C2 - No Significant Harm and Transboundary Environmental Impact Assessment

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Scope: This class presents three principles that govern the implementation of the no-harm rule, namely the obligation of notification and consultation, the duty to carry out an Environmental Impact Assessment (EIA) and the principle of public participation. These principles are presented as 'environmental' techniques that prevent significant harm from occurring and that contribute to the prevention of disputes between riparian States. First, the class illustrates the principle of notification and consultation through State and international practice, including an analysis of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (the UN Watercourses Convention or UNWC). Secondly, it describes the procedural steps required to carry out an EIA, focusing on the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context and other international instruments. Thirdly, it examines the requirements of public participation during an EIA under the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and other international practice. The class illustrates these three principles by examining case studies at the basin level, including the 2002 Senegal River Water Charter, the 2008 Niger Basin Water Charter and the 2012 Lake Chad Basin Charter and case law of the International Court of Justice (ICJ).
Purpose: The class will answer the following questions:

1. What are the conditions triggering the duty of notification and consultation and the obligation to carry out an EIA?
2. What must an EIA contain?
3. What are the requirements for public participation during an EIA?

Methodology: The methodology combines the study of agreements adopted at the universal, regional and basin levels with an analysis of case law. Pertinent State and international practice will be made available to participants. It is expected that participants will become familiar with international practice and will be able to compare international instruments and identify emerging common trends. The group exercise includes discussion forums in which participants will share their knowledge of specific basins. The second proposed exercise consists in writing a short report. This assignment will be submitted by groups of two or three participants.

Site: UNITED NATIONS INFORMATION PORTAL ON MULTILATERAL ENVIRONMENTAL AGREEMENTS
Course: The "Greening" of Water Law: Implementing Environment-Friendly Principles in Contemporary Water Law
Book: C2 - No Significant Harm and Transboundary Environmental Impact Assessment

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1. Key issues

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- The scope and content of an EIA.
- Public participation during the procedure of an EIA.

2. Introduction

The obligation of notification and consultation, the duty to carry out an EIA, and the principle of public participation during an EIA, are three essential requirements in the management and protection of transboundary water resources. The basic rationale of these obligations is to prevent adverse transboundary effects on other watercourse states. Thus, these duties appear as mechanisms to avoid disputes by creating the conditions for cooperation through notification, consultation, exchange of EIA and participation of the public. Ensuring the respect of these obligations is crucial for the protection of the environment.

3. The Principle of Notification and Consultation

The principle of notification and consultation is vastly enshrined in agreements on transboundary water resources. Among the global instruments relating to international watercourses that address the issue of prior notification, reference should be made to Articles 12-19 of the UN Watercourses Convention and Article 15 of the International Law Commission's Draft Articles on the Law of Transboundary Aquifers. Article 10 of the United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention), calls for consultations between riparian parties on the basis of reciprocity, good faith and good neighbourliness.

Specific watercourses agreements also contain detailed obligations on notification. Examples are the 1973 Treaty Concerning the Rio de la Plata and the Corresponding Maritime Boundary (Arts. 17-22), the 1975 Statute on the Uruguay River (Arts.7-13), the 2002 Water Charter of the Senegal River (Arts.24-26), the 2008 Water Charter of the Niger Basin (Articles 19-24) and the 2012 Water Charter of the Lake Chad Basin (Arts. 52-60). The Institute of International Law and the International Law Association (ILA) have both contributed to the development of the principle of notification and consultation. The ILA Seoul Complementary Rules Applicable to International Water Resources of 1986 (Art. 3) and the Berlin Rules on Water Resources of 2004 make reference to the duty to notify and to consult (Arts. 57-58). The arbitral tribunal in the *Lake Lanoux* case clarified the basis of notification stating that: "A state wishing to do that which will affect an international watercourse cannot decide whether another state's interest will be affected; the other state is the sole judge of that and has the right to information on the proposals" (p.15).

The obligation of notification provides that a watercourse state which plans to carry or permit activities that may cause a significant adverse transboundary environmental effect to another state shall give timely notification of such planned activities to such other state and enter into consultation in good faith. This obligation covers measures planned both by a watercourse state and private entities.

3.1. The triggering condition for the implementation of the obligation of notification

In the analysis of the principle of notification, there are questions that need to be addressed such as what kind of 'activities' and 'transboundary adverse effect' are concerned by the obligation of notification. It appears from state and treaty practice that identification of relevant activities and the form of injuries do not lend themselves to a single formula. For example, Article 12 of the UN Watercourses Convention requires notification "for planned measures which may have a significant adverse effect upon other watercourse states." As a global instrument, the UNWC Convention does not draw a list of activities that would necessitate a notification requirement. Specific rules for the activities requiring a notification procedure may be enshrined in regional agreements or treaties at the basin level.

In the UNECE region, the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) lists activities that require notification in its Appendix I. It includes among other things, oil refineries, coal gasification plants, thermal power stations, large diameter oil and gas pipelines, trading ports, waste disposal installations for incineration, chemical treatment or landfills of toxic and dangerous wastes, offshore hydrocarbon production, and major storage facilities for petroleum, petrochemical and chemical products. At the initiative of any of them, concerned states can enter into discussions on whether other activities, not listed in Appendix I, are likely to cause a significant adverse transboundary impact and should be treated as if they were listed (Art. 2.5).

International law does not define in a strict manner the gravity threshold that requires notification prior to implementation. Very often, practice requires that the transboundary harm must present some level of gravity. The procedure of notification of the UNWC is triggered by the criterion that measures planned by a watercourse state may have "significant adverse effect" upon other watercourse states. Attempting to clarify what the term "significant" means, the UN Sixth Committee convened as a Working Group of the Whole issued as Statement of Understanding. This statement affirmed that the "term 'significant' is not used in this article or elsewhere in the present Convention in the sense of 'substantial' […] While such an effect must be capable of being established by objective evidence and not be trivial in nature, it need not to rise to the level of being substantial." In the 1978 United Nations Environment Programme (UN Environment) Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, this criterion has been interpreted as "any appreciable effects on a shared natural resource, and excludes "de minimis" effects". The criterion of the "significant adverse effect" should be determined case by case and on the basis of objective evidence.

3.2. Time of notification

To ensure that notification is not to be deprived of practical significance, practice sets a timeliness condition. The ILC has defined the term “timely notification” as “intended to require notification sufficiently early in the planning stages to permit meaningful consultations and negotiations” (1994 ILC Commentaries, p.111). The ICJ confirmed this in considering that “notification must take place before the state concerned decides on the environmental viability of planned measures” (ICJ, *Pulp Mills on the Uruguay River*, 2010, para. 120).

3.3. Consultation process

The duty to consult appears as the process that ensues if the potentially affected state does not agree with the planned measures. The purpose of consultations is for the parties to find acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm, or at any event to minimize the risk of harm. The principle of good faith is an integral part of any requirement of consultations and negotiations (*Lake Lanoux* case, 1957, p.16).

A number of agreements provide for notification and consultation through an institutional mechanism established to facilitate the management of transboundary water resources. Examples are the 2002 Charter on the Waters of the Senegal River (Art. 24), the 2008 Charter on the Niger River Basin (Art.20) and the 2012 Water Charter for the Chad Lake Basin (Art.52).

4. The Duty to Carry Out a Transboundary EIA

The no-harm principle is the basis for the requirement for a state planning a project on an international watercourse to conduct an EIA where activities undertaken within its territories are likely to have a significant impact in the territory of another state. In order to prevent harm to the environment of other watercourse states, the EIA must be conducted prior to the implementation of a project and before operations have started. Also, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken (Art. 7 of the Espoo Convention; *Pulp Mills* case, para. 205).

The transboundary obligation to carry out EIA has been included in international instruments such as the 1991 Espoo Convention and the 1987 UN Environment Goals and Principles of Environmental Impact Assessment.

The duty to carry out an EIA is strictly related to the obligation of notification. The requirement to produce an EIA among the elements of notification has gained attention in practice. The EIA is perceived as a vehicle for providing relevant information and data. For example, Article 12 of the UN Watercourses Convention provides that "notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified states to evaluate the possible effects of the planned measures." Article 24 of the Water Charter of the Senegal River enters into more detail by stating that "The notification must be done in good time and be accompanied by all technical data necessary to its evaluation, in particular the impact studies." Similarly, the ICJ in the *Pulp Mills* case between Argentina and Uruguay pointed out "the need for a full environmental impact assessment in order to assess any significant damage which may be caused by a plan" (para. 116). In this regard, the Court considered that EIA is a customary law obligation (para. 204).

4.1. The scope and content of an EIA

General international law does not prescribe the scope and content of an EIA. The domestic legislation of each state or the authorization process for a project determines the content of an EIA. There are, however, some minimum requirements watercourse states should take into account when planning a project with likely adverse impact on the environment of other states. Some international instruments specify the content of an EIA, including the 1991 Espoo Convention and 1987 UN Environment Goals and Principles of EIA. An assessment of a projected activity or use of a watercourse will need to clearly identify likely environmental harms, predict their potential impacts and assess the significance of those impacts. The results of the EIA must be made available to affected states. It should be included in the documents that the notifying state submits to the notified state to evaluate the possible effects of the planned measures. These documents must also form the basis of consultations between watercourse states. Minimum criteria of an EIA include a description of the proposed activity, a description of potential impacts on the environment, the assessment of alternatives, the identification of possible measures to mitigate adverse environmental impacts of the proposed activity, the indication of gaps in knowledge and uncertainties which may be encountered in complying the information (Appendix II of the 1991 Espoo Convention; Principle 4, 1987 UN Environment Goals and Principles of Environmental Impact Assessment).

4.2. The principle of public participation

Public participation in the screening, scoping and study of the stages of environmental assessment forms part of process under the Espoo Convention. The requirement to provide opportunities for public participation extends to the members of the public of the affected state. For example, Article 2(6) of the Espoo Convention provides that the state of origin of a project shall provide opportunities of participation to the public of the affected state that are equivalent to the opportunities available to the public in the state of origin of the project. The right to public participation in the context of EIA has also been recognized in the 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). In essence, the state planning a project shall treat the public of the affected state no differently than its own citizens. In the *Pulp Mills* case, the ICJ found that the duty of a state of origin of a project to afford rights of public consultation to the public of an affected state is not required by international law. But, in light of the increased recognition of individual rights in relation to the environment in international law, the conclusion is open to question. The conclusion should be restricted to the particular legal instruments governing the relations between parties to that dispute.

The Aarhus Convention and Principle 10 of the 1992 Rio Declaration on Environment and Development emphasize the commitment of states to provide opportunities for participation in decision-making processes. They support the extension of participatory rights in EIA to the public of the affected states. Both the Espoo (Arts. 2.6 and 3.8) and Aarhus Conventions (Arts. 2.5, 6, 9.2) do not differentiate between the obligations owed to one's own citizens and the citizens in other states. Rather, the obligation to engage the public is owed to citizens regardless of their geographic location. In this regard, the EIA is one mechanism that implements the obligation to engage the public. It does so by affording rights of prior notification and consultation to any member of the affected public.

5. Conclusion

The basic rationale underlying the obligation to notify and consult is to prevent adverse transboundary effects on other states. For its part, the obligation to carry out an EIA provides states with an opportunity to apply environmental principles to concrete project proposals. The theory that underlies EIA is that decisions should be made with appropriate information and in a consultative and transparent environment. The respect of these criteria will produce outcomes that are more likely to be accepted by those impacted by the decision. In this regard, the EIA is also a mechanism to engage the public by affording rights to participate effectively during environmental decision-making.