**PA Persona e Amministrazione**
*Ricerche Giuridiche sull'Amministrazione e l'Economia*

Marta Pecchioli
Dottoranda di ricerca, Scuola Superiore Meridionale
m.pecchioli@ssmeridionale.it

# The requirement for environmental impact assessment in cases of transboundary harm in the jurisprudence of the International Court of Justice: how far have we come?

Abstract

At the international level, the duty to conduct an environmental impact assessment (EIA) for those projects that may pose a significant threat to the environment is now enshrined in numerous treaties and multilateral agreements. However, these are not always binding, the parties signing them are usually limited, and their provisions are often vague. In this context, the role of judges in substantiating the EIA obligation is particularly important. This paper analyses the rulings issued by the International Court of Justice (ICJ) on EIA to date. These pronouncements have been scarcely progressive and harboured new interpretative doubts on the content of such duty. Greater clarity and incisiveness on the part of the international judges is desirable if EIAs are to prove a truly useful tool in preventing transboundary environmental damage. After briefly reviewing the development and main features of EIA, the work analyses the relevant jurisprudence of the ICJ in order to identify the Court's recurring errors. Subsequently, in the light of the pressing need for environmental protection caused by the worsening climate crisis, it questions some of the possible causes of the judges' conservatism and attempts to propose solutions to improve future jurisprudence. Indeed, it is likely that the Court will be called upon to adjudicate on transboundary environmental protection issues with increasing frequency.

Keywords: environmental impact assessment – international court of justice – environmental protection – transboundary harm – water protection

errors of the Court and indications for moving forward – 5. Possible causes for the Court's conservatism – 6. Prospects: the case of Japan – 7. Conclusion

## 1. Introduction

Although there are various definitions of environmental impact assessment (EIA) at international, regional and national level[1], it can generally be defined as «*an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development*»[2]. This is done «*by improving the quality of information to decision makers, so that environmentally sensitive decisions can be made* [adequately]»[3]. EIA, by combining well-defined procedural rules, in the short term allows democratic legitimacy to be conferred on the decision-making process by facilitating the negotiation of competing interests[4], while in the long term can acquire a 'transformative value' by molding the interests of actors towards the implementation of international environmental standards[5]. Especially at national level, EIA cannot assure that mitigating measures are always taken[6]. Its goal is to contribute to more informed and conscious decision-making through the negotiation of stakeholders, the study of potential environmental impacts of proposed projects, and the examination of alternatives to such projects. In the transnational context, although its informational function is still paramount, EIA becomes particularly relevant also in the prevention of environmental damage, as it substantiates the principle of the prohibition of transboundary harm[7].

---

1 For a comprehensive analysis, see A. GILLESPIE, *Environmental Impact Assessments in International Law*, in *Review of European Community & international environmental law*, 2008, 17(2), 221 ff.

2 UNEP - *UNITED NATIONS ENVIRONMENTAL PROGRAMME Goals and Principles of Environmental Impact Assessment*, January 16, 1987.

3 UNECE, *Policies and Systems of Environmental Impact Assessment*, in *Environment Series*, January 1991, ECE/ENVWA/15.

4 N. CRAIK, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, Cambridge University Press, 2008, p. 39.

5 *Ibid*, Ch. 7.

6 J.H. KNOX, *The Myth and Reality of Transboundary Environmental Impact Assessment*, in *The American Journal of International Law*, 2002, 96(2), p. 298.

7 On the principle of transboundary damage, see M. GEMALMAZ, *Transformation From Soft Law to Hard Law of International Environmental Protection: Process, Basic Concepts and Principles – Part*

A wide range of treaties and international legal instruments enshrine the EIA obligation[8]. However, many of them merely establish a general requirement to carry out EIAs and use abstract and vague formulations, which lead to some obstacles in practical application. Even when more specific EIA standards are outlined in multilateral agreements, these rarely have binding force[9] and the parties to them are limited. In this context, the role of the International Court of Justice (ICJ) is very important in providing guidance on the interpretation and application of EIA laws. Although the Court has been given several opportunities to rule on the subject over the past 30 years, its jurisprudence on EIA is, to date, rather disappointing and lacking in clarifying guidance for customary international law.

After briefly reviewing some significant stages of the codification of EIA and its main features, this paper seeks to analyse the jurisprudence of the ICJ on transboundary EIA in order to highlight its inconsistencies and shortcomings. It then attempts to identify the reasons that motivate the conservative attitude of the Court's judges and to indicate a way forward that would mark a positive change in their rulings, also in light of the challenges they are likely to face in the near future.

## 2. Outreach and content of EIA obligations

The obligation to conduct an EIA can be traced back to the US National Environmental Policy Act (NEPA) of 1969, which led to its spread in national

*1: «Common Heritage of Mankind", «Present and Future Generations», «Inter/Intra-generational Equity» and «Sustainable Development»*, in *Annales de la Faculté de droit d'Istanbul*, 2022. J.H. KNOX, *The Myth and Reality of Transboundary Environmental Impact Assessment*, *Ibid*, argues that it is wrong to derive the EIA obligation from the principle of transboundary damage, which is more an ideal than a principle of customary law which is being followed in practice. Rather, it is more useful to link EIA to the principle of non-discrimination, also in order to make EIA a more effective tool to prevent environmental damage.

8 See N. CRAIK, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, *cit.*, Ch. 4.

9 The only formally binding treaties are the Espoo Convention and the Protocol on Environmental Protection to the Antartic Treaty: see *Ibid.*

legislation worldwide[10]. At regional level, an important step was the adoption of the EIA Directive no. 85/337 by the EC in 1985, later repealed by Directive no. 2011/92 and subsequently amended by Directive no. 2014/52. At international level, its role in international environmental protection was only officially recognised in 1987 by the United Nations Environment Programme (UNEP), which published the Objectives and Principles of Environmental Impact Assessment[11], a set of guidelines aimed at defining in detail how EIA should be conducted by States. Subsequently, it found its way into various multilateral treaties, albeit with often generic formulations. After initially being excluded from the final version of the Stockholm Declaration for fear that it might undermine the right to development of States[12], EIA was enshrined in Article 17 of the Rio Declaration[13]. Of particular relevance is also the Espoo Convention[14], adopted in 1991 and in force since 1997. It constitutes a significant step forward in international law both because it institutionalises a standardised EIA process and mandates it not only in a national, but also in a transboundary context, and because it contains an unprecedented level of detail for the conduct of EIA. The Convention has been ratified by 41 countries (mostly from Western and Eastern Europe) and signed, but not ratified, by Russia and the United States. It was subsequently amended in 2001 to allow States that are not members of the UNECE but are part of the United Nations to accede to it. Other notable instruments of international law that provide for the EIA obligation include the United Nations Convention on

10 Including developing countries. See *Ibid*, Ch. 2.

11 UNEP - *UNITED NATIONS ENVIRONMENTAL PROGRAMME Goals and Principles of Environmental Impact Assessment*, *cit.*

12 L.B. SOHN, *The Stockholm Declaration on the Human Environment*, in *Harvard International Law Journal*, 1973, 14(3), p. 431.

13 The *Rio Declaration on Environment and Development* of 1992 states: «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».

14 *Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)*, February 5, 1991.

the Law of the Sea (UNCLOS) [15], the Protocol on Environmental Protection to the Antarctic Treaty[16], Convention on Biological Diversity (CBD)[17], the Draft Articles of the International Law Commission on the Prevention of Transboundary Damage Resulting from Hazardous Activities[18] and more[19].

The reiterated recognition of the EIA obligation suggests that it belongs to customary international law, although there is considerable uncertainty about its content. In general, by looking at the domestic practice of the most developed States on matters of EIA[20], it can be said that it must consist of the following phases in order to be effective: (i) screening, to identify activities to be subjected to EIA and to provide minimum information about them; (ii) scoping, to better identify projects that actually entail some risks; (iii) impact analysis and assessment of alternatives; (iv) public participation; (v) final decision; and (vi) follow-up, to ensure continuous post-project monitoring. Under domestic EIA regulations, international treaties and instruments, and, as will be seen, the ICJ's jurisprudence, an EIA should only be undertaken for those projects that, based on a preliminary assessment, may present a risk of significant harm to the environment. It is unclear, however, how the threshold of significance should be assessed. A further issue that generates uncertainty concerns the specific content of the EIA, i.e. which elements should be taken into account, how they should be assessed and what impact they should have in the decision-making process. While the Court basically leaves these issues to be dealt with internally by States, international legal instruments sometimes provi-

15 *United Nations Convention on the Law of the Sea*, December 10, 1982, 1833 U.N.T.S. 397, p. Articles 204, 205 and 206.

16 *Protocol on Environmental Protection to the Antarctic Treaty*, October 4, 30 I.L.M. 1455, Art. 8.

17 *Convention on Biological Diversity*, June 5, 1992, 1760 U.N.T.S. 79, 143; 31 I.L.M. 818, Art. 14.

18 INTERNATIONAL LAW COMMISSION, *Draft Articles on the Prevention of Transboundary Damage Resulting from Hazardous Activities*, August 10, 2001, UN Doc. A/RES/56/82 (2001), UN Doc A/56/10, Art. 7.

19 See Y. SONG, *The Obligation of EIA in the International Jurisprudence and Its Impact on the BBNJ Negotiations*, in *Sustainability*, 2023, 15(1) 487 ff. and N. CRAIK, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, *cit.*, Ch. 4.

20 See N. CRAIK, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, *Ibid,* Ch. 2.

de more precise guidance. In particular, the Espoo Convention stipulates in Appendix I which activities must necessarily undergo an EIA, while Appendix III sets out general criteria for evaluating the environmental impact of a proposed activity. However, it is doubtful whether these instruments reflect international custom and thus whether they can bind non-contracting parties.

### 3. The ICJ's case law

The rule requiring States to carry out an EIA if there is a risk of significant transboundary damage was first explicitly stated by the Court in 2010. However, this was not a new concept in its jurisprudence. As early as 1995, in the *Nuclear Tests II* Case, New Zealand had argued that France was obliged to conduct an EIA before carrying out nuclear tests in the Pacific Ocean, according to both the Numea Convention binding the two States and customary law[21]. Although the Court did not enter into the substantive issue, Judge Weeramantry, in his dissenting opinion, noted that EIA was enjoying increasing international acceptance and advocated for the requirement to conduct EIAs in case of a risk of transboundary harm by virtue of the «*position of special trust and responsibility in relation to the principles of environmental law*»[22]. In 1997, in the *Gabčíkovo-Nagymaros* Case, the same judge reiterated the concept, emphasising in particular the necessary continuing nature of EIA[23]. In general, existing international EIA case law sheds light on conflicting interpretations of the nature and scope of EIA obligations and it also reveals the context in which disputes are most likely to arise. In fact, all the cases examined so far by the Court relate to the use of transboundary watercourses. This section deals with subsequent developments in the Court's case law, from 2010 to date.

---

21 International Court of Justice, *Request for An Examination of the Situation with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, ICJ Reports 1995, p. 288, para. 35.

22 *Ibid*, *Dissenting opinion of Judge Weeramantry*, paras 344-335.

23 *GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, I.C.J. Reports 1997,* p. 7, *Dissenting opinion of Judge Weeramantry*, paras 111-113.

### 3.1 The Pulp Mills Case

The dispute concerned the use of the Uruguay River, which marks the border between Argentina and Uruguay, on whose banks Uruguay had authorized in 2005 the construction of one of the world's largest paper mills, which has been operational since 2007. While for Uruguay this activity was desirable to generate job opportunities, Argentina, which would not obtain any economic benefit, opposed the project from the outset, arguing that it would harm public health and the environment. Consequently, after months of unsuccessful negotiations with Uruguay, Argentina submitted a request for provisional measures to the ICJ, which was rejected on the basis that there was no evidence that the construction of the mills would result in damages that could not be removed later should Argentina prevail on the merits[24]. Although the final ruling came in 2010, the refusal to grant provisional measures was somehow already indicative of the Court's stance[25]. Following the commissioning of the plant and the inevitable souring of interstate relations, Argentina and Uruguay appealed to the ICJ, which delivered its decision on 20 April 2010[26].

The judgment represented a turning point in international environmental law because the Court ruled for the first time that the practice of EIA «*in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law* […] *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*»[27]. The Court expressly linked EIA to the principle of prevention and also stipulated that continuous monitoring of the project's

24 *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006,*
*I.C.J. Reports 2006,* p. 113.

25 This point is also stressed by C.R. PAYNE, *International Court of Justice - duty of environmental impact assessment - right to develop - duty to notify and consult - international standards - equitable and reasonable use of watercourses - duty to prevent pollution*, in *The American journal of international law*, 2011, 105(1), p. 100.

26 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14.

27 *Ibid*, para 204.

effects on the environment must be carried out[28]. At the same time, however, the ICJ stated that international law does not specify the scope and content of EIA and that it is therefore up to state discretion to define them on a case-by-case basis[29]. Although some authors have praised this ruling for its innovative content[30], it is not particularly commendable, as the dissenting judges and several commentators pointed out.

Firstly, although it noted that it was necessary to interpret the 1975 Statute regulating the management of the river between the two States in the light of the relevant rules of customary international law, the Court confirmed, as argued by Uruguay, that its jurisdiction was limited to such Statute[31]. Since Article 41 of the Statute does not entail a referral to other sources of international law[32], the Court did not find it necessary to invoke, for example, the 1997 UN Convention on Watercourses[33], nor the Espoo Convention, to which the parties do not adhere but whose authority would have helped to better delineate the content of EIA. Furthermore, since the decision excluded Argentina's claims relating to noise, visual and air pollution[34], it overlooked customary and conventional requirements that could exemplify established practices and standards of international law, thus limiting the judgment's impact on the development of international environmental law.

---

28 *Ibid*, paras 204-205.

29 *Ibid*, para 205.

30 See, for example, A. BOYLE, *Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention*, in *Review of European Community & international environmental law*, 2011, 20(3) 227 ff. and J. DE MULDER *Case note*: *International court of justice judgement on the paper mill permit dispute between Argentina and Uruguay recognizes the requirement of environmental impact assessment in a transboundary context*, in *RECIEL*, 2010, 19(2) 263 ff.

31 *Pulp Mills on the River Uruguay*, *cit.*, para 52.

32 D.K. ANTON, *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep (20 April 2010)*, in *Australian International Law Journal*, 2010, 17(1), p. 219 notes that it only establishes an obligation for the parties to exercise their regulatory power in accordance with international obligations.

33 *Convention on the Law of the Non-Navigational Uses of International Watercourses*, May 21, 1997, UN Doc. A/51/869.

34 With the exception of air pollution that affects the river's water quality: see *Pulp Mills on the River Uruguay*, *cit.*, para 52.

Secondly, although the Court reiterated the importance of ensuring the environmental protection of shared natural resources while allowing for sustainable economic development, it did not take a position on Argentina's request that the river's pre-existing legitimate interests (including recreational and tourist uses) be taken into account[35]. Such neutrality indicates a lack of sensitivity on the part of the judges towards environmental protection and a disguised fear of compromising the economic rationale behind the project.

Thirdly, the Court held that it was for Argentina, the applicant, to bear the burden of proving that Uruguay had not taken all necessary measures to protect the environment and prevent pollution[36]. This disregards the obvious difficulty of meeting the burden of proof in the context of environmental damage, especially when this is to be done in a prognostic manner. It is therefore not surprising that the Court found the evidence submitted by Argentina to be inconclusive. In this regard, as noted by Judges Al-Khasawneh and Simma in their joint dissenting opinion[37], the Court's choice not to avail itself of non-party expert testimony, as required by Articles 50 and 62 of its Statute[38], is also blameworthy. In fact, the experts were presented as counsels or advocates and were therefore not subject to questioning by the other party and the Court, despite the fact that their contribution could have been of crucial importance, especially in a case of such high technical complexity.

Fourthly, the Court recognised that Uruguay had breached its procedural obligations under Article 7 of the 1975 Statute by failing to notify Argentina before issuing the environmental permits for the mills[39]. However, it considered that since the infringement had ceased, the mere declaration of its existence by the Court was an adequate satisfaction[40]. Such *ex post* approach

35 *Ibid*, para 177.
36 *Ibid*, para 164.
37 *Ibid*, *Joint dissenting opinion Judges Al-Khasawneh and Simma*, para 5.
38 Statute of the International Court of Justice, June 26, 1945, 3 Bevans 1179, 59 Stat 1031, TS 993, 39 AJIL Supp 215 (1945), Cmd 7015.
39 *Pulp Mills on the River Uruguay*, *cit.*, paras 104-107 and 158.
40 *Ibid*, para 269.

was criticised by Judges Al-Khasawneh and Simma, who noted that the Court's duty is not to determine *a posteriori* whether a breach has occurred and what remedies are available, but to assist the parties from the outset of the dispute to prevent the violation from taking place[41].

Finally, and surprisingly considering the emphasis placed on cooperation by the Espoo and Aarhus Conventions, the Court did not find a legal obligation to consultation, although it acknowledged that Uruguay had indeed consulted the affected populations of both countries[42]. In this regard, it is unfortunate that the Court did not seize the opportunity, as requested by Argentina, to give relevance to Principles 7 and 8 of the UNEP Goals and Principles on EIA and especially Article 13 of the 2001 ILC's Draft Articles on the Prevention of Transboundary Damage from Hazardous Activities[43].

### 3.2. Certain Activities/Construction of a Road Case

The hope that the Court would be more progressive in its post-*Pulp Mills* jurisprudence was dashed by the following EIA case it had to deal with. In 2010, Costa Rica submitted a claim to the ICJ, arguing that Nicaragua had violated its international treaty obligations, including the Ramsar Convention on Wetlands, by committing incursions and occupations in Costa Rican territories, along with dredging and channeling activities, which were causing serious damage to protected rainforests and wetlands of the Colorado and San Juan rivers. In turn, Nicaragua initiated proceedings against Costa Rica in 2011, which resulted in the two judgments being joined. Nicaragua complained that, by building a road along part of the border in Costa Rican territory, Costa Rica had caused damage to the river ecosystem and violated various international

41 *Joint dissenting opinion Judges Al-Khasawneh and Simma*, *cit.*, para 21.
42 *Pulp Mills on the River Uruguay*, *cit.*, para 40.
43 This is particularly regretful, especially in light of the ILC's role in the progressive development of international law: see G. HAFNER and H.L. PEARSON, Environmental issues in the work of the Environmental Law Commission, in *Yearbook of International Environmental Law*, 2000, 11(1), p. 3.

environmental obligations[44]. Both countries, believing that the other had caused transboundary harm, recognised the need to conduct an EIA, but argued that the other party had failed to do so.

The Court delivered its judgment in 2015[45]. While Costa Rica's claim that there was a significant risk of transboundary harm from Nicaragua's dredging activities was rejected, the ICJ accepted such a risk existed for Nicaragua in relation to Costa Rica's road construction project. The Court, after reaffirming that EIA is an obligation under general international law, specified that it applies not only to industrial activities but to any project that may cause significant transboundary environmental damage[46]. Furthermore, it clarified that EIA obligations consist of two stages. The first one is a preliminary assessment to be conducted «*on the basis of an objective evaluation of all the relevant circumstances*»[47]. If this first phase reveals the presence of a risk of significant transboundary harm, the second stage is triggered and it consists of the requirement to conduct a more comprehensive EIA. Other than that, the ruling did not mark a significant step forward with respect to the *Pulp Mills* Case and has therefore been severely criticised. It reiterated that the content of EIA will be decided subjectively by the States[48], leaving the line between the State's discretion in conducting an EIA and the Court's requirement for a preliminary impact assessment to determine the existence of a significant risk of transboundary harm «*entirely subjective and indeterminate*»[49]. In Nicaragua's

44 In particular, the Ramsar Convention, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica, the CBD Convention and the Convention for the Conservation of the Biodiversity and Protection of the Main Wildlife Areas: see para. 50 of the judgment.

45 International Court of Justice, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015,* p. 665.

46 *Ibid*, para 106.

47 *Ibid*, para 153.

48 *Ibid*, para 104.

49 D. DESIERTO, *Evidence but not Empiricism? Environmental Impact Assessments at the International Court of Justice in 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)'* at https://www.ejiltalk.org/evidence-but-not-empiricism-environmental-impact-assessments-at-the-international-court-of-justice-in-certain-activities-carried-out-by-nicaragua-in-the-

application, the Court was more precise in identifying the scientific data that led it to conclude in favour of the appellant, concluding that «*the nature and magnitude of the project and the context in which it was to be carried out*»[50] indicated that Costa Rica's construction of the road posed a risk of significant damage. Strikingly, instead, in the case brought by Costa Rica, the ICJ did not clarify what evidence it relied on to conclude that Nicaragua's activities did not pose a risk of significant damage. In addition, the Court came to this conclusion while ignoring the content of the Ramsar Convention, which grants enhanced environmental protection to wetlands, such as the San Juan River on which Nicaragua performed the dredging works. In so doing, it missed the opportunity to clarify the meaning of 'significant transboundary harm', once again limiting its jurisdiction and avoiding reference to instruments of international law that would have helped it to better frame the scope of the EIA requirement[51].

Since the Court did not specify what is part of «*general international law*», the judges questioned whether the EIA obligation stems from an independent customary rule or is part of the principle of due diligence. According to *ad hoc* judge Dugard, EIA can be derived from *opinio iuris*, whereas due diligence is a separate duty that must be applied when conducting EIA[52]. Judge Donoghue, conversely, argues that the expression «*general international law*» includes, in addition to *opinio iuris*, a reference to the «*fundamental parameters of the international legal order*»[53], in particular due diligence[54]. This latter view seems to

---

border-area-costa-rica-v-nicaragua-and-con/, 2016-

50 *Certain Activities/Construction of a Road Case*, *cit.*, para 155.

51 In particular, the Espoo Convention and the Draft Articles of the International Law Commission (see reference at 18). The latter, in Article 1, links the concept of significant transboundary harm to the «*physical consequences' of proposed activities, by taking into account the «developments in scientific knowledge*» in their assessment. Moreover, «*an activity may involve a risk of causing significant transboundary harm even though those responsible for carrying out the activity underestimated the risk or were even unaware of it. The notion of risk is thus to be taken objectively* …».

52 *Certain Activities/Construction of a Road Case*, *cit.*, *Separate opinion of Judge ad hoc Dugard*, para 9.

53 *Certain Activities/Construction of a Road Case*, *cit.*, *Separate opinion of Judge Donoghue*, para 3.

54 *Ibid*, para 1.

result in more specific duties, as due diligence may take the form of different obligations depending on the stage at which it is applied. However, it cannot be ignored that the principle of due diligence still suffers from considerable vagueness[55]. Furthermore, Judge Dugard warned that «[t]*he danger of considering the duty of due diligence as the source of the obligation to carry out an EIA is that it allows a State to argue, retrospectively, that because no harm was demonstrated at the time of the release procedure, no duty of due diligence arose at the time of project planning*»[56]. This would undermine the duties of cooperation between States, including those of notification and consultation. Indeed, the Court is ambiguous on this point as well, because it asserts that only after EIA has confirmed the existence of a risk of transboundary harm is the State obliged, «*in accordance with the duty of due diligence*»[57], to notify and consult in good faith with the concerned States. Judge Donoghue was rather critical on this point and suggested that the obligations of consultation and notification should be independent of the duty to conduct EIA, as they may, in fact, arise even earlier[58]. Such contention is confirmed by international law[59].

It is therefore evident that this case represents the failure of the Court to evolve from its precedent in *Pulp Mills*, despite the fact that in the five years elapsing since such ruling, international environmental law had taken important steps forward, especially with the enactment of the Paris Agreement. The ICJ did not exhibit a heightened awareness of the need to better delineate the objective obligations of EIA, nor of the contribution it could make to the prevention of transboundary harm. Instead, it issued a ruling that is not only non-innovative, but also a source of new ambiguities.

---

55 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?, in *Questions of International Law*, 2017, 42, p. 18.

56 *Separate opinion of Judge ad hoc Dugard*, *cit.*, para 10.

57 *Certain Activities/Construction of a Road Case*, *cit.*, para 104.

58 *Separate opinion of Judge Donoghue*, *cit.*, para 10.

59 See Art. 16 of the Rio Declaration; Art. 15.2(b) of the Protocol on Environmental Protection to the Antarctic Treaty; Article 14.1(c) and (d) of the Convention on Biological Diversity.

### 3.3. The Silala Case

The Court's latest decision related to EIA dates back to 1 December 2022[60]. Although the Court issued a final ruling and did not delve into the discussion on EIA, the judgment is nevertheless significant to understand the evolution of the Court's attitude towards the protection of transboundary watercourses. The dispute originated in 2016 when Bolivia filed a claim against the Chilean government for the use of the Silala river system. The river flows naturally from Bolivia to Chile (although the surface flow is artificially increased) and is located in the Atacama Desert, one of the world's most arid regions. On 6 June 2016, the Republic of Chile filed an application with the ICJ to initiate proceedings against Bolivia seeking declarations on (i) the nature of the Silala river system as an international watercourse; (ii) its right to the equitable and reasonable utilisation (ERU) of the river's waters; (iii) Bolivia's obligation to take all necessary measures to prevent and control environmental damage on the river; and (iv) Bolivia's obligation to cooperate and notify Chile of activities that may have an adverse effect on the shared watercourse. Pursuant to Article XXXI of the Pact of Bogotá, on which the dispute was based, the Court concluded that its jurisdiction depended on the actual existence of a dispute between the parties[61]. The Court found that there no longer existed a dispute, the parties having eventually agreed on the legal standards to be applied and the facts of the case[62]. The only point on which the Court reached a determination was the duty of the States to consult and notify each other on the use of Silala's waters, although it held that Bolivia had not violated such obligation[63].

This ruling was also criticised by dissenting judges and commentators, mainly because it had been hoped that this case would shed light on the

60 International Court of Justice, *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. Reports 2022*, p. 614.
61 *Ibid*, para 39.
62 *Ibid*, para 59.
63 *Ibid*, para 118.

definition of watercourse in international law[64]. The Court was accused of leaving the parties without a declaratory judgment that would provide guidance on their rights and obligations[65]. In this regard, *ad hoc* judge Simma noted that a convergence of views is not a legally binding agreement and does not necessarily result in a common understanding of how to settle a dispute[66]. Judge Charlesworth observed that in declaring the controversy without object, the Court wrongly relied on the precedent of the *Nuclear Tests* Case, where, unlike the dispute at hand, a binding legal agreement had been reached whereby France would cease conducting atmospheric nuclear tests in the South Pacific[67]. This case would thus represent a dangerous precedent because of the ease with which the ICJ maintained that the claims had no object and issued a final ruling instead of a declaratory judgment[68], leaving both parties dissatisfied and without granting full environmental protection.

Specifically, the Court did not clarify the content of the general principles of international law applicable to international watercourses, including the principle of ERU, the duty not to cause significant harm and that to exchange information. First, it is still uncertain whether, as argued by Chile, the definition of 'international watercourse' under Article 2 of the 1997 Watercourses Convention[69] reflects customary international law. In addition, it was not established whether Chile's use of the river waters complied with the principle of ERU (whose applicability, not content, was acknowledged by the parties), nor did the Court assess whether the «*unique characteristics*»[70] of the river could have had an impact on such principle. Likewise, the notion of

64 See L. KONG, *The Dispute over the Status and Use of the Waters of the Silala Case and the Customary Rules on the Definition of International Watercourse*, in *Review of European Community & international environmental law*, 2020, 29(3) 322 ff.

65 D. ZIEBARTH, *Dispute Over the Status and use of the Waters of the Silala (Chile v Bolivia): A significant non-decision*, in *The Journal of Water Law*, 2022, 27(6) 199 ff.

66 *Dispute over the Status and Use of the Waters of the Silala*, *cit.*, *Separate opinion of Judge ad hoc Simma*, para 9.

67 *Ibid, Declaration of Judge Charlesworth*, paras 13-14.

68 D. ZIEBARTH, *cit.*

69 See reference at 33.

70 *Dispute over the Status and Use of the Waters of the Silala*, *cit.*, para 58.

Chile's «acquired right» to use the river was not addressed, the ICJ having ruled that any modification of river flows by Bolivia would not constitute a violation[71]. Finally, and most significantly for the purposes of the present argument, the Court did not shed light on the scope of the obligation to consult and notify under, respectively, Articles 11 and 12 of the Watercourses Convention. It denied that Article 11 reflects customary international law[72] and reiterated its previous jurisprudence, stating that it is the existence of a risk that triggers EIA obligations and, therefore, also the duty to notify[73]. It was noted that these uncertainties would not have arisen had the Court not limited its focus to the Convention and referred to the other relevant legal sources on internationally shared waters, especially to the detailed requirements on consultation, notification and equitable and reasonable use set forth in the Berlin Rules on Water Resources which, according to the International Law Association, express the current state of customary international law on the subject[74].

Therefore, this decision can also be said to be unsatisfactory in many respects, save for one. Compared to its previous case law, in this case the ICJ carefully considered the scientific evidence, as it relied on the submissions of independent experts who were cross-examined and re-examined[75].

## 4. Recurring errors of the Court and indications for moving forward

In its jurisprudence so far, the ICJ has firstly shown a contradictory attitude. Although as early as the *Gabčíkovo-Nagymaros* Case it affirmed its «*awareness of the vulnerability of the environment*» *and stated the «often irreversible*

71 T.M. KEBEBEW, *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia): Is the International Court of Justice falling short?*, in *Review of European Community & international environmental law*, 2023, 32(2), p. 373 ff.

72 *Dispute over the Status and Use of the Waters of the Silala*, *cit.*, para 112.

73 *Ibid*, para 116.

74 J.W. DELLAPENNA, *The Dispute over the Status and Use of the Silala River (Chile v. Bolivia): The International Court of Justice Again Declines to Apply International Water Law*, in *Wyoming law review*, 2023, 23(2), p. 88.

75 See *Dispute over the Status and Use of the Waters of the Silala*, *cit.*, para 22.

*character of damage to the environment*»[76], in its case law it has consistently debased the role of EIA. Indeed, despite the fact that EIA requires compliance with a standardised procedure, the Court, by erroneously making it depend on factual elements – namely the existence of risk – has thus «*undermin*[ed] *the very rationale of the EIA, i.e. the identification of future environmental damage, to the extent that the presence of harm, instead of being the outcome of the process, becomes one of its constitutive elements*»[77]. Besides, if we look at Article 17 of the Rio Declaration, we can notice that it requires EIAs for activities that may have a «*significant impact on the environment*» and not for those that entail a risk of damage, as constantly required by the Court. Moreover, although the Court has upheld the centrality of an «*ecosystem approach*»[78] and has emphasised the importance of the precautionary principle in this context, it then reversed the burden of proof on the applicant. This entails a narrow reading of the principle of precaution which paves the way to the possibility that environmental damage may not be prevented and shows that the Court was oblivious to the fact that the standard of proof may vary from case to case[79]. Also, the Court continued to maintain that EIA obligations belong to customary international law, thus forgetting the fact that a standard has achieved customary status is of secondary importance when it lacks the necessary details to influence the practice of States[80]. Consequently, it did not clarify the minimum content of EIA, what the threshold is for determining when harm may be significant, nor the relationship between the EIA requirement and the duty to consult and notify the parties that may be affected by the proposed project. Furthermore, the

76 *GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, cit.*, para 112.

77 E. RUOZZI, *The Obligation to Undertake an Environmental Assessment in the Jurisprudence of the ICJ: A Principle in Search of Autonomy*, in *European journal of risk regulation*, 2017, 8(1), p. 166.

78 O. MCINTYRE, *The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay*, in *Water alternatives*, 2011, 4(2), p. 139.

79 *Pulp Mills on the River Uruguay*, *cit.*, *Separate opinion of Judge Greenwood*, paras 24-25.

80 D. BODANSKY, *Customary (and Not So Customary) International Environmental Law*, in *Indiana journal of global legal studies*, 1995, 3(1), p. 105 says that considering law as customary even when it is not followed in the practice of States belongs to the «*myth system*» of international environmental law.

references to «*general international law*» oblige interpreters to wonder what sources the Court might be alluding to and effectively prevent them from reaching definitive solutions. This results in reliance on domestic law, which can be dangerous especially when it is not aligned with the standards required at the international level. In this regard, the claim that vagueness in EIA is beneficial because it may lead States to act with caution and (as they fear that the threshold has been reached) avoid the risk of procedural violations[81], seems to be fallacious. Not only is it dangerous for effective environmental protection, but it is also not borne out by the facts.

Secondly, the Court errs towards drawing a clear distinction between substantive and procedural obligations and in continuing to frame EIA as a purely procedural one[82]. While the latter relate to the duty of States to comply with certain procedures before carrying out activities that may entail a transboundary environmental risk, substantive obligations concern state duties that derive from international conventions or customary international law and that aim at the effective protection of the environment[83]. The Court's statement in *Pulp Mills* that the two are «*intrinsically linked*»[84] is of little value in light of the later consideration that they, not being indivisible, must be considered separately[85]. While it is true that a breach of procedural obligations may be instrumental in establishing non-compliance with substantive duties[86], the reverse is not necessarily true, i.e. that mere observance of procedural obligations determines fulfilment of substantive obligations as well. Rather, the fact that a State is essentially only bound to comply with procedural

81 Cogan (2016), 326. J.K. Cogan, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, in *The American journal of international law*, 2016, 110(2), p. 326.

82 This is also noted by Judges Khasawneh and Simma (see reference at 37), paras 26-28.

83 Arslan (2022), 459. K.B. Arslan, *The Extraterritorial Application of Human Rights Treaties in the Context of Environmental Transboundary Harm*, in *Public and Private International Law Bulletin*, 2022, 42(1), p. 459.

84 *Pulp Mills on the River Uruguay*, *cit.*, para 68.

85 *Ibid*, paras 23-24.

86 O. McIntyre, *The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay*, *cit.*, p. 137.

requirements risks releasing it from its substantive law commitments, thus allowing it to freely promote its political and economic interests 'masked' behind the impartiality of EIA[87]. Additionally, classifying EIA as a merely procedural requirement undermines its intimate connection with substantive obligations, such as the principle of due diligence. Indeed, EIA is one of the parameters for assessing respect for the duty of due diligence, although it stands as an autonomous constraint. To argue the contrary, not only exposes one to the dangers already highlighted by the dissenting judges, but also means failing to understand that due diligence originates from the imperative to refrain from causing harm and, therefore, is closely linked to the *ex post* liability of the State[88]. Instead, EIA takes an anticipatory perspective which aims to prevent the problem from arising. In this sense, EIA might seem more easily assimilated with the precautionary principle or that of cooperation. On closer inspection, however, even when placed in relation to these two principles, EIA remains an independent obligation. It is not part of the precautionary principle, but it can be useful in determining whether precautionary measures need to be taken[89]. It cannot be incorporated into the duty to cooperate either, the latter being only one of the requirements to be applied to EIA. However, by emphasising the relationship between cooperation and EIA, it is possible to clarify certain doubts about the threshold of significance of harm, the timing of notification and, if the duty to cooperate within EIA is breached, to provide for compensatory damages[90]. It would therefore be appropriate for the Court, also in light of the recognition of EIA as a customary obligation, to unequivocally establish its autonomy from other principles of international

87 A. LANGSHAW, *Giving Substance to Form: Moving towards an Integrated Governance Model of Transboundary Environmental Impact Assessment*, in *Nordic Journal of International Law*, 2012, 81(1), p. 27.

88 Y. TANAKA, *Obligation to Conduct an Environmental Impact Assessment (eia) in International Adjudication: Interaction between Law and Time*, in *Nordic Journal of International Law = Acta Scandinavica Juris Gentium*, 2021, 90(1), p. 91.

89 *Ibid*, p. 97 ff.

90 N. CRAIK, *The Duty to Cooperate in the Customary Law of Environmental Impact Assessment*, in *International and Comparative Law Quarterly*, 2020, 69(1), p. 257.

environmental law, while recognising their value in making the latter operational.

Following these remarks, it is possible to try and trace the trajectory that the ICJ should follow in its future rulings in order to make its case law on EIA and on environmental protection more impactful. To begin with, due to the transboundary nature of environmental problems, it is necessary for the ICJ, as a body serving the international community, to understand that disputes between States involving environmental interests almost never affect only the parties involved, as they can have consequences on a global scale. Therefore, too broad a deferral to the discretion of national decision-makers, who might be influenced by selfish political and economic concerns, does not seem the optimal solution in the environmental field. Leaving the definition of the content of EIA in the hands of States, moreover, amounts to characterising it «*as an aid to decision-making rather than as a determining factor*», thus not enabling it to fulfil its role in promoting sound decision-making in the international arena[91].

The Court has a (legal and ethical) duty to promote the model of «*composite administration*»[92], which can foster dialogue between international bodies and States on environmental matters. This does not only mean acting as an interlocutor for the parties by simply inviting them to improve cooperation in good faith, but also to play, when necessary, the role of an authoritative guide that sets precise standards that foster coordination between States[93]. The ICJ should establish that the EIA obligation is independent of other principles of environmental law and specify once and for all not only its procedural, but also its substantive characteristics. This would strengthen the responsibility of

91 Y. SONG, *The Obligation of EIA in the International Jurisprudence and Its Impact on the BBNJ Negotiations*, in *Sustainability*, *cit.*

92 See A. VON BOGDANDY and P. DANN, *International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority*, in *German law journal*, 2008, 9(11), 2013 ff.

93 N. CRAIK, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, *cit*, Ch. 3.

States and thus the environmental protection function of EIA[94]. Indeed, as long as a violation is only framed as procedural, the State concerned is left with no remedy other than the declaration by the Court that such breach has taken place, as no material damage can be identified[95]. The ICJ could also go a step further and show awareness in its decisions that proposed activities that could have a significant impact on the environment acquire relevance not only in terms of the harm that a party has suffered or may suffer but, in light of the intersection between the right to a healthy environment and the human rights regime, they also involve ecological, social and economic interests, which are also likely to have global repercussions[96]. In this sense, the ICJ should explicitly acknowledge the importance of integrating EIA with strategic environmental assessments (SEAs) and social impact assessments (SIAs)[97]. In doing so, the Court should not be afraid of undermining the independence of state executive powers. It should not be forgotten that the distinctly procedural character of EIA makes it, compared to substantive duties, an obligation to which States are more willing to conform and has thus determined its popularity and rapid spread across different legal regimes. Moreover, defining more clearly the standards to be applied at the international level to EIA does not amount to creating new law, but simply to specifying how to achieve its objectives and general principles. In this case, the main goal of EIA lies in the prevention of transboundary environmental harm, which has been established independently by national governments and has found recognition in domestic

94 Y. SONG, *The Obligation of EIA in the International Jurisprudence and Its Impact on the BBNJ Negotiations*, in *Sustainability*, *cit*.

95 N. CRAIK, *The Duty to Cooperate in the Customary Law of Environmental Impact Assessment*, *cit*, p. 257.

96 Y. WU, *'Limited Sovereignty' or 'Community of Interests'? A Review of the Indus Water Kishenganga Awards*, in *International Journal of Water Resources Development*, 2024, 1 ff. states that this requires a shift from the «*limited sovereignty*» to the «*community of interests*» approach.

97 SEAs relate to the integration of environmental considerations into the preparation of policies, plans and projects, whereas SIAs relate to social and cultural impact assessments. See J. NAKAMURA *et al.*, *International Legal Requirements for Environmental and Socio-Cultural Assessments for Large-Scale Industrial Fisheries*, in *Review of European Community & International Environmental Law*, 2022, 31(3), 336 ff.

laws and multilateral treaties. In this respect, it would be helpful if the Court would clarify whether the Espoo Convention belongs to customary international law, considering that it is recognised as the «*exemplary standard for the process to be followed when conducting an EIA*»[98] and its effectiveness in handling controversial situations[99].

## 5. Possible causes for the Court's conservatism

After many years of vague and unsatisfactory case law for both or only one of the parties, it is difficult to understand why the Court, despite its key role in the evolution of international law, has not yet felt the need to clarify the content of customary international law applicable to transboundary watercourses. A few theories can be offered to explain the scarcely progressive attitude of the Court. According to some commentators, much depends on the parties' ability to fully develop their arguments so as to allow the Court a more informed decision[100]. However, it cannot be ignored that ultimately the task of articulating the law does not lie with the parties. Another reason could be the generality of treaty provisions, which could detail the conditions for triggering EIA or require it for all activities[101]. However, this seems unlikely to happen, considering that the generality of international law regulations is one of the conditions that ensure their legitimacy by virtue of the flexibility they provide. Moreover, it cannot be denied that in both domestic and international law there are already several examples of legal instruments specifying in detail the mandatory content of EIA, which may provide the Court with a solid starting point to develop its jurisprudence[102]. While it is true that the Court's

98 *Certain Activities/Construction of a Road Case*, *Separate opinion of Judge Bhandari*, *cit*., para 32.

99 See M. KOYANO, *The significance of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) in international environmental law: examining the implications of the Danube Delta case*, in *Impact Assessment and ProjectAappraisal*, 2008, 26(4), 299 ff.

100 A. BOYLE, *Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention*, *cit*, p. 231 asserts so in relation to the *Pulp Mills* Case.

101 Y. TANAKA, *Obligation to Conduct an Environmental Impact Assessment (eia) in International Adjudication: Interaction between Law and Time*, *cit*., pp. 110-112.

102 N. CRAIK, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, *cit*, p. 126 ff., notes that EIA has acquired a specific significance in the international

jurisdiction is usually based on the existence of compromissory clauses that limit its gaze to the multilateral agreement in which the clause is found[103], it is equally true that the Court itself has admitted since 1986 the need to take into account developments in international law in its case law[104]. In addition, following Dworkin's reasoning according to which the law is not only a set of written norms[105], the Court would in any case be required to go beyond the boundaries of legal texts to include in its decisions rules that are not explicitly mentioned in them.

Three convincing hypotheses behind the ICJ's reluctance to interpret the precautionary principle more broadly have been advanced[106]. These may be helpful in explaining the Court's general attitude in the rulings under examination. The first is the fear that a broad interpretation of the principle could pose a threat to States as it could become a pretext for increasing the number of lawsuits against them; the second may be related to the Court's perceived risk of losing its position of power within the UN; the third could stem from the structure of the ICJ, which partly mirrors that of the Security Council in that the latter's permanent members, namely China, Russia, the UK and the US, always have a member in the ICJ and are skeptical towards such principle.

Finally, a further reason behind the conservatism of the ICJ, complementary to those advanced so far, could be the lack of adequate awareness on the part of judges of the importance of environmental protection, in particular water protection. In this sense, it would be necessary to promote for judges and at all levels of education an approach that leads to

---

arena.

103 J. HARRISON, *Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Disputes and the Development of International Environmental Law*, in *Journal of Environmental Law*, 2013, 25(3) 501 ff.

104 *GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, cit.*, para 140.

105 R. DWORKIN, *Taking rights seriously* (Bloomsbury, 2008), pp. 22-23 claims that law is not only made up of written legal norms, but also of principles and policies.

106 D. KAZHDAN, *Precautionary Pulp: 'Pulp Mills' and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle*, in *Ecology law quarterly*, 2011, 38(2), pp. 549-550.

the abandonment of the utilitarian perspective of the 'here and now' in favour of one that looks to the interests of future generations[107]. This could be done by applying Rawls' social contract theory to the goals of sustainable development[108]. By educating judges to perform thought experiments such as the 'original position' and the 'veil of ignorance'[109] ones, they could abandon their prejudices and gain greater awareness of how serious environmental issues will become in the long run. Certainly, in a field as complex and highly technical as environmental protection, relying on experts is also crucial for judges to make up for their lack of scientific knowledge. In this regard, the fact that the Court made use of independent experts in the *Silala* case is a positive sign in this direction.

## 6. Prospects: the case of Japan

The shift in attitude required from the Court is imperative. The worsening of the climate crisis is becoming more tangible, and the voices of those calling for environmental protection to be given a prominent place in policy making are becoming increasingly loud. As a result, the number of cases concerning environmental litigation and transboundary EIA to be heard by the Court is likely to grow. One case that is causing a stir and may soon come before the judges of the ICJ is that of the management of contaminated water generated as a result of the 2011 earthquake-affected Fukushima nuclear power plant accident. After evaluating other disposal options for the nuclear-contaminated water, in 2021 Japan concluded that dumping into the Pacific Ocean was

107 See M. ZALEWSKA, *The New Dimension in Judicial Decisions for Acceleration of Water Resources and Biosphere Sustainability*, in *Ecohydrology & Hydrobiology*, 2024.

108 See G.E. HENDERSON, *Rawls & Sustainable Development,* in *The McGill international journal of sustainable development law and policy*, 2011, 7(1), 1 ff.

109 'Original position' means that the rules for a just society are established from the beginning. 'Veil of ignorance' means that people in their original position do not know who they will be in this society, whether they are competent or not, healthy or sick, strong or disabled: see M. ZALEWSKA, *The New Dimension in Judicial Decisions for Acceleration of Water Resources and Biosphere Sustainability*, *cit.*

the most convenient and cost-effective solution[110]. This raised an outcry from neighbouring countries, international organisations and citizens[111], who considered the action irresponsible and not compliant with international law[112], particularly because a proper EIA had not been conducted.

Japan appears to have performed a preliminary assessment of the risk of significant harm[113] from which it concluded that the radioactive impact of the discharge is extremely low[114]. In doing so, however, it has not addressed the request of a considerable number of countries to assess the radioactive elements other than tritium in the contaminated water[115], thus failing to consider «*all the relevant circumstances*»[116] in its preliminary EIA. Moreover, various reports and studies have shown that Japan's discharge practice is far from risk-free[117]. Therefore, a second and more thorough EIA should have been conducted to assess the environmental impact of the dumping activity, as required by Article 206 of UNCLOS[118]. By failing to fulfil this obligation and by not engaging in consultations with the relevant stakeholders[119], Japan appears to have violated not only the treaties on nuclear safety, but also the

110 The Prime Minister in Action, *Inter-Ministerial Council for Contaminated Water, Treated Water and Decommissioning Issues*, April 13, 2021 at <https://japan.kantei.go.jp/99_suga/actions/202104/_00012.html>.

111 See The Guardian, *Fukushima: Japan announces it will dump contaminated water into sea*, April 13, 2021 at <https://www.theguardian.com/environment/2021/apr/13/fukushima-japan-to-start-dumping-contaminated-water-pacific-ocean>.

112 The reference is to Articles 194-206 of the Convention on the Law of the Sea (UNCLOS), to the Convention on Nuclear Safety and the Convention on Early Notification of a Nuclear Accident (CENNA).

113 TEPCO, *TEPCO Releases Report on Treated Water Disposal*, March 17, 2020 at <https://www.tepco.co.jp/en/hd/newsroom/reports/archives/2020/pr20200327-e.html>.

114 IAEA, *IAEA Releases First Report on Safety of Planned Water Discharge from Fukushima Daiichi Site*, 2022 at <https://www.iaea.org/newscenter/pressreleases/iaea-releases-first-report-on-safety-of-planned-water-discharge-from-fukushima-daiichi-site>.

115 Y.C. CHANG *et al.*, *Frontier Issues in International Ocean Governance: Japan's Discharge of Nuclear Contaminated Water into the Sea*, in *Marine pollution bulletin*, 2024, 198115853 ff.

116 *Certain Activities/Construction of a Road Case*, *cit.*, para 153.

117 See W. MEN, *Discharge of Contaminated Water from the Fukushima Daiichi Nuclear Power Plant Accident into the Northwest Pacific: What Is Known and What Needs to Be Known*, in *Marine pollution bulletin*, 2021, 173(A) 112984 ff.

118 «*When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in Article 205*».

general principles of precaution, due diligence, prohibition of transboundary harm and cooperation, as well as the international case law on transboundary damages. This is compounded by two problems. First, the lack of specification of the scope of substantive EIA makes it more difficult to prove Japan's liability and thus compel it to behave in good faith to preserve the marine environment from irreparable impairment. Second, the fragmented and generic nature of the provisions on nuclear discharges at sea[120] is not conducive to States' compliance with best practices in this field. Notably, there are no standards that can be applied to nuclear contaminated water from nuclear accidents. In this regard, it was argued that «*a systematic review of the international law rules and requirements for the EIA and achieving their concretisation in specific circumstances would contribute to reducing the arbitrariness of Japan's decisions and actions*»[121]. More specifically, the need to develop a legal framework on transboundary EIA for Northeast Asia that relies on non-compliance procedures to resolve disputes in a non-confrontational manner was also advocated[122].

Under such circumstances, the role of international courts will be crucial. Indeed, the matter may end up under the scrutiny of the ICJ, although proving Japan's violation of substantive rules may not be an easy task for the claimants[123]. Alternatively, it will be possible to initiate arbitration proceedings before the ITLOS which, following an application by Ireland under Annex VII of UNCLOS, is already handling the *MOX Plant* Case between Ireland and the

119 Pacific Island Forum, *SG Puna Opening Remarks, Third Briefing Session with the Government of Japan regarding its intention to discharge ALPS Treated Water into the Pacific Ocean*, September 15, 2021 at <https://forumsec.org/publications/sg-puna-opening-remarks-third-briefing-session-government-japan-regarding-its>.

120 See X. CHEN X and Q. XU, *The Implementation of the Environmental Impact Assessment in Fukushima Contaminated Water Discharge: an Analysis of the International Legal Framework*, in *Frontiers in Marine Science*, 2024, 1 ff.

121 *Ibid*, p. 2.

122 R. AN *et al.*, *A New Transboundary EIA Mechanism is Called for: Legal Analysis and Prospect of the Disposal of Fukushima ALPS-Treated Water*, in *Environmental impact assessment review*, 2024, 105 ff.

123 However, the Court is showing increasing openness to judging violations of *erga omnes* obligations under international environmental law: see *Ibid.*

UK[124], whose circumstances are very reminiscent of the Japan case. It is hoped that Japan's conduct, being unique in history, will ensure that the judges or the arbitrators will not only address the regulatory fragmentation on nuclear issues and promote cooperation between States, but also clarify once and for all the aspects of EIA that are still obscure.

It has been rightly argued that parties that might be harmed by Japan's discharge activity could and should rely on the ICJ's power to issue advisory opinions[125]. Indeed, the Court has already issued such opinions in cases involving the use of nuclear weapons[126]. In this respect, it is relevant to note that on 29 March 2023 a request for advisory opinion, initiated by civil society, was filed by the UN General Assembly asking the ICJ for the first time about the obligations of States to address climate change[127]. The delivering of the opinion is expected in 2025 and it represents an important opportunity for the Court to embrace a more progressive attitude that allows it to contribute to the clarification and development of international environmental law. This will be facilitated by two factors. Firstly, the ICJ can render advisory opinions without the constraint of the existence of a bilateral litigation relationship, which significantly simplifies the burden of proof. Secondly, the Court will not be limited

124 ITLOS, *The MOX Plant Case (Ireland v United Kingdom)*, *Provisional Measures*, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95.

125 Y.C. CHANG and X.Y. DUAN, *ICJ Advisory Opinion Key Step in Dealing with Japan's Nuclear-Contamination Water Dumping*, in *Global Times*, 2022 at <https://www.globaltimes.cn/page/202204/1259122.shtml>.

126 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226 and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66.

127 An advisory opinion on the same matter was submitted to the ITLOS in 2012 and was delivered on the 24th of May. In it, ITLOS has claimed that «*States Parties to the Convention have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection*» (para 243) and stressed the importance of due diligence (para 235): see ITLOS Press Release, *Tribunal Delivers Unanimous Advisory Opinion in Case No. 31*, May 24, 2024 at <https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_350_EN.pdf>. A third advisory opinion of the same caliber is currently being examined by the Inter-American Court of Human Rights: see Riemer and Scheid (2024). L. RIEMER and L. SCHEID, Leading the Way: The IACtHR's Advisory Opinion on Human Rights and Climate Change, in *VerfBlog*, 2024 at <https://verfassungsblog.de/leading-the-way/>.

in its jurisdiction to specific sources of international law, as the applicants have adopted a holistic approach in citing sources of international law for the Court to consider[128]. This suggests that, to some extent, the Court's advisory opinions may be even more important than its case law. Indeed, whilst not binding, they have legal weight and moral authority and can be cited as precedents in subsequent judgments[129].

## 7. Conclusion

EIA is a governance process that acquires normativity because, if properly implemented, it fosters transparency, discourse and participation in matters of public interest that may have a detrimental impact on the environment. Notwithstanding its importance at the domestic level, it is at transnational level that EIA best expresses its potential to converge heterogeneous governmental concerns, enabling reasoned solutions to collective problems to be generated. In this context, internationally developed EIA standards are essential to guide the behaviour of States. However, EIA provisions are often vague, contained in soft law instruments, or have a territorially limited application. Therefore, States rely on the regulations of domestic law, which are not always aligned with the most up-to-date practice of environmental law and, above all, may be influenced by the selfish logic of short-term profit maximisation.

The role of international courts is crucial in outlining more precise EIA standards. Yet, to date, the jurisprudence of the ICJ on EIA is rather disappointing. Apart from clarifying in 2010 that EIA is an obligation belonging to customary international law, the Court continues to show great deference to national legislators. By failing to contribute to the development of more precise procedural

128 As in the Request: «*Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment …*».

129 See Y.C. Chang *et al.*, *Frontier Issues in International Ocean Governance: Japan's Discharge of Nuclear Contaminated Water into the Sea*, *cit.*

and substantive requirements for EIA, the ICJ has shown a lack of awareness of the importance of this instrument in preventing transboundary environmental damage and a fear of establishing itself as a major player in international environmental protection. The change of course requested by the Court will only occur when judges realise that climate challenges require them to adopt a new perspective which puts the interests of future generations at the centre. This paper argued the need for the ICJ to promptly adopt an adaptive teleolgical interpretation in its jurisprudence that takes into account developments in international law and the urgency of tackling the climate crisis on a global scale. The identification and acknowledgment of the mistakes made so far is crucial to achieve a more progressive attitude on the part of the judges and their contribution to the evolution of international environmental law. The Court could exercise its power in shaping the law not only by delivering judgments, but also by issuing advisory opinions. The latter, more informal option is particularly useful as it leaves the Court freer to express its views on the issues before it. Of course, not all the responsibility for ensuring environmental protection can fall on judges, or on the law in general. To effectively address environmental challenges and promote effective sustainable development, as is well known, the law only goes so far if it is not flanked by appropriate economic, political and social strategies.