DEFINING RESPONSIBILITY OF STATES TOWARDS SUSTAINABLE USE OF THE ENVIRONMENT: THE NATURE OF DUE DILIGENCE OBLIGATION IN THE CONTEXT OF TRANSBOUNDARY ENVIRONMENTAL HARM

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ABSTRACT

The obligation of States under international law to act with due diligence does not provide a clear basis for determining the standard of behavior that States should observe when regulating activities subject to their jurisdiction and control. Due diligence remains one of the elusive normative constructs in international law especially in the area of transboundary environmental harm despite conscious jurisprudential attempts to define its scope. This paper contributes to the literature on due diligence as it highlights the normative contours of the due diligence obligation under international environmental law, exploring the various dimensions and implications of this fundamental principle and bringing them to bear with controversial cases such as the Grand Ethiopian Renaissance Dam. Drawing from existing jurisprudence, the paper attempts to provide a glance at the nuances of the due diligence obligation required in the exploitation and management of shared resources while evincing its strengths and frailties.

INTRODUCTION

While permanent sovereignty is notoriously invoked as basis for state's power to freely explore, develop and dispose of its natural resources in

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accordance with its own priorities,[2] international jurisprudence maintains that such states' freedom to engage in or permit natural resources-related activities within their territorial boundaries or subject to their jurisdictional control should not produce transboundary effects 'contrary to the rights of others'.[3] The import of what has emerged as a primary duty of states is the responsibility of states, while in pursuance of their sovereign rights over natural resources, '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'.[4] Rather than operating to totally stall states' activities in pursuit of their economic well-being where there exist potential transboundary environmental threats, the duty imposes upon States a duty to take appropriate measures to prevent or minimise the risk of significant transboundary harm, i.e. the obligation to act with due diligence.[5] Though proven a laudable standard in balancing states' sovereign interests against the overarching global interest in the conservation of the environment and in the moderation of the impacts of states' activities on the global environment, the obligation to act with due diligence is nonetheless laced with uncertainties and limitations. These are uncertainties characterised by the practical relativeness of the concept; its application is subject to differential perspectives and the unequal contextual capacities of states bound to act according to its dictates. Moreover, the content of due diligence is largely dictated by the vicissitudes of time, especially in terms of scientific and technological evolution. What constitutes an appropriate standard for compliance with

2 U.N. CHARTER, art.2, para1; U.N.G.A. Res. 2849, Development and Environment, A/RES/2849 (XXVI 1972), UN General Assembly, 20 December 1971, para 4(a); UN Assembly, *Permanent sovereignty over natural resources*, A/RES/3171, UN General Assembly, 17 December 1973, A/RES/1803 (XVII 1962).

3 Günther Handl, 'Transboundary Impacts' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) ch 22, 533; Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Rep. 1949 (Apr. 9), p. 4 at 22 (9 April): "every state's obligation not to allow knowingly its territory to be used so as to cause harm to the citizens or property of other States". The rule originated in the Trail Smelter Arbitration (United States v. Canada) (1931-41) 3 RIAA 1905. The customary law status of this limitation with regard to the extent to which states may exercise their sovereign rights over natural resources can further be deduced from the decisions of the International Court of Justice in Legality of the Treat or Use of Nuclear Weapons, Advisory Opinion,I.C.J. Rep. 1996 (July 8), p. 226 and Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Rep. 1997 (Sept. 25), p.7. The rule is also codified in Principle 2 of the Declaration of the UN Conference on the Human Environment (1972) and Principle 21 of the Rio Declaration on Environment and Development (1992). The latter advises that "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".

4 United Nations Rio Declaration on Environment and Development (13 June 1992), 31 I.L.M. 874 (1992), principle 2.

5 See Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission (2001-II), Part 2, para 7.

the obligation to act with due diligence is unclear. The conditions necessary to discharge this obligation are not sufficiently definitive. This paper will be dedicated to justifying the aforementioned claims. Preliminarily, the proceeding section will consider cursorily the normative contours of due diligence as an established principle of international law.

AN OVERVIEW OF THE NORMATIVE CONTOURS OF DUE DILIGENCE

The obligation to act with due diligence developed as a necessary element of the obligation under international law to look after the territory of one's neighbour: *sic utere tuo ut alienum non laedas*,[6] which is exemplified by Principle 2 of the Rio Declaration.[7] The International Court of Justice (ICJ) in the ***Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*** pointed to the fundamental character of the obligation to act with due diligence when it stated that 'the principle of prevention, as a customary rule had its origins in the due diligence that is required of a state in its territory'.[8] It entails the duty to take appropriate measures to prevent or minimise the risks of significant transboundary harm that an activity may pose.[9] Since compliance with due diligence is conditioned on positive action it may consequently be understood as an obligation the breach of which is occasioned by an omission to do what a state will reasonably be expected to do in pre-emption of a foreseeable risk of transboundary harm presented by a developmental project undertaken by or subject to the jurisdictional control of the state.[10]

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6 Principles of neighborliness with regards to transboundary environmental harm can be traced back to the *Alabama Claims Arbitration* and subsequently, the *Trial Smelter Arbitration (United States v. Canada)* (1931-41) 3
RIAA 1905; AJIL (1939) 182. In the latter, US was ordered to pay damages and prescribe a regime for controlling future emissions from a Canadian smelter which had caused air pollution damage. The tribunal concluded that 'no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or to the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'. see 35 AJIL (1941) 716.

7 Ibid (n 3).

8 Case Concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment of 20 April 2010, 2010 I.C.J. (Apr. 20) paras. 67-158 (hereinafter Pulp Mills case), para 101. As of 2015 when *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)* were decided by the ICJ the precise scope of the obligation to act with due diligence vis a vis other international environmental obligation remained unclear. See Yotova, R, 'The Principles of Due Diligence and Prevention in International Environmental Law', The Cambridge Law Journal (2016), 75(3), 445-448

9 Prevention of Transboundary Environmental Harm 2001, art 3.

10 Günther Handl, 'Transboundary Impacts' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), The Oxford Handbook of International Environmental Law (Oxford University Press 2008) ch 22, 538.

Generally speaking, the duty to act with due diligence connotes, on one hand, the implementation of policies, legislation, and administrative controls applicable to public and private conduct which are capable of preventing or minimising the risk of transboundary harm to other states or the global environment and on the other hand, the adherence to modern scientific best practices and the adoption of current technologies.[11] On the former, the ICJ in stressing the scope of the obligation cautioned that states are further required to exercise a certain degree of vigilance in their enforcement and exercise of administrative control such as regularly monitoring the activities of the private and public operators.[12] The obligation to exercise due diligence acknowledges the practical impossibility of totally curbing significant harm yet it does not seek to suspend developmental projects where there are possibilities of significant harm.[13] The magnitude of potential harm or inherently harmful nature of a project, such as that of nuclear weapon plants, does not in and of itself render the project illegal. Responsibility for transboundary environmental damage is instead founded on a determination of whether the host state (other than the operator)[14] sufficiently discharged its due diligence obligation in preventing or minimising the harm.[15] For instance, following the Sandoz disaster, Switzerland claimed responsibility for failing to regulate spills from pharmaceutical plants to the standard required by the 1976 Rhine Chemicals Convention.[16] The infamous Sandoz disaster was caused by a fire and its subsequent extinguishing in an agrochemical storehouse resulting in the release of toxic agrochemicals into the air and seriously polluting the Rhine river. A massive casualty of wildlife downstream was recorded including the killing of a large proportion of the European eel population in the river.[17] Furthermore, in the *Pulp Mills* case (supra), the adequacy of the regulatory system of Uruguay, its environmental impact assessment (EIA) and its choice of technology were crucial in determining whether it complied with its due diligence obligation.[18] Factors such as the degree of risk, nature of the activity; its location, size of operation, special climatic conditions, the extent of territorial control, and resources available to the state, are supported by international jurisprudence as necessary

11 ILC Report (2001) GAOR A/56/10, 395-5. These have been expressed as conducts to be expected of good government. See Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd Edition, Oxford University Press 2009), 147.

12 *Pulp Mills* case (n 8) para 197.

13 ILC Report (n 11) 538-40.

14 Ibid 399, para 3; OECD, Legal aspects of Transfrontier Pollution, 380.

15 P. Birnie, (n 11) 148

16 Ibid, 147

17 Herbert Güttinger and Werner Stumm, 'Ecotoxicology: An Analysis of the Rhine Pollution caused by the Sandoz Chemical Accident, 1986' (1992) 17(2) Interdisciplinary Science Reviews < https://doi.org/10.1179/isr.1992.17.2.127 > accessed 05 September 2024.

18 P. Birnie, (n 11) 148.

in determining what conduct of the host state will be appropriate and reasonable in discharging its due diligence obligation.[19] To put in context, 'activities which may be considered ultra-hazardous require a much higher standard to enforce them'.[20]

On the other hand, the due diligence obligation requires states to keep abreast with changing trends in science and technology. This is justified on grounds that the standard of care that may be expected of a state may vary with time. In other words, a reasonable conduct today may not satisfy the threshold of reasonableness in future. For instance, it is empirically logical to expect a newly built mill to operate at higher technological standard than one built decades ago.[21] In this light, the existing international standards requires the adoption of 'best available techniques', 'best practicable means' or 'best environmental practices' in pre-emption of any significant harm.[22] States are consequently required to adopt policies and measures that are commensurate with the expert demands that come with scientific and technological advancement in order to discharge their due diligence obligation.[23]

The main strength of the obligation lies in its flexibility with regards to what should be expected of individual states in any given circumstance taking into account, inter alia, material factors concerning the relative position of the host state in responding to the risk in question.[24] The relative character of this obligation however may prove detrimental in defining the appropriate standards for regulating states' behaviour. The proceeding section will highlight perceivable frailties of the due diligence obligation in that regard.

PERCEIVABLE SHORTCOMINGS OF THE DUE DILIGENCE OBLIGATION

Issues concerning the determination of risk

Identifying the degree of foreseeable risk of harm is necessary to determining what pre-emptive measures will satisfy the threshold

19 *Alabama Claims Arbitration*; *Corfu Channel Case*, ICJ Reports (1949) 89; *Case Concerning Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980) 29-33.
20 ILC Report (2001) GAOR A/56/10, 394, para 11.
21 See *Pulp Mills case* (n 8)
22 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992, art 2(3).
23 ibid
24 P. Birnie, (n 11) 149

of reasonableness to comply with the obligation of due diligence.[25] Determining risk involves an assessment of the likelihood of harm and the significance of the anticipated effect. Risk of causing transboundary harm has been defined as 'risks taking the form of a high probability of causing significant transboundary harm and low probability of causing disastrous transboundary harm'.[26] It is not clear what threshold of risk is the object of the obligation to prevent or mitigate. The initial preference of the International Law Commission (ILC) for 'appreciable' magnitude[27] was superseded by the *Trail Smelter* requirement of a relatively high threshold, i.e. 'serious' injury.[28] Recent international jurisprudence, however, forecasts preference for 'significance' of harm.[29] Meanwhile in the ILC's understanding, 'significant harm need not be substantial but must be 'more than trivial'.[30] There's however no definition for 'more than trivial', a lacuna which provides room for uncertainties as to what the due diligence obligation of states may entail in respect of transboundary harm. Even if the element 'significant harm' is to be taken on its face value, it operates as a limitation on the overall aim of the obligation to prevent or mitigate transboundary harm. This is because an activity must be identified to have such level of risk in order to trigger the host state's due diligence obligation. For instance, based on Nicaragua's environmental studies of the impact of the dredging on its own environment and on the expert evidence presented, the Court found that Nicaragua's dredging programme did not pose a risk of significant transboundary harm. In the absence of such risk, the obligation to carry out an EIA or to notify or consult Costa Rica were not triggered.[31]

In addition to the uncertainties surrounding the magnitude of risk is the more controversial balance of interests approach that takes into account equitable considerations of circumstances of individual states in assessing the threshold of harm.[32] The uncelebrated effect of this approach, Birnie

25 ILC Report (2001) GAOR A/56/10, 391-2, para 11; 'the standard of due diligence against which the conduct of the state of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance'.

26 Prevention of Transboundary Environmental Harm (2001), art 2(a).

27 ILC, Draft Articles on International Liability, Un Doc A/CN 4/428 (1990) and on International Watercourses, II YblLC (1993) Pt 1, 112.

28 *Trial Smelter Arbitration (United States v. Canada)* (1931-41) 3 RIAA 1905;35 AJIL (1941) 716.

29 See for instance 1997 Convention on International Watercourses and 2001 Articles on Prevention of Transboundary Environmental Harm

30 ILC Report (2001) ibid 388, paras (4)-(7).

31 See *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, ICJ Reports 2015. See Yotova, R, (n 9) 446.

32 Though not yet legally accepted it has been advocated by most academics as a necessary approach in determining the magnitude of risk. See Philipe Sands and Jacqueline Peel, *Principles of International Environmental Law*, (3rd Edi, Cambridge Press, 2012), 187

rightly pointed out, 'could allow the utility of the activity to outweigh the seriousness of the harm and have the effect of converting an obligation to prevent harm into an obligation to use territory equitably or reasonably or into a constraint on abuse of rights'.[33]

Moreover, the perception of risk is subject to the exigencies of scientific and technological advancements. Taking all material environmental factors into account, the nature and extent of risk of a particular activity is expected to change in the light of increased scientific knowledge and understanding of environmental problems. Consequently, the standard of behaviour of states is expected to increase. However, for states which are slowly catching up on the pace of such advancement it may be challenging to define an objective standard of reference in relation to them. While it may be prudent to consider each state's case on its own merit, the possible effect will be creating opportunities for unfair advantage.

Issues regarding Foreseeability and the Link with the Precautionary Principle

Foreseeability is an acid test for reasonable conduct. A state cannot be required to take pre-emptive measures in response to harm which is not foreseeable. The due diligence obligation cannot be triggered where a state undertakes an activity the potentially harmful effect of which the state 'is not and could not reasonably have been aware' and which it 'did not know and could not reasonably have known'.[34] The significance of harm must be borne in mind, i.e. the state must have foreknowledge of nothing less than a 'significant harm'. Given that scientific and technological evolution influence perceptions of risk variations in what individual states would foresee as potential significant harm is expected. In this light, the threshold of due diligence becomes weaker in favour of developing states, especially if the *Trial Smelter Standard* which requires states to act only where there is a 'clear and convincing' evidence is to be considered the standard approach. The possible effect of this approach generally is to allow activities to proceed as long as their riskiness is not unequivocally established, and irrevocable harm has not been caused. Developing states may therefore leverage their level of scientific and technological acumen as justification for their inability to foresee the risks or the significance thereof. In timely counterweight to such possibility is the intervention

33 Ibid.
34 P. Birnie, (n 11) 153

of the *precautionary principle*.[35] This principle provides that lack of full scientific certainty shall not be used as reason for postponing cost-effective measures to prevent environmental degradation' where 'threats of serious irreversible damage' are present.[36] This is basically a risk-management approach that encourages decision-makers to take action when there is a possibility of harm to the public or environment, but there is no scientific certainty on the issue. However, what constitutes cost-effective measures is ideally to be determined by the state based on its capacity and given that states are keen on their economic development there is a high possibility of states overlooking certain risks where they are satisfied that the benefits of the project could cater for potential damage. Also, it is logical not to expect the host state to have foreknowledge of 'threats of serious irreversible damage' when it could not even establish the potential harm by clear evidence. Besides, it is uncertain as to what degree of scientific certainty is required for the application of the principle.

While itemisation of activities and their potential risks in international standard setting instruments may be helpful in guiding states as to what risks should be foreseeable, such approach may indirectly permit activities which are not explicitly listed. For instance, the Espoo Convention lists the construction of roads as one of the risky activities necessitating an EIA.[37] In contrast, the dredging of canals is not covered by the presumption that it too might be risky.[38] The fact that, at least, some guidance is offered by this approach in case of uncertainty cannot be overlooked.

Issues regarding the Unequal Capacities of States and Determination of 'Appropriate Standards'

Though some possible effects of varying capacities of states on establishing the content of due diligence obligation have been frequented in the above section, it is worth recalling the extent to which considerations of the circumstances of developing states may operate to lower the standard of behaviour expected of them. The essence of acknowledging this fact lies in it having been legally recognised in flagship international agreements

35 Rio Declaration on Environment and Development (1992), principle 15. The ITLOS observed in Advisory Opinion on Responsibilities and Obligations in the Area, 2011, para 135, that the precautionary principle could be considered today as 'part of customary international law'.

36 Principle 15 of Rio Declaration

37 Appendix I of ESPOO Convention (Convention on Environmental Impact Assessment in a Trans-boundary Context) 1991.

38 Yotova, R. (n 8) 448

as the principle of 'common but differentiated responsibility'[39] which balances, on the one hand, the need for all states to take responsibility for global environmental problems and, on the other hand, the need to recognize the wide differences in levels of economic development between states. The international community has however been unsurprisingly stricter in the assessment of due diligence obligation for developing states as there is a high chance of such states taking unwarranted advantage of their relative capacities to pollute the environment.[40] Arguments in favour of lower standards for developing states in respect of oil tankers and nuclear power stations, for instance, have not gained international acceptance. The application of such exceptions where developing states are required to apply the highest possible standards however, may cause undue limitation on developing states' right to develop these resources. The relative contextual capacities of states underscore the difficulty in formulating an economy-wide standard for compliance with due diligence for specific risks. Perhaps a better compromising approach will be to ascribe certain standards to be applied by all states in some circumstances. International treaties as well as EU Law therefore require states to adopt 'best available techniques' or 'best environmental practices' to mitigate the risks of environmental harm.[41] Meanwhile what may be the best of the host state may be far lower than what may be considered appropriate. It therefore leaves much to be desired if the requirements are to be interpreted subjectively than objectively. If the latter is preferred, what then will constitute the appropriate standard against which the reasonableness of the host state's conduct will be measured? As rightly noted by Birnie, the main disadvantage of the relative nature of due diligence 'is that it offers limited guidance on what legislation or technology are required in specific cases'.[42] Reference is therefore usually made to standards set by internationally recognised organisations such as the International Maritime Organisation (IMO) and the International Atomic Energy Agency (IAEA).[43] Standards set by these bodies however may not have the force of customary international law to be binding on all states. Thus, until state practice converts such standards into binding ones, states may exercise discretion according to rules of sovereignty to decide

39 Principle 7 of Rio Declaration. See Article 3(1) and 4(1) of the United Nations Framework Convention on Climate Change (UNFCCC). See also Christopher D. Stone, 'Common but Differentiated Responsibilities in International Law', AJIL Vol. 98, No.2 (Apr. 2004), 276-301.

40 P. Birnie, (n 11) 149

41 Article 194(1) of United Nations Convention on Law of the Sea (UNCLOS), 1982. See also Article 2(3) of OSPAR Convention

42 P. Birnie, (n 11) 149.

43 International Maritime Organization and International Atomic Energy Agency. See MARPOL Convention (Articles of the International Convention for the Prevention of Pollution from Ships, 1973) and Nuclear Safety Convention, 1994, adopted by the IAEA.

whether or not to be bound by a standard.

The Grand Ethiopian Renaissance Dam & Due Diligence

In 2011, Ethiopia announced the construction of a mammoth hydropower dam on the Nile River, known as the Grand Ethiopian Renaissance Dam ('the GERD'), without notifying downstream riparian states, Egypt and Sudan, and proceeded to construct. The dam was meant to cover an estimated height of 145m; 246km in length and a total area of approximately1,874km^2. The GERD will have the capacity to generate 6,000MW of electricity. The dam is expected to feed electricity into the grids of Ethiopia and its neighbouring countries with promising economic advantages for the region. A consultation process begun at the initiative of Ethiopia. An International Panel of Experts' report on the GERD requested additional studies on the project. The Parties agreed to hire international firms to conduct the study. In 2015 a Declaration of Principles between Egypt, Sudan and Ethiopia on the GERD was adopted[44] which required inter alia, the obligation to respect the outcome of the joint studies. Construction which had however already begun continued unabated without regard to the studies. Downstream riparian States viciously contended against the project citing negative impact on downstream waterflows and freshwater resources. Questions abound as to the legality of the project in international law.[45] More precisely whether or not the GERD achieves a correct balance between Ethiopia's rights and obligations under international law. Does customary international law allow Ethiopia an unfettered right to unilaterally initiate construction of the GERD and proceed in a way that disregards the dam impact studies?[46]

The due diligence obligation is well-entrenched in international watercourse law. Article 7 United Nations Watercourse Convention[47] provides that:

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44 Agreement on Declaration of Principles between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia, and the Republic of the Sudan on on the Grand Ethiopian Renaissance Dam Project, Mar. 23, 2015

45 Ranjan, A. (2024). Grand Ethiopian Renaissance Dam dispute: implications, negotiations, and mediations. *Journal of Contemporary African Studies*, *42*(1), 18–36. <https://doi.org/10.1080/02589001.2023.2287425>; Re Von R. E. Meding. (2022). 'The Grand Ethiopian Renaissance Dame: A Large Scale Energy Project in Violation of International Law?' LSU Journal of Energy Law and Resources, Vol. 10, Issue 1; Funnemark, A. (2020), 'Water Resources and Inter-State Conflict: Legal Principles and the Grand Ethiopian Renaissance Dam (GRED)' PSRP

46 Questions posed by Dr. Jasmine Moussa in her lecture on 'The Grand Ethiopian Renaissance Dam: A Catalyst For Cooperation?'

47 UN Convention on the Law of Non-Navigational Uses of International Watercourses, 1997.

1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.

2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

The combined effect of these provisions assumes the position that where irrespective of a State meeting its due diligence obligation having adopted all appropriate measures to prevent harm to others, harm nonetheless occurs, there is an obligation to consult with the affected state to eliminate or mitigate harm, with due regard to equitable and reasonable use. Thus, the project may not be illegal in itself irrespective of the potential environmental risks. The illegality would arise only in respect of non-compliance with the procedural requirements meant to safeguard the equitable interests of other states which may be directly or indirectly affected by the project. Article 5 of the UNWC states that Watercourse States shall in their respective territories *utilize* an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, *taking into account the interests of the watercourse States concerned*, consistent with adequate protection of the watercourse. Optimal utilisation is defined by the ILC in the following terms: 'attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction for all their needs, while minimizing the detriment to, and unmet needs, of each.'[48] Further Articles 11-19 of the UNWC provide that "watercourse States are under a duty to consult, exchange information and notify other States **before** implementing a planned measure", and that:

> The task before . . . [the Parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal

48 Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries, 1994.

> rights of the other [to] . . . the facts of the particular situation, and having regard to the interests of other States [with] . . . Established . . . rights ....[49]

The Declaration of Principles, which the parties voluntary adopted prescribes 'inform[ing] the downstream countries of any unforeseen or urgent circumstances requiring adjustments in the operation of GERD' and for 'sustain[ed] cooperation and coordination on the annual operation of GERD with downstream reservoirs . . . through the . . . ministries responsible for water.' Essentially Ethiopia is expected to consult, exchange information and notify.

As to whether there have been potential breaches of this procedural requirements, it is settled that international law does not support a unilateral exploitation or use of transboundary resources. The international legal frameworks on use of transboundary resources maintain a fair balance between a Sate's permanent sovereignty and the equitable interests of other states in respect of a shared resource. This is manifest in the application of the procedural rules above-mentioned. It has been projected that Ethiopia could be in potential breach of the procedural rules for instance 'by not conducting joint studies with Egypt and Sudan and initiating the filling of the dam without a subsequent agreement.'[50] It has been argued that though to some extent Ethiopia had met its obligations to carry out negotiations in good faith the country should have refrained from filling the dam reservoir altogether.[51] In the ***Indus Waters Kishenganga Arbitration***,[52] it was held that where there are several different designs, techniques or modes of operation for a planned use, there is an obligation to implement the one that is least harmful, even if this does not correspond to the 'optimal' or most cost-effective design. While negotiations continue amidst the myriad legal and political issues with which the project is fraught, the aforementioned prescriptions of the due diligence obligation must control the many considerations and hegemony of the parties as regards the project.

CONCLUSION

Environmental law is a relatively new and unsettled area of international law in need of further clarification and the due diligence obligation

49 Article 17 of the United Nations Watercourse Convention, 1997
50 Meding, (n 45) 55.
51 Ibid 56.
52 *Pakistan v India*, 2013, PCA.

has proven a vivid example in that regard. In its Advisory Opinion on Responsibilities and Obligations in the Area, the ITLOS noted that the content of the due diligence obligation 'may not easily be described in precise terms'.[53] Apparently, what constitutes a reasonable or appropriate behaviour of states at a certain moment depends on the level of scientific and technological understanding of environmental problems, the level of risk of transboundary harm a situation gives rise to, the circumstance of the host state as well as international views on appropriate behaviour in particular circumstances.

The legal character of proper standards expected of States in the context of transboundary environmental harm must be authoritatively delineated especially as cases such as the Grand Ethiopian Renaissance Dam continue to challenge the existing legal frameworks on the use of transboundary resources. The ICJ has been instrumental in recent years in that regard. For instance, until the *Pulp Mills case*[54] in 2010, it was not clear whether or not as part of ascertaining the potential transboundary risks of a project States were obligated to conduct an EIA. The preexisting rules on EIA were cast in treaties and soft law such as the 1992 Rio Declaration, the 1991 Espoo Convention on Transboundary EIA and the ILC Draft Articles on Transboundary Harm[55]. It follows that unless a State is a party to the Espoo Convention for instance, that State may not in principle be bound by any positive rule of international law to conduct an EIA in respect of projects that involve risks of transboundary harm. In the *Pulp Mills case* the ICJ pronounced astoundingly that the EIA obligation had in recent years 'gained so much acceptance among states that it may now be taken as 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…'[56] The Court affirmed that the EIA is a necessary element of the due diligence obligation and in appropriate circumstances must be carried out prior to the implementation of a project that is likely to cause significant transboundary harm.[57] Yet the scope and content of an EIA are not precisely provided for under general international law. The Court proposed that it is for each party to determine on a case-by-case basis what is required 'having regard to the nature and magnitude of the

53 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion) (Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, ITLOS Case No.17, 1 Feb. 2011), para 117.

54 *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay*), Judgment of 20 April 2010, (n 8).

55 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous activities, 2001.

56 *Pulp Mills case*, (n 8) para 204.

57 Ibid para 205.

proposed development and its likely adverse impact'.[58]

Indeed, given the growing state practice and proliferation of multilateral treaties on the requirements of due diligence obligation in the context of transboundary harm there is barely any room for States faced with litigation for transboundary environmental damage to challenge the existence of an obligation to carry out due diligence protocols. It is worth reiterating that the general rule of international law laid down in the *Corfu Channel Case*, the *Nuclear Weapons Case*, the *Trail Smelter Arbitration* and reaffirmed in the *Pulp Mills Case* that 'A State is thus obliged to use all of the means at its disposal in order to avoid activities which take place in its territory, or in an area under its jurisdiction, causing significant damage to the environment of another state'.[59]

Finally, as to what the exercise of due diligence entail, the ICJ in the Pulp Mills case enunciated that it required that 'adoption of appropriate rules and measures', 'a certain level of vigilance in their enforcement', 'the exercise of administrative control applicable to public and private operators', 'careful consideration of the technology to be used', EIA and notification.[60]

58 Ibid.
59 Ibid para 101.
60 Ibid.