-Am Ct HR (2007) para 194; see also UNHCR, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John Knox – Mapping Report' (30 December 2013) UN Doc A/HRC/25/532014 Mapping Report.