SEPARATE OPINION OF JUDGE BHANDARI

Introduction

1. In the instant case, the Court has been presented with two separate but related disputes that have arisen between Costa Rica and Nicaragua pertaining to the San Juan River, which serves as the international boundary between these two nation-States.

2. The first dispute, known as the *Certain Activities* case, deals with, *inter alia*, the dredging by Nicaragua of the Lower San Juan River, over which it has sovereign title up to the right bank, in order to improve the navigability of the said river.

3. The second dispute, known as the *Construction of a Road* case, is centred around the construction by Costa Rica within its own territory of a road nearly 160 km in length, which follows the course of the right bank of the San Juan River for approximately 108 km (Judgment, para. 64).

4. As the Judgment's analysis explains (*ibid.*, paras. 63-64; 104-105 and 160-161), since both Nicaragua's dredging of the Lower San Juan River and Costa Rica's construction of a road along the right bank of that river are public projects that have occurred near an international boundary, the possibility of transboundary harm arises in both contexts. Consequently, in both the *Certain Activities* and *Construction of a Road* cases the Applicant argued that the Respondent did not, contrary to its obligations under public international law, perform an Environmental Impact Assessment ("EIA").

5. While I concur with the majority's conclusion that Costa Rica ought to have produced an EIA in the *Construction of a Road* case (Judgment, paras. 104-105 and 160-162), I feel the present Judgment offers a welcome opportunity to expand upon the present state of the law surrounding EIAs, and to offer insight as to how the body of law governing such instruments may be complemented so as to provide clearer guidance to nation-States contemplating large-scale public works projects that contain a prospect of transboundary impacts.

6. As I shall discuss at greater length below, the obligation to produce an EIA presently arises not only under general international law, but has also been codified by various international treaties and other legal instruments. Regrettably, despite the current widespread acceptance of the necessity to conduct an EIA where there is a risk of transboundary harm, public international law presently offers almost no guidance as to the spe-

cific circumstances giving rise to the need for an EIA, nor the requisite content of any such assessment.

7. For these reasons, in the present opinion I intend to offer some suggestions as to how the public international law standards governing EIAs could be improved. In undertaking this endeavour, I draw inspiration from the words of Judge Weeramantry in his dissenting opinion to this Court's *Nuclear Tests II* Order:

> "This Court, situated as it is at the apex of international tribunals, necessarily enjoys a position of special trust and responsibility in relation to the principles of environmental law, especially those relating to what is described in environmental law as the Global Commons. When a matter is brought before it which raises serious environmental issues of global importance, and a prima facie case is made out of the possibility of environmental damage, the Court is entitled to take into account the Environmental Impact Assessment principle in determining its preliminary approach."[1]

8. In keeping with this sage pronouncement, I shall first examine how the legal instrument of an EIA fits within the broader history and contemporary régime of international environmental law. Against this backdrop I shall proceed to a discussion of current trends in public international law pertaining to transboundary EIAs. Finally, I shall provide some recommendations that in my respectful view could serve as useful minimum standards for determining the content of transboundary EIAs under public international law.

Brief History of the Law Pertaining to EIAs

9. Over approximately the past half-century remarkable progressive steps have been taken with regard to international environmental law since the United Nations Conference on the Human Environment was held at Stockholm in 1972 ("Stockholm Conference")[2]. One of the reasons for this evolution is scientific development, in so far as increased technological capacity for scientific inquiry has heightened the ability of

[1] *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) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 345 (*"Nuclear Tests II* Order").

[2] The United Nations Conference on the Human Environment (1972) convened by United Nations General Assembly res. 2398 (XXIII).

mankind to ascertain the harm it is committing against its own natural habitat. This is demonstrated most obviously through a greatly intensified focus on climate change over the past twenty years[3].

10. Some of the driving forces behind the advent and growing acceptance of the need to conduct EIAs are the concomitant rise in other international environmental law doctrines, such as the principle of sustainable development, the principle of preventive action, global commons, the precautionary principle, the polluter pays principle and the concept of transboundary harm.

Principle of Sustainable Development

11. The principle of sustainable development has been a driving force in international environmental law for several decades. Indeed, the Stockholm Conference culminated in the issuance of a comprehensive report recognizing, *inter alia*, that environmental management is designed for the purpose of facilitating comprehensive planning that takes into account the side effects of human activities on the environment[4]. Chapter I of that report consisted of a declaration ("Stockholm Declaration") containing 26 principles.

12. Principle 1 of the Stockholm Declaration implicitly embodied the principle of sustainable development when it stated in relevant part that:

> "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."

The actual term "sustainable development" was coined in a report prepared in 1987 by the World Commission on Environment and Development[5], commonly known as the "Brundtland Report"[6], and has figured prominently in numerous international treaties, legal instruments and cases applying international environmental law ever since.

13. The notion of sustainable development is said to embody the balancing of two ideas. The first is the idea of granting priority to essential needs such as food, clothing, shelter, and the second is the idea of limitations imposed by the ability of the environment to meet such future needs[7]. As the term implies, the industrial development and scientific progress

[3] See, generally, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

[4] Report of the United Nations Conference on the Human Environment, UN doc. A/CONF.48/14/Rev.1, p. 28.

[5] Philippe Sands, *Principles of International Environmental Law*, 2nd ed., 2003, p. 252.

[6] Report of the World Commission on Environment and Development, *Our Common Future* (1987), p. 43.

[7] *Ibid.*

taking place in the world must be done in a manner that takes into account the impact of such activities on the environment. In fact, in the *Gabčíkovo-Nagymaros Project* Judgment, this Court discussed this balancing act in the following terms:

> "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[8]

The principle of sustainable development is thought of as an underlying concern in all negotiations and discussions of the international community relating to the environment[9].

Principle of Preventive Action

14. In addition to sustainable development, the principle of preventive action is another pillar of modern international environmental law[10]. Whereas certain principles of international environmental law such as sustainable development focus on balancing the often competing needs of industrial development and environmental protection, the principle of preventive action, by contrast, focuses solely on the minimization of environmental damage[11]. As the term would imply, the preventive action called for must be done prior to the occurrence of any environmental damage. This Court has recognized the importance of the principle of preventive action in the *Gabčíkovo-Nagymaros Project* Judgment, where it stated that:

> "[t]he Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irre-

[8] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140.

[9] Xue Hanqin, *Transboundary Damage in International Law*, p. 326.

[10] Report of the International Law Commission, Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries (2001), 56th Session, UN doc. A/56/10.

[11] Philippe Sands, *Principles of International Environmental Law*, 2nd ed., 2003, p. 281.

versible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage"[12].

Global Commons

15. Central to the principles of sustainable development and preventive action is the core idea of common custody over the earth's resources and that stewardship over the environment cannot end at the border of a nation-State. These values of good neighbourliness and co-operation[13] are based on the maxim of *sic utere tuo ut alienum non laedas*[14]. Indeed, a logical corollary of the foundational principle under international law that each nation is sovereign over its own territory, is that if one nation deleteriously affects the territory of another, certain obligations and/or liabilities might arise.

16. One expression of this imperative can be found in Principle 24 of the Stockholm Declaration, which urges the need for such co-operation:

> "International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing.
>
> Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States."[15]

Precautionary Principle

17. The precautionary principle aims to provide guidance in development and application of international environmental law where there is scientific uncertainty[16]. Although the precautionary principle is an important one, its status in international law is still evolving. Its core ethos, however, is captured by Principle 15 of the Rio Declaration:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where

[12] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78. para. 140.

[13] Philippe Sands, *Principles of International Environmental Law*, 2nd ed., 2003, p. 249; Report of the International Law Commission, Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries (2001), 56th Session, UN doc. A/56/10, Art. 4.

[14] "Use your own property in such a way that you do not injure other people's", *Oxford Dictionary of Law*, 7th ed., 2009, 2014 online version.

[15] The United Nations Conference on the Human Environment (1972) convened by United Nations General Assembly res. 2398 (XXIII).

[16] Philippe Sands, *Principles of International Environmental Law*, 2nd ed., 2003, p. 267.

there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[17]

18. There exists some confusion in the international community with regard to this principle as it has been provided for in many conventions though in different language. Certain conventions couch this principle in terms similar to progressive realization of enhanced scientific capabilities and available knowledge[18]. This principle was urged before the Court by New Zealand (as well as all five intervening nations) in *Nuclear Tests II*[19]. However, in that Order the Court did not make any finding as to the applicability of the precautionary principle. Nearly two decades later, and despite being urged by New Zealand as an intervening State, the Court did not take into account the precautionary principle in its analysis during the *Whaling in the Antarctic*[20] case. This was pointed out in the separate opinions of Judge Cançado Trindade[21] and Judge *ad hoc* Charlesworth[22].

Polluter Pays Principle

19. The principle of polluter pays[23] might be looked at as a retrospective method of allocating loss after an incident resulting in transboundary harm has already occurred. This principle could contribute to enhancing economic efficiency[24] in the case of an incident that causes transboundary

[17] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, UN doc. A/Conf.151/26 (1992).

[18] International Convention for the Regulation of Whaling, 161 United Nations, *Treaty Series (UNTS)*, 1946, signed at Washington, D.C.; Convention concerning the Protection of Workers against Ionising Radiations (entry into force: 17 June 1962), adoption: Geneva, 44th Session of the International Law Commission (22 June 1960).

[19] *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) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 288.

[20] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

[21] *Ibid.*, pp. 371-375, paras. 60-71; separate opinion of Judge Cançado Trindade.

[22] *Ibid.*, pp. 455-456, paras. 6-10; separate opinion of Judge *ad hoc* Charlesworth.

[23] Report of the International Law Commission, Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries (2006), 58th Session, UN doc. A/61/10 (2006), pp. 145-147; UN Conference on Environment and Development, Rio Declaration on Environment and Development, UN doc. A/Conf.151/26, (1992), Principles 13 and 16.

[24] Alan E. Boyle, "Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs" in Francesco Francioni and Tulio Scovazzi (eds.), *International Responsibility for Environmental Harm*, pp. 363, 369.

harm, by judging the actions of polluters under a strict liability standard of care. As the concept arose from the Organization for Economic Co-operation and Development ("OECD")[25] and does not have the status of a principle of general international law[26], it presently acts as merely a general guideline of public international law[27].

Transboundary Harm

20. As the preceding discussion underscores, there are a variety of overlapping principles when it comes to international environmental law, with distinct approaches and objectives, that converge upon the common conclusion that nation-States owe certain obligations toward the environment, particularly in a transboundary context. When nation-States transgress these obligations vis-à-vis their neighbours, the resultant consequences may fall under the rubric of transboundary harm.

21. There exists no single definition of transboundary harm under international law. Though the Draft Principles relating to prevention of transboundary harm by the International Law Commission ("ILC")[28] do contain a definition of this concept, the idea of "risk of causing significant transboundary harm" is quite vague. Harm as per the ILC must be physical and is limited to persons, property or the environment[29]. However, the accompanying commentary does provide some clarity in this regard and explains that the idea of risk and harm are not to be isolated, but thought of in conjunction with each other:

> "For the purposes of these articles, 'risk of causing significant transboundary harm' refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of 'risk' and 'harm' which sets the threshold."[30]

[25] OECD, Guiding Principles concerning International Economic Aspects of Environmental Policies, 26 May 1972, C (72), p. 128.

[26] Declaration on the Human Environment, Report of the UN Conference on the Human Environment (Stockholm, 1972), UN doc. A/Conf.48/14/Rev.1; Alan E. Boyle, "Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs" in Francesco Francioni and Tulio Scovazzi (eds.), *International Responsibility for Environmental Harm*, pp. 363, 369; James Crawford (ed.), *Brownlie's Principles of Public International Law*, Oxford University Press, 7th ed., 2008, p. 359; Philippe Sands, *Principles of International Environmental Law*, 2nd ed., 2003, p. 281.

[27] Antonio Cassese, *International Law*, 2nd ed., pp. 492-493.

[28] Report of the International Law Commission, Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries (2001), 56th Session, UN doc. A/56/10.

[29] *Ibid.*, Art. 2 *(b)*.

[30] *Ibid.*, Art. 2, Commentary 2.

The ILC also gives guidance on the meaning of the word "significant" by way of its commentary:

> "The term 'significant' is not without ambiguity and a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that *'significant' is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'*. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards."[31]

22. Transboundary harm has been succinctly described by this Court as "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[32]. However, a review of the various authorities in which the concept is discussed reveals four common factors present in cases of transboundary environmental harm: firstly, the harm must be a result of human activity; secondly, the harm must result as a consequence of that human activity; thirdly, there must be transboundary effects on a neighbouring nation-State; and fourthly, the harm must be significant or substantial[33].

23. The requirement of a country contemplating a public works project that poses a risk of transboundary harm to produce an EIA can thus be seen as a tangible manifestation of these collective requirements that has gained increasing recognition amongst the community of nations. The Goals and Principles of Environmental Impact Assessment promulgated by the United Nations Environment Programme ("UNEP") in 1987, and endorsed by the United Nations General Assembly that same year ("UNEP Principles") demonstrate that the rise in the importance of conducting EIAs has been commensurate with the increase in the possibility of transboundary harm emanating from activities carried out by neighbouring nation-States[34]. Moreover, when the United Nations Conference on Environment and Development, popularly known as the "Earth Summit", was held in Rio de Janeiro in 1992, it issued its Declaration on Environment and Development ("Rio Declaration")[35],

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[31] Cf. *op. cit. supra* note 28, p. 152.

[32] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J Reports 1949*, p. 22.

[33] O. Schachter, *International Law in Theory and Practice* (1991), pp. 366-368 as referred in Xue Hanqin, *Transboundary Damage in International Law*, p. 4.

[34] UNEP Goals and Principles of Environmental Impact Assessment, UN doc. UNEP/GC/14/25, 14th Session (1987), endorsed by UNGA res. 42/184 (1987), p. 1.

[35] UN Conference on Environment and Development, Rio Declaration on Environment and Development, UN doc. A/Conf.151/26 (1992).

the obligation to undertake an EIA already existed in many international law instruments[36].

24. However, despite the burgeoning acceptance of this obligation under international law, discerning the exact procedural and substantive requirements of an EIA has proven elusive. Indeed, the present-day régime governing EIAs consists of a patchwork of different international law instruments, including UNGA resolutions[37], the UNEP Principles[38], the Rio Declaration[39] and a host of multilateral conventions[40].

25. For example, the Rio Declaration does not dictate the contents of an EIA, but rather simply states that: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority".[41]

26. Moreover, the UNEP Principles define an EIA in similarly vague language, describing it merely as "a process of identifying, predicting, interpreting and communicating the potential impacts that a proposed project or plan may have on the environment"[42].

27. Another pertinent example is the Convention on Biological Diversity ("CBD")[43], also an outcome of the Earth Summit at Rio de Janeiro[44], to which both Parties in the present case are signatories. It contains the requirement to conduct an EIA in situations giving rise to "significant

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[36] Convention on Biological Diversity, 1760 *UNTS*, p. 79, signed on 5 June 1992 at Rio de Janeiro; UN Convention on the Law of the Sea, 1833 *UNTS*, p. 320, signed on 10 December 1982 at Montego Bay.

[37] Co-operation between States in the Field of the Environment, General Assembly res. 2995 (XXVII), UNGAOR 27th Session, Supplement No. 30 (1972), para. 2.

[38] UNEP Principles on Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, 17 *International Legal Materials (ILM)* 1094, UN doc. UNEP/IG.12/2 (1978), Principle 4; UNEP Goals and Principles of Environmental Impact Assessment, UN doc. UNEP/GC/14/25, 14th Session (1987), endorsed by United Nations General Assembly, res. 42/184, UNGAOR 42nd Session, UN doc. A/Res/42/184 (1987).

[39] UN Conference on Environment and Development, Rio Declaration, 14 June 1992, 31 *ILM* 874, UN doc. A/Conf.151/5/Rev.1, Principle 17.

[40] Convention on Biological Diversity, 1760 *UNTS*, p. 79, signed on 5 June 1992 at Rio de Janeiro; UN Convention on the Law of the Sea, 1833 *UNTS*, p. 320, signed on 10 December 1982 at Montego Bay.

[41] UN Conference on Environment and Development, Rio Declaration, 14 June 1992, 31 *ILM* 874, UN doc. A/Conf.151/5/Rev.1, Principle 17.

[42] UNEP Principles on EIA, p. 1.

[43] 1760 *UNTS*, p. 79, signed on 5 June 1992 at Rio de Janeiro.

[44] UN Conference on Environment and Development, Rio Declaration on Environment and Development, UN doc. A/Conf.151/26 (1992).

adverse effects on biological diversity"[45] but does not provide any further elucidation as to the practical implications of this responsibility.

28. Finally, in the *Pulp Mills* Judgment of 2010, upon which the present Judgment has placed considerable emphasis, this Court noted:

> "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 not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.
>
> . . . . . .
>
> The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken."[46]

However, in the same section of that Judgment, the Court opined that

> "it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment".[47]

29. Thus, we see that while the *Pulp Mills* Judgment elevated the practice of conducting an EIA to an imperative under general international law when certain preconditions are met, at the same time it allowed for a *renvoi* to domestic law in terms of the procedure and content required when carrying out such an assessment. In view of the paucity of guidance from the Court and other sources of international law, it could plausibly be argued there are presently no minimum binding standards under pub-

[45] Convention on Biological Diversity, signed on 5 June 1992 at Rio de Janeiro, 1760 *UNTS*, p. 79, Art. 14 (1).

[46] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 83-84, paras. 204-205.

[47] *Ibid.*, p. 83, para. 205.

lic international law that nation-States must follow when conducting an EIA.

30. One reason for the lack of clarity as to what exactly a nation-State must do under international law to discharge its burden of conducting an EIA under these various authorities could be that the extent of the obligations arising under such instruments are difficult to define with precision. Some have suggested that this lack of precision is attributable to the fact that such assessments are a policy instrument[48]. Whatever the reason, the situation as it currently stands is less than ideal.

Basic Requirements of an EIA under Contemporary Public International Law

31. To discern the current state of the law on this point, one must endeavour to assimilate the various international law instruments that impose upon nation-States an obligation to conduct an EIA and synthesize the obligations imposed thereunder. Notwithstanding the lack of guidance under general international law and other binding or hortatory instruments, as the present Judgment at paragraphs 147-155 demonstrates, there are three cumulative stages that must be fulfilled when it comes to assessing the impact of a proposed project in a case of possible transboundary harm. The first stage is to conduct a preliminary assessment measuring the possibility of transboundary harm. In the present case, we see the Court has looked at the magnitude of the road project and local geographic conditions in assessing that a preliminary assessment by Costa Rica was warranted as to the possibility of harm to the San Juan River (Judgment, para. 155). If a preliminary assessment determines that there is a risk of significant transboundary harm, then the State has no choice but to conduct an EIA. The actual production of this document constitutes the second stage of the overall process, and entails certain corollary procedural obligations such as the duty to notify and consult the affected neighbouring nation-State (*ibid.*, para. 168). The third and final stage of this process is that of post-project assessment (*ibid.*, para. 161). This is in keeping with the Court's reasoning in the *Pulp Mills* Judgment that "once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken"[49].

32. In my respectful view, what appears to be missing in this analysis by the Court is what specific obligations arise during *stage two* of this

[48] Neil Craik, *The International Law of Environmental Impact Assessment*, Cambridge University Press, 2008, pp. 3-6.

[49] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 83-84, para. 205.

process. In attempt to fill this lacuna, the present opinion will offer suggestions as to appropriate minimum standards that should be fulfilled by any nation-State conducting an EIA. In this regard, the Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention")[50] drafted by the United Nations Economic Commission for Europe ("UNECE") provides, in my view, an exemplary standard for the process to be followed when conducting an EIA. In making this statement, I readily concede that the Espoo Convention is primarily a regional instrument designed to regulate transboundary harm in a European context. Because international law is grounded in the bedrock principle of consent between sovereign nation-States, and bearing in mind that the present case arises in the geopolitical context of Latin America, I am acutely aware that one cannot simply interpose the obligations arising under this regional treaty to non-signatories from other parts of the world. Indeed, criticism has been levied against the Espoo Convention as it derives its obligations from the domestic legislation of highly developed nations, which reduces the probability of ratification[51].

33. Taking such valid criticism into account, but also noting that the Espoo Convention contains a provision that allows for non-European nation-States to join it[52], I believe that it is helpful to consider the Espoo Treaty as a standard that nation-States should strive toward, as it contains novel and progressive guidelines that the community of nations would be well served to treat as persuasive authority in creating a more comprehensive global régime regarding the required content of transboundary EIAs under public international law. If the international community were to come together for the purpose of putting in place a convention dealing with transboundary EIAs, I propose that the Espoo Convention would constitute a very useful starting-point.

Espoo Convention: A Brief Overview

34. I shall now consider what are, in my opinion, certain important characteristics of the Espoo Convention that lay out what may be considered "best practices" in carrying out transboundary EIAs.

35. Article 2 (6) of the Convention places heavy emphasis on the need for public participation of the likely affected population(s). The form that this obligation takes under the Convention requires that the State propos-

[50] *UNTS*, Vol. 1989, p. 309.

[51] John H. Knox, «Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment», 12 *NYU Envtl. L.J.* 153 (2003).

[52] Report of the Second Meeting [of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context] UN doc. ECE/MP.EIA/4 (2001), p. 144, Ann. XIV.

ing the project allow for the participation of not only its own affected population but that of the potentially affected neighbouring State as well. The notion that international law has begun to pay more attention to individuals is demonstrated by the requirement of public participation[53]. This concept of public participation expands upon prior pronouncements contained in Principle 10 of the Rio Declaration[54]. However, it should be noted that the notion that there is a duty to consult affected populations was rejected by the Judgment of this Court in the *Pulp Mills* case[55].

36. Article 3 of the Convention requires the nation proposing a project to notify a potentially affected neighbouring nation-State regarding any proposed activity that is likely to cause a "significant adverse transboundary impact". There is, naturally, great debate about the extent of the obligation that this phrase entails. A country proposing a project might argue that any impact is neither significant nor adverse, and thus escapes the ambit of Article 3. In fact this seems to be a similar threshold provided for by the Judgment, i.e., "risk of significant adverse impact" (Judgment, para. 167). This provision also lays down all the information one State must provide to another. Article 3 (7) stipulates that if there is a question that an activity will have a significant impact or not then the question is to be settled by an inquiry commission.

37. Article 5 of the Convention requires consultations with the affected State, to give recommendations to the State of origin methods for the reduction or the elimination of the harmful impact. This allows for a more amicable settling of disputes and problems arising out of a particular project.

38. Article 6 of the Convention outlines that a final decision regarding a proposed project is to be made with due regard to the conclusion of the EIA. This provision requires transmitting the final decision to the

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[53] Simon Marsden, "Public Participation in Transboundary Environmental Impact Assessment: Closing the Gap between International and Public Law", in Brad Jessup and Kim Rubenstein, *Environmental Discourses in Public and International Law*, p. 238.

[54] Principle 10:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[55] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 86-87, paras. 215-219: "The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina." (Para. 216.)

affected party, along with reasons and considerations on which a decision is based.

39. Article 15 of the Convention discusses the settlement of disputes if they arise between parties. The dispute might either be settled by way of arbitration or by this Court. Regrettably, there is no specific provision dealing with reparations or compensation of any kind.

40. Importantly, Appendix I has a non-exhaustive list of activities that require conducting an EIA, in the manner prescribed under Appendix II of the Convention. Thus, for the purpose of ascertaining minimum requirements it is helpful to refer to Appendix II of the Convention as it lays down what the content of an EIA must be. Additionally, Appendix III provides guidance in deciding whether an activity would fall within the list provided in Appendix I.

Suggested Minimum Standards for EIA under International Law

41. This part outlines certain minimum standards to be followed in cases where there is no domestic legislation that guides an EIA. These minimum standards reflect in large part my affinity toward the ambitious approach taken in the Espoo Convention. However, rather than using the sometimes onerous obligations arising from that treaty as the requisite minimum standard for every country, in every context, I have instead laid out what, in my considered opinion, ought to be adopted as the lowest common denominator while conducting an EIA. These minimum standards may be broken down into procedural and substantive obligations. In my opinion, procedural obligations of an EIA would relate to when and under what circumstances such an assessment must be carried out, whereas substantive obligations refer to what must be done by a nation-State when conducting an EIA.

Procedural Obligations

42. Procedural obligations arising out of the obligation to perform an EIA arise out of questions of when an EIA is to be conducted. Presently, an EIA is required to be conducted when there is "risk of significant adverse impact" (Judgment, para. 167). A nation-State contemplating a project might claim that the risk of harm is not significant and therefore there exists no obligation to conduct an EIA. However, to avoid the possibility that countries may abuse their discretion in labelling certain activities as environmentally benign, I suggest that the best approach to take lies in the Espoo Convention, which lays down certain types of industries for which there is an automatic requirement to conduct an EIA if the said activities are being proposed near an international border. To that end, I

recall my observation above that Appendix 1 to the Espoo Convention lists a number of activities that require an EIA per se[56]. However, the fact that a project does not appear on this list does not mean it cannot be subject to an EIA. For instance, there might be other types of activities not contemplated within Appendix 1 of the Espoo Convention, but which might still produce dangerous pollutants or effluents as a by-product. Those activities must also be recognized as harmful, thus giving rise to EIA obligations. To this end, Appendix III of the Espoo Convention contains general criteria to assist in the determination of the environmental significance of various activities.

43. Once it is established that a certain activity requires that an EIA be carried out, nation-States may invoke certain exemptions that would relieve them of their obligation to conduct an EIA. Such pleas may include natural disasters, nuclear disasters, terrorism, internal disturbance or emergency, among others. If such a claim is made by a nation it has to be well substantiated and the burden of proof, which would lie with the country proposing the project, must be high.

44. It should be remembered that even private companies might propose projects near an international border. It is then the responsibility of

[56] 1. Crude oil refineries; 2. Thermal and nuclear power stations; 3. Any type of work that requires or uses nuclear elements (for any purpose, as fuel, for storage, or as fissionable material); 4. Smelting of cast iron and steel; 5. Any type of work that requires or uses asbestos for any purpose; 6. Integrated chemical installations; 7. Construction of motorways, express roads, railways, airports with runways of more than 2,100 m; 8. Large-diameter pipelines for the transport of oil, gas or chemicals; 9. Trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 metric tons; 10. Waste-disposal installations for the incineration, chemical treatment or landfill of toxic and dangerous wastes, or if it is non-hazardous waste then chemical treatment of the same waste with a capacity increasing 100 metric tonnes per day; 11. Dams and reservoirs; 12. Groundwater abstraction activities or artificial groundwater recharge schemes where the annual volume of water to be abstracted or recharged amounts to 10 million cubic metres or more; 13. Pulp, paper and board manufacturing of 200 air-dried metric tons or more per day; 14. Major quarries, mining, on-site extraction and processing of metal ores or coal; 15. Offshore hydrocarbon production, extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 metric tons/day in the case of petroleum and 500,000 cubic metres/day in the case of gas; 16. Major storage facilities for petroleum, petrochemical and chemical products. 17. Deforestation of large areas; 18. Works for the transfer of water resources between river basins; 19. Waste-water treatment plants with a capacity exceeding 150,000 population equivalent; 20. Installations for the intensive rearing of poultry or pigs with more than: 85,000 places for broilers, 60,000 places for hens, 3,000 places for production pigs (over 30 kg), or 900 places for sows; 21. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km; 22. Major installations for the harnessing of wind power for energy production (wind farms).

the country in whose territory the project is being proposed to provide an EIA to a potentially affected country. Essentially, if a private project that falls within one of the above mentioned industries listed at Appendix 1 to the Espoo Convention, or is part of an industry that creates pollutants or dangerous effluents, then the responsibility to ensure that an EIA has been completed and duly transmitted to the neighbouring nation-State that might be affected, and the host country's international responsibility should be invoked, irrespective of the fact that the project falls within the domain of private enterprise.

Substantive Obligations

45. As noted above, the required content of an EIA has not specifically been laid down under public international law. However, by referring to the above-referenced documents it is possible to distil certain minimum criteria which must be adhered to while performing an EIA.

46. For example, UNEP Principle 4 stipulates certain minimum contents of an EIA:

"*(a)* A description of the proposed activity;
(b) A description of the potentially affected environment, including specific information necessary for identifying and assessing the environmental effects of the proposed activity;
(c) A description of practical alternatives, as appropriate;
(d) An assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, cumulative, short-term and long-term effects;

(e) An identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and alternatives, and an assessment of those measures;

(f) An indication of gaps in knowledge and uncertainties which, may be encountered in compiling the required information;
(g) An indication of whether the environment of any other State or areas beyond national jurisdiction is likely to be affected by the proposed activity or alternatives;

(h) A brief, non-technical summary of the information provided under the above headings."

Notably, these criteria are not as burdensome as the requirements of the Espoo Convention. The Espoo Convention requires certain additional information to be included in an EIA, such as the purpose of the project[57].

[57] The Espoo Convention, App. II *(a)*.

It also requires that alternatives to the project be proposed, including the alternative that no action will be taken[58]. Another way in which the Espoo Convention increases the substantive obligations of a country contemplating a project is by requiring "an explicit indication of predictive methods and underlying assumptions as well as all the environmental data used"[59]. Finally, the Espoo Convention imposes the further hurdle that an EIA must contain an outline of how post-project assessment is to be conducted[60].

Conclusion

47. As I have detailed throughout the present opinion, the current state of international environmental law is lamentably silent on the exact procedural steps and substantive content that are required when a situation of potential transboundary harm gives rise to the obligation of a nation-State to produce an EIA. In my view, it is incumbent upon the international community to come together and develop a sound, pragmatic and comprehensive régime of EIA that rectifies this problem. The suggestions I have made during the course of this opinion are in keeping with the principles of sustainable development, preventive action and global commons and reflect the bedrock international law values of consensus, co-operation and amicable relations between nations.

48. In my considered opinion, the above minimum standards should be reflected in a comprehensive international convention with global reach, given the fact that the concept of EIA is a general principle of international law applicable to all nation-States.

(Signed) Dalveer BHANDARI.

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[58] The Espoo Convention, App. II *(b)*, Art. 2 (6).
[59] *Ibid.*, App. II *(f)*.
[60] *Ibid.*, App. II *(h)*.