# SEPARATE OPINION OF JUDGE DONOGHUE

*Obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm — Environmental Impact Assessment — Notification — Consultation.*

1. In each of these joined cases, the Applicant contends that the Respondent violated general international law by causing significant transboundary harm to the territory of the Applicant, by failing to conduct an environmental impact assessment and by failing to notify and to consult with the Applicant. I write separately to present my views regarding customary international law in respect of transboundary environmental harm. In particular, I emphasize that States have an obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm. I consider that the question whether a proposed activity calls for specific measures, such as an environmental impact assessment, notification to, or consultation with, a potentially affected State, should be judged against this underlying obligation of due diligence.

2. I begin with two points of terminology. First, the Court today, as in the *Pulp Mills* case (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 14), uses the terms "general international law" and "customary international law", apparently without differentiation. Although some writers have ascribed distinct meanings to these two terms, I consider that the task before the Court today is the examination of "international custom, as evidence of a general practice accepted as law" in accordance with Article 38, paragraph 1 *(b)*, of the Statute of the Court. Secondly, I use the term "State of origin" here to refer to a State that itself plans and engages in an activity that could pose a risk of transboundary harm. Much of what I have to say would also apply to a State that authorizes such an activity. I do not intend here to address the legal consequences of private activities that are not attributable to the territorial State, nor do I take account of ultra-hazardous activities, which are not before the Court today.

## Customary International Law of the Environment

3. An assessment of the existence and content of customary international law norms is often challenging. Over the years, some have seized on the 1927 statement of the Permanent Court of International Justice that

"[r]estrictions upon the independence of States cannot . . . be presumed" (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18) to support the assertion that, where evidence of State practice and *opinio juris* is incomplete or inconsistent, no norm of customary international law constrains a State's freedom of action. Such an assertion, an aspect of the so-called *"Lotus"* principle, ignores the fact that the identification of customary international law must take account of the fundamental parameters of the international legal order. These include the basic characteristics of inter-State relations, such as territorial sovereignty, and the norms embodied in the Charter of the United Nations, including the sovereign equality of States (Article 2, paragraph 1, of the Charter of the United Nations).

4. In the case concerning *Jurisdictional Immunities of the State* (*(Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 99), the question was whether, under customary international law, Germany was immune from certain lawsuits and measures of constraint in Italy. The Court recognized that it faced a situation in which two basic parameters of the international legal order — sovereign equality and territorial sovereignty — were in tension. It observed that State immunity "derives from the principle of sovereign equality of States" which "has to be viewed together with the principle that each State possesses sovereignty over its own territory" (*ibid.*, pp. 123-124, para. 57). More precisely, "[e]xceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it" (*ibid.*, p. 124, para. 57). The Court then evaluated the evidence of State practice and *opinio juris* in light of these competing principles, finding sufficient evidence of State practice and *opinio juris* to define with some precision the rules of customary international law that governed the facts in that case.

5. The Court's approach in *Jurisdictional Immunities of the State*, which grounds the analysis in fundamental background principles, applies with equal force to the consideration of the existence and content of customary international law regarding transboundary environmental harm. If a party asserts a particular environmental norm without evidence of general State practice and *opinio juris*, the *"Lotus"* presumption would lead to a conclusion that customary international law imposes no limitation on the State of origin. As in *Jurisdictional Immunities of the State*, however, the appraisal of the existence and content of customary international law regarding transboundary environmental harm must begin by grappling with the tension between sovereign equality and territorial sovereignty.

6. As a consequence of territorial sovereignty, a State of origin has broad freedom with respect to projects in its own territory (the building

of a road, the dredging of a river). However, the equal sovereignty of other States means that the State of origin is not free to ignore the potential environmental impact of the project on its neighbours. At the same time, the rights that follow from the equal sovereignty of a potentially affected State do not give it a veto over every project by the State of origin that has the potential to cause transboundary environmental harm.

7. The 1992 Rio Declaration on Environment and Development (Principle 2) and its predecessor, the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment (Principle 21), offer a widely-cited formulation that balances the interests of the State of origin and potentially affected States:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (Rio Principle 2.)

8. The Court in the *Pulp Mills* case took an approach that synthesizes the competing rights and responsibilities of two sovereign equals in respect of transboundary environmental harm, by holding the State of origin to a standard of due diligence in the prevention of significant transboundary environmental harm:

> "The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law relating to the environment' (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29)." (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101.)

Thus, taking into account the sovereign equality and territorial sovereignty of States, it can be said that, under customary international law, a State of origin has a right to engage in activities within its own territory,

as well as an obligation to exercise due diligence in preventing significant transboundary environmental harm.

9. The requirement to exercise due diligence, as the governing primary norm, is an obligation of conduct that applies to all phases of a project (e.g., planning, assessment of impact, decision to proceed, implementation, post-implementation monitoring). In the planning phase, a failure to exercise due diligence to prevent significant transboundary environmental harm can engage the responsibility of the State of origin even in the absence of material damage to potentially affected States. This is why (as in *Nicaragua* v. *Costa Rica*) a failure to conduct an environmental impact assessment can give rise to a finding that a State has breached its obligations under customary international law without any showing of material harm to the territory of the affected State. If, at a subsequent phase, the failure of the State of origin to exercise due diligence in the implementation of a project causes significant transboundary harm, the primary norm that is breached remains one of due diligence, but the reparations due to the affected State must also address the material damage caused to the affected State. (For these reasons, I do not find it useful to draw distinctions between "procedural" and "substantive" obligations, as the Court has done.)

10. This obligation to exercise due diligence is framed in general terms, but that does not detract from its importance. The question whether the State of origin has met its due diligence obligations must be answered in light of the particular facts and circumstances. Of course, it is possible that customary international law also contains specific procedural or substantive rules that give effect to this due diligence obligation. To reach conclusions on the existence and content of such specific rules, however, account must be taken of State practice and *opinio juris*. Absent consideration of such information, the Court is not in a position to articulate specific rules, and the rights and obligations of parties should be assessed with reference to the underlying due diligence obligation.

11. With this framework in mind, I turn next to some observations regarding environmental impact assessment, notification and consultation.

## Environmental Impact Assessment

12. In the *Pulp Mills* case, the Court supported its interpretation of a bilateral treaty between the Parties by observing 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." (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 204.)

13. This statement is widely understood as a pronouncement that general (or customary) international law imposes a specific obligation to undertake an environmental impact assessment where there is a risk of significant transboundary environmental harm. I am not confident, however, that State practice and *opinio juris* would support the existence of such a specific rule, in addition to the underlying obligation of due diligence. This does not mean that I am dismissive of the importance of environmental impact assessment in meeting a due diligence obligation. If a proposed activity poses a risk of significant transboundary environmental harm, a State of origin would be hard pressed to explain a decision to undertake that activity without prior assessment of the risk of transboundary environmental harm.

14. In *Pulp Mills*, the Court wisely declined to elaborate specific rules and procedures regarding the assessment of transboundary environmental impacts, stating that:

> "[I]t 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." (*Ibid.*, para. 205.)

15. Today's Judgment makes clear that the above-quoted passage from the *Pulp Mills* case does not give rise to a *renvoi* to national law in respect of the content and procedures of environmental impact assessment (as one of the Parties had asserted). Instead, the "[d]etermination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case" (para. 104). Thus, the Court does not presume to prescribe details as to the content and procedure of transboundary environmental impact assessment. This leaves scope for variation in the way that States of origin conduct the assessment, so long as the State meets its obligation to exercise due diligence in preventing transboundary environmental harm.

## NOTIFICATION AND CONSULTATION

16. Today's Judgment also addresses the asserted obligations of notification and consultation in relation to significant transboundary environmental harm, stating that:

> "If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk." (Judgment, para. 104.)

17. The Court does not provide reasons for its particular formulation of the obligations of notification and consultation, which does not emerge obviously from the positions of the Parties or from State practice and *opinio juris*. Both Parties assert that general international law requires notification and consultation regarding activities which carry a risk of significant transboundary environmental harm. However, the Parties do not present a shared view of the specific content of such an obligation. For example, Nicaragua maintains that a duty to notify and consult only arises if an environmental impact assessment indicates a likelihood of significant transboundary harm to other States, whereas Costa Rica suggests that notice to the potentially affected State may be required prior to undertaking an environmental impact assessment.

18. Because each Party seeks to hold the other to these asserted requirements, neither has an incentive to call attention to aspects of State practice or *opinio juris* that would point away from the existence of particular obligations to notify or to consult. The Court is also ill-equipped to conduct its own survey of the laws and practices of various States on this topic. (To arrive at an understanding of United States federal law regarding environmental impact assessment in a transboundary context, for example, one would need to study legislation, extensive regulations, judicial decisions and the pronouncements of several components of the executive branch.)

19. The Parties do not offer direct evidence of State practice regarding notification and consultation with respect to transboundary environmental impacts, but instead refer the Court to international instruments and decisions of international courts and tribunals. The Court's formulation of specific obligations regarding notification and consultation bears similarity to Articles 8 and 9 of the International Law Commission's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, pp. 146-147). Although these widely-cited Draft Articles and associated commentaries reflect a valuable contribution by the Commission, their role in the assessment of State practice and *opinio juris*

must not be overstated. One must also be cautious about drawing broad conclusions regarding the content of customary international law from the text of a treaty or from judicial decisions that interpret a particular treaty (such as the Judgment in *Pulp Mills*). The 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention), for example, contains specific provisions on notification and consultation. The Treaty was drafted to reflect practices in Europe and North America, and, although it is now open to accession by States from other regions, it remains largely a treaty among European States and Canada. When a broader grouping of States has addressed environmental impact assessment, notification and consultation, as in the 1992 Rio Declaration, the resulting formulation has been more general (see Rio Principle 19, which calls for the provision of "prior and timely notification and relevant information" to potentially affected States and consultations with those States "at an early stage and in good faith").

20. For these reasons, whereas I agree that a State's obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm can give rise to requirements to notify and to consult with potentially affected States, I do not consider that customary international law imposes the specific obligations formulated by the Court. I note two particular concerns.

21. First, the Judgment could be read to suggest that there is only one circumstance in which the State of origin must notify potentially affected States — when the State of origin's environmental impact assessment confirms that there is a risk of significant transboundary harm. A similar trigger for notification appears in Article 8 of the International Law Commission's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. However, due diligence may call for notification of a potentially affected State at a different stage in the process. For example, input from a potentially affected State may be necessary in order for the State of origin to make a reliable assessment of the risk of transboundary environmental harm. The Espoo Convention (Art. 3) calls for notification of a potentially affected State before the environmental impact assessment takes place, thereby allowing that State to participate in that assessment.

22. The facts in the *Nicaragua* v. *Costa Rica* case illustrate the importance of notification before the environmental impact assessment is complete. Only Nicaragua is in a position to take measurements or samples from the San Juan River, or to authorize such activities by Costa Rica.

Consequently, it is difficult to see how Costa Rica could conduct a sufficient assessment of the impact on the river without seeking input from its neighbour.

23. Secondly, 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, such as the parties' respective views on the sensitivity of the environment in the affected State or the procedural details of an environmental impact assessment process.

24. Because the Court today reaffirms that the fundamental duty of the State of origin is to exercise due diligence in preventing significant transboundary environmental harm, I do not understand the Judgment to mean that a State is obligated to notify a potentially affected State only when an environmental impact assessment finds a risk of significant transboundary environmental harm, nor do I consider that the Court has excluded the possibility that the due diligence obligation of the State of origin would call for notification of different information or consultation regarding topics other than those specified by the Court. The question whether due diligence calls for notification or consultation, as well as the details regarding the timing and content of such notification and consultation, should be evaluated in light of particular circumstances.

*(Signed)* Joan E. DONOGHUE.