

Environmental Impact Assessment in the Global Commons: Bringing Cooperation Back

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In the recent ICJ decision in the connected disputes between Nicaragua and Costa Rica, the ICJ affirmed that states are required to conduct environmental impact assessments (EIAs) when they propose activities that may pose a risk of significant harm to another state. The ICJ indicates that the obligation to conduct EIAs forms part of a state's general due diligence obligation, but the relationship between due diligence and EIA gives rise to a deeper and unresolved methodological dispute on the court respecting the identification of customary rules.

The debate over the relationship between EIA and general obligations in international law provides the background for this paper, which argues that the ICJ's account of EIAs is incomplete. While acknowledging the role of the no-harm principle, the ICJ has ignored the duty to cooperate, notwithstanding the latter duty's equally strong standing in international environmental law. Ignoring the duty to cooperate pushes the court towards a formal and sequential understanding of EIA, which undervalues the centrality of notice and consultation in EIA. In effect, viewed through the no-harm lens, EIA is understood as an entirely procedural and technical tool; whereas, if the duty to cooperate is brought back, EIA's democratic and 'other-regarding' nature is more clearly seen.

A more complete understanding of the EIAs' role in structuring state interactions over commons resources provides a more sound foundation for creating procedures that will aid states in realising collective environmental goals in the commons.



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He is the author/editor of several books, including *Global Environmental Change and Innovation in International Law*, (Cambridge University Press 2018), *Climate Change Policy in North America: Designing Integration* (UTP 2013), *Public Law: Cases, Materials and Commentary* (Emond Montgomery 2011) and *The International Law of Environmental Impact Assessment: Process Substance and Integration* (CUP 2008), in addition to numerous book chapters and journal articles. He is a Senior Fellow at the Centre for International Governance Innovation (CIGI), Co-director of the BSIA/CIGI International Law Summer Institute, and, from 2011 to 2017, he served as the Director of the School of Environment, Enterprise and Development at the University of Waterloo.

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