

EIA in Protection and Preservation of the Marine Environment: A preliminary Study

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01 | The Origins of EIA



1.1 Definiation of EIA

Environmental impact assessment (EIA) is a key mechanism in international environmental law and a commonly used mechanism for states to gain knowledge of the environmental consequences of actions they authorize or participate in.

The *Espoo Convention on Environmental Impact Assessment* describes it as

“a national procedure for evaluating the likely impact of a proposed activity on the environment.”



1.1 Definiation of EIA

UNEP's Goals and Principles of EIA describes:

“EIA is a democratic, scientific and public-participatory procedure that assesses the potential environmental impacts of a proposed activity, examines alternative plans, proposes measures to prevent, control or reduce relevant impacts and monitors implementation of the assessment outcomes.”



1.2 Classification of EIA

According to effected areas :

- Transboundary Environmental Impact Assessment (TEIA)
- Global Commons Environmental Impact Assessment (GCEIA)



1.2 Classification of EIA

TEIA

1. Classic example:

Upstream and downstream state

2. Actual cases:

1) Burning of forests and land in Indonesia, which creates haze pollution consisting of smoke and dust which spreads across national borders and causes human health problems in Singapore and Malaysia.

2) Colombia's aerial spraying of toxic herbicides to coca leaf plantations on locations near its border with Ecuador as part of Colombia's "war on drugs" causing damage to people and the natural environment in Ecuador.



1.2 Classification of EIA

GCEIA

1. The areas beyond state's jurisdiction
2. Example:
 - 1)The Antarctic: Antarctic treaty system
 - 2)The Arctic :*Guidelines for Environmental Impact Assessment in the Arctic*(1994)
 - 3)International seabed area:UNCLOS,Seabed Advisory(2011)



1.3 Sources of EIA

National

1. National Environmental Policy Act of 1969, US (the very first)
1. Environmental Impact Assessment Directive of 1985 (85/337CEE), EC



1.3 Sources of EIA

Regional

1. Nordic environment protection convention , 1974
2. ASEAN agreement , 1985
3. Convention on the Protection of Natural Resources and the Environment in the South Pacific region, 1986
4. Convention on Environmental Impact Assessment in a Transboundary Context (**Espoo Convention**),1991
5. Protocol for the Antarctic Treaty on Environmental Protection, 1991
6. Oslo Paris Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), 1992
7. Air quality Agreement between the United States and Canada, 1991
8. North American Agreement on Environmental Cooperation (NAAEC), 1993
9. Guidelines for Environmental impact Assessment and the Caspian Sea Coastal Environmental Protection Agreement (Tehran Convention), 2003



1.3 Sources of EIA

Global

1. Kuala Lumpur Convention for the Protection of Nature and Natural Resources, 1985
2. United Nations Convention on the Law of the Sea, United Nations Environment Programme Regional Seas Convention and Plan of Action, 1982
3. Basel Convention on Transboundary Movements and Disposal of Hazardous Wastes, 1989
4. United Nations Framework Convention on Climate Change, 1992
5. Convention on Biological Diversity, 1992
6. Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention), 1992
7. Annex II to the Protocol to the Dumping Convention, 1996
8. United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, 1997
9. Berlin rules on Water Resources, 2004



1.3 Sources of EIA

International Customary Law

1. Prohibition of transboundary environmental harm (no-harm rule)

The use of one's own property shall not prejudice the interests of others;

States may not conduct or permit activities within their territories, or in common spaces, without regard to other states or for the protection of the global environment.

2. Requirements for prior transboundary environmental impact assessment

The commentary to article 29 of the Berlin Rules clearly states: "the International Law Association recognizes that the practice of transboundary environmental effects has formed practice in international law, at least with regard to transboundary effects."



1.3 Sources of EIA

Soft Law

1. Stockholm Declaration, 1972
2. Rio Declaration, 1992

Article 17: “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.”

3. Agenda 21, 1992
4. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (Articles of Prevention), ILC, 2001
5. United Nations Draft Articles on the Law of Transboundary Aquifers, ILC, 2006



02

EIA in General International Law



- ◆ Where an activity to be undertaken by a State may involve the risk of damage to the environment, requiring the State to adopt an EIA has become a **rule of customary international law**. And this has been recognized by international treaties and international practice.



2.1 Espoo Convention

Article 2:

“3. The Party of origin shall ensure that in accordance with the provisions of this Convention an EIA is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

EIAs as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent appropriate, the Parties shall endeavour to apply the principles of EIA to policies, plans and programmes.”



2.1 Espoo Convention

Article 2:

- **“a proposed activity”**:

This provision shifts the scope of EIA from the direct obligations of States in UNEP Goals and Principles to obligations based on the proposed activity.

- **transboundary impact**

The scope is transboundary EIA. Global Commons' EIAs are different. (the affected party, consultation)

- **principles of EIA to policies, plans and programmes.**

The scope of EIA not only include proposed activity under state's jurisdiction or control, but also embrace the the policies, plans and programmes.(SEA)



2.1 Espoo Convention

- **a significant adverse**
- This criterion is difficult to quantify. To what extent is it a “significant adverse”?
- The Convention therefore determines whether an activity is a “significant adverse” in two ways: (1) the enumeration of projects that are bound to have a significant environmental impact; and (2) the promotion of discussions and consultations among parties on specific projects.
- In addition, in some exceptional cases, even if the proposed boundary activity is not an item listed in the Convention, it should be studied if the project has a significant environmental impact, as proposed by one of the parties. Further, parties may make new agreements to regulate the issue.
- According to the commentaries to the Articles on Prevention the threshold shall be measured by “factual and objective standards.”



2.1 Espoo Convention

The **content** of EIA report was listed in Espoo Convention's Annex II:

Information to be included in the EIA documentation shall, as a minimum, contain, in accordance with Article 4:

- (a) A description of the proposed activity and its purpose;
- (b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;
- (c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives; and
- (d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;



2.1 Espoo Convention

- (e) A description of mitigation measures to keep adverse environmental impact to a minimum;
- (f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
- (g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;
- (h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and
- (i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.)”

In Pulp Mills case, ICJ refused to clarify the scope and content of EIA.



2.1 Espoo Convention

The Espoo Convention defines EIA as “a national procedure for evaluating the likely impact of a proposed activity on the environment.”

- national procedure , refer to international law
- no discriminatin rule/state sovereignty
- That is to say, the development and procedure of EIA is a matter within the state sovereignty, and the state has the discretion.
- But at the same time, the state should also fulfill the rules of international law on EIA, including international treaties and international customary law.
- EIA procedural shall refer to the Articles on Prevention, especially the obligations of cooperation in good faith, and of prior notification, consultation and negotiation. Article 4 require states to “cooperate in good faith” in preventing significant transboundary harm or at any event in minimizing the risk thereof.



2.2 Practice of ICJ

In judicial practice, EIA has evolved gradually from a treaty-based obligation to an international customary law obligation.

For the first time, the ICJ requires states to consider environmental protection and conduct EIA before planned activities.

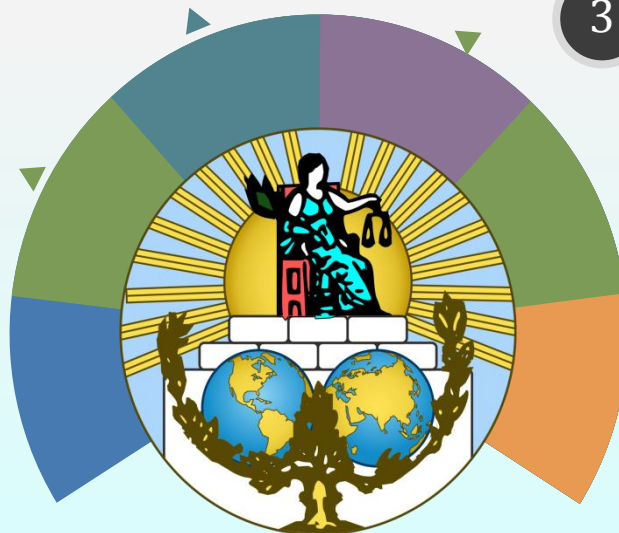
2 Gabčíkovo-Nagymaros :

1 Nuclear tests II:

This case evidences an emerging recognition of a customary obligation to conduct transboundary EIA among the parties and the dissenting judges.

3 Pulp Mills:

For the first time, the ICJ has elevated environmental impact assessments to a position as a general obligation under international law, requiring all States to comply with



2.2 Practice of ICJ

1995, Nuclear test II case , New Zealand VS France

- France decided to carry out a series of underground nuclear tests in the South Pacific.
- Whether these new tests would violate the rights under international law of New Zealand and other states, and that it was unlawful for France to undertake the tests without first conducting an environmental impact assessment.
- New Zealand discussed the concept of environmental impact assessment and “its evolution into a legal requirement” in depth in its pleadings.



2.2 Practice of ICJ

1995, Nuclear test II case , New Zealand VS France

- New Zealand claimed that France had a clear obligation to undertake an EIA and share its result with the countries in the region before conducting further testing, and that this duty had not been fulfilled. This assertion was based both on treaty law and on customary international law.
- New Zealand tied the duty to conduct an EIA directly to the obligations of environmental protection.
- New Zealand claimed that France could not know that it was meeting its obligation to take appropriate measures to prevent pollution without having first carried out an EIA.



2.2 Practice of ICJ

1995, Nuclear test II case , New Zealand VS France

The dissenting opinion :

- Judge Weeramantry, who indicated that an obligation to conduct EIAs existed separate from treaty law. He found that such an obligation was “gathering strength and international acceptance, and has reached the level of general recognition at which the Court should take notice of it”.
- Judge Palmer emphasized that states have a legal duty before initiating an activity, to establish that the activity does not involve any unacceptable risk to the environment and that an EIA is “simply a means of establishing a process to comply with that international legal duty”.



2.2 Practice of ICJ

1997, Gabčíkovo-Nagymaros case , Hungary VS Czechoslovakia (Slovakia)

- In Gabčíkovo-Nagymaros it was asserted by Hungary that an EIA had not been carried out before the construction of the project on the Danube River. The treaty concerning the construction and operation of the Gabčíkovo-Nagymaros system had provisions on environmental protection, but none that expressly required undertaking of EIAs. Still, the question **whether adequate EIAs had been conducted was discussed by the parties, and none of the parties denied that they had a legal obligation to conduct EIAs.**



2.2 Practice of ICJ

1997, Gabčíkovo-Nagymaros case , Hungary VS Czechoslovakia (Slovakia)

- Judge Weeramantry found that “this(EIA) followed from the treaty concerning the construction and operation of the Gabčíkovo-Nagymaros system”, but also clearly expressed the view that the obligation was a general one, stating that it is “a specific application of the larger general principle of caution”.
- Judge Weeramantry tied the obligation to conduct EIA tightly to the duty to prevent significant environmental harm.



2.2 Practice of ICJ

2010, Pulp Mills case , Uruguay VS Argentina

Legal status: accepted by states, customary obligation

- In Pulp Mills, the majority of the Court finally expressly acknowledged that **a prior EIA is a requirement of general international law, and thus an obligation not dependent on basis in treaty law.**
- The obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.



2.2 Practice of ICJ

2010, Pulp Mills case , Uruguay VS Argentina

Scope and Content: ICJ unanswered what the scope and content of such an obligation is.

- The Court found that neither the 1975 Statute(treaty) nor general international law specified the scope and content of an environmental impact assessment”.
- Each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case,
- having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.



2.3 Articles on Prevention

Following the international community's recognition of a need for more generalized rules and principles regarding transboundary harm issues, the ILC was given the task of formulating a legal framework built on the Trail Smelter decision and the Stockholm Declaration's Principle 12/2.

- The work was initiated in 1978 under the topic “International liability for injurious consequences arising out of acts not prohibited by international law”.
- Finally two documents are formed:
- the 2001 *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* (Articles on Prevention) and
- the 2006 *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities* (Principles on Allocation of Loss).



2.3 Articles on Prevention

- The Articles on Prevention contains transboundary EIA clauses, which requires an assessment of the potential impact of a project or activity on individuals, property and the environment in other countries.
- This treaty is a codification activity with far-reaching implications for customary law and general international law.



2.4 International organization's practice

- At present, EIA has been widely supported and used in international law. A number of international organizations concerned with environmental protection, including the OECD, FAO, and the UNEP, have adopted recommendations or declarations to support EIA.
- International financial institutions play an important role in transboundary EIA. Almost all infrastructure projects funded by multilateral development banks or assisted by other international development agencies now require an EIA process to assess their potential domestic, transboundary and global commons environmental impact.



03

EIA under UNCLOS and ITLOS



3.1 Articles relation to EIA under UNCLOS

Article 206: Assessment of potential effects of activities

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.”



3.1 Articles relation to EIA under UNCLOS

Article 205: Publication of reports

States shall publish reports of the results obtained pursuant to Article 204 or provide such reports at appropriate intervals to the competent international organisation, which should make them available to all States.



3.1 Articles relation to EIA under UNCLOS

Article 204

Monitoring of the risks or effects of pollution

1. States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organisations, to observe, measure, evaluate and analyse, by recognised scientific methods, the risks or effects of pollution of the marine environment.
2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.



3.1 Articles relation to EIA under UNCLOS

- “Although articles 204-206 of UNCLOS require States to consider EIA in ocean governance, it does not impose substantive obligations on EIA, nor does it even require EIAs, but it only requires evaluation.”(BOYES)
- According to the preparation documents, an EIA provision had not been seriously opposed by any State. Finally, this article does not use “environmental impact assessment” or nor does it use “environmental impact statement” referred to in the draft article.
- Articles 204-205 provide the basic requirements on EIA, in particular the threshold to initiate EIA, rights and obligations of the States and channels of information exchange.



3.1 Articles relation to EIA under UNCLOS

Scope

Article 206 “all planned activities under national jurisdiction or control”

geographical scope of the obligation is very broad: areas under states jurisdiction and beyond states jurisdiction (TEIA and GCEIA)

all planned activities: irrespective of the nationality of the person or entity (Virginia Commentary) (states and private subjects)

activities: limited only to “activities” and not to national policies, national strategies (SEA)



3.1 Articles relation to EIA under UNCLOS

Content

Articles 205 and 206 do not provide any definition of the content of environmental assessment, only in article 205 requires states to “publish reports of the results obtained pursuant to Article 204.”
What exactly does the report and results include?

At least two aspects:

“the risks or effects of pollution of the marine environment”.

“whether these activities are likely to pollute the marine environment”.



3.1 Articles relation to EIA under UNCLOS

Threshold to Initiate

From the text, to initiate EIA, two basic conditions should be satisfied: “reasonable grounds” and “may cause substantial pollution of or significant and harmful changes to the marine environment”.

“reasonable grounds”:the countries concerned have a certain discretion in this respect(Virginia Commentary)

“substantial pollution of or significant and harmful”: the commentary does not address; Each country has discretion to determine the threshold of “significant and harmful”.

In fact , this standard is stricter than “significant”.



3.1 Articles relation to EIA under UNCLOS

- **Procedural Obligations**

“Communication” obligation:

Article 205: “States shall publish reports of the results to the competent international organisation”.

- a “competent international organisation”: capacity? which one?
- no special provisions for countries and people who are seriously affected

“Monitoring” obligation : prior EIA /continuous monitoring

A prior EIA can never anticipate every possible environmental danger, and that “the greater the size and scope of the project, the greater is the need for a continuous monitoring of its effects



3.1 Articles relation to EIA under UNCLOS

- **Procedural Obligations**

However, article 206 and related articles do not refer to other procedural obligations such as notification, information, consultation, negotiation, or substantive obligations, such as the duty of care and diligence.



3.1 Articles relation to EIA under UNCLOS

- **SUMMARY**

Article 206 is vague and unclear, which does not have operational standards. This clause does not adopt the term “environmental impact assessment”, but is simply called “assessment of potential effects of activities”. Therefore, it is not enough to invoke this article alone on the MEIA. Attention should also be paid to the general rules of international law for EIA, especially Espoo Convention and judicial practices.



3.2 Practice of ITLOS

- **MOX Plant case**
- **2001, Ireland V. United Kingdom, International Tribunal for the Law of the Sea, Request for provision measures**



3.2 Practice of ITLOS

1. Content of EIA

- Ireland claimed that the United Kingdom has breached its obligation under article 206 of UNCLOS in relation to the authorisation of the MOX plant, including by
 - “(a) failing, by its 1993 Environmental Statement, properly and fully to assess the potential effects of the operation of the MOX plant on the marine environment of the Irish Sea; and/or
 - (b) failing, since the publication of its 1993 Environmental Statement, to assess the potential effects of the operation of the MOX plant on the marine environment by reference to the factual and legal developments which have arisen since 1993, and in particular since 1998; and/or



3.2 Practice of ITLOS

- (c) failing to assess the potential effects on the marine environment of the Irish Sea of international movements of radioactive materials to be transported to and from the MOX plant; and/or
- (d) failing to assess the risk of potential effects on the marine environment of the Irish Sea arising from terrorist act or acts on the MOX plant and/or on international movements of radioactive material to and from the MOX plant.”

The Tribunal did not answer Ireland's claim directly.
Different cases have different EIA reports.



3.2 Practice of ITLOS

2. precautionary principle/proof burden/ assurances

- Ireland argues that the precautionary principle places the **burden** on the United Kingdom to demonstrate that no harm would arise from discharges and other consequences of the operation of the MOX plant.
- United Kingdom argues that Ireland has failed to supply **proof that** there will be either **irreparable damage** to the rights of Ireland or **serious harm** to the marine environment resulting from the operation of the MOX plant and that, on the facts of this case, the precautionary principle is not applicable.
- The Tribunal did not clarify the application of precautionary principle and the burden of proof, but considered the assurances of the United Kingdom's statement.



3.2 Practice of ITLOS

- The United Kingdom stated further that “there will be no export of MOX fuel from the plant until summer 2002” and that “there is to be no import to the THORP plant of Spent unclear fuel pursuant to contracts for conversion to the MOX plant within that period either”.
- Considering the assurances given by the United Kingdom, the Tribunal does not find that the urgency of the situation requires the prescription of the provision measures requested by Ireland.
- **Assurances=release from proof buren (only once)**



3.2 Practice of ITLOS

3. irreparable damage or serious harm

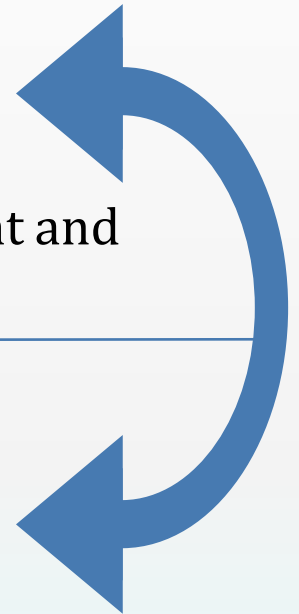
- Article 206 of UNCLOS: “substantial pollution of or significant and harmful”
-

Early stage

- Trail Smelter: “serious consequences”
 - Lac Lanoux: “serious injury”
 - Gabčíkovo-Nagymaros: “substantial damage”
-

Recently

- Aerial Herbicide Spraying: “significant deleterious effects”
- Pulp Mills: “significant damage”
- Espoo Convention: “significant adverse”



3.2 Practice of ITLOS

According to the commentaries to the Articles on Prevention, “significant” is “something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial’”.

The requirement of UNCLOS is close to that expressed in the Trail Smelter and Lac Lanoux cases.



3.2 Practice of ITLOS

4. Other procedural obligations

- Although article 206 of UNCLOS does not mention other procedural obligations, the juridical practice of ITLOS also refer to other obligations.
- In the view of the tribunal, “prudence and caution require that Ireland and the United Kingdom **cooperate in exchanging information** concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate.”



3.2 Practice of ITLOS

“Ireland and the United Kingdom shall **cooperate** and shall, for this purpose, enter into **consultation** forthwith in order to:

- (a) Exchange further **information** which regard to possible consequences for the Irish Sea arising out the commissioning of the MOX plant;
- (b) **Monitor** risk or the effects of the operation of the MOX plant for the Irish Sea;
- (c) **Devise**, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.”



3.2 Practice of ITLOS

SAMMARY

- Article 206 of the United Nations Convention on the Law of the Sea defines the basic elements of MEIA, but does not provide operational rules.
- In addition to the application of article 206, ITLOS also refers to an international law on EIA.



Observation

- Environmental impact assessment (EIA) is a key mechanism in international environmental law to prevent environmental damages.
- EIA has become a rule of customary international law. And this has been recognized by international treaties and international practice.
- The scope and content of such an obligation is still unanswered .
- Articles 204-206 of UNCLOS, esp. Article 206, are vague and unclear, which does not have operational standards on substantial and procedure. it is not sufficient to invoke this article alone on the MEIA.
- Case under ITLOS provides some insights on MEIA.
- More judicial practices are needed for elaborating the scope, content and its procedure requirements of EIA.



Thanks! Comments?

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