Developments in International Law of EIA and their Relation to the Espoo Convention

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1. Intro: Pulp Mills – the obligation to do an EIA

The International Court's 2010 judgment in *Pulp Mills on the River Uruguay*[1] is the most significant authority on EIA in general international law. It is the first occasion on which an international court has held that prior assessment of transboundary impacts is not merely a treaty based obligation but a requirement of general international law. It is also the first case to consider the content of such an EIA. The case arose out of the construction of a wood pulp mill in Uruguay. Effluent from the mill would be discharged into the River Uruguay, which forms the border with Argentina. There is no reference to EIA in the 1975 Statute of the River Uruguay, the applicable law in the dispute, nor are Argentina or Uruguay parties to the 1991 Espoo Convention on Transboundary EIA. Uruguayan law nevertheless required an EIA for a project of this kind and one was duly carried out by Botnia, the company which owned the plant, and two further EIAs were also produced by consultants acting for the IFC, which funded the construction work.

Accepting the arguments of both parties on this point, and in accordance with the Vienna Convention on Treaties, Art 31(3)(c), the International Court found that:

> "the obligation to protect and preserve, under Article 41 *(a)* of the Statute [of the River Uruguay], 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. Moreover, *due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised*, if a party planning works liable to affect the régime of the river or the

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[1] 2010 ICJ Reports. The author was counsel for Uruguay in this case, but the views expressed here are given in a personal capacity.

quality of its waters *did not undertake an environmental impact assessment* on the potential effects of such works." (at para. 204)

This finding treats transboundary EIA as a distinct and freestanding obligation in international law – reflecting Principle 17 of the Rio Declaration on Environment and Development, the Espoo Convention, and Article 7 of the ILC draft articles on transboundary harm. Nevertheless, the court also endorsed the alternative view that EIA is a necessary element of the general obligation of due diligence in the prevention and control of transboundary harm, suggesting that the content of the obligation may evolve over time, and will reflect the capabilities of the party concerned and the particular circumstances of the case. Either way, the Court has now confirmed that in appropriate circumstances an EIA must be carried out *prior to the implementation* of a project that is likely to cause significant transboundary harm. (para. 205) Moreover, it also held that "once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken." (ibid).

Principle 17 of the Rio Declaration calls for an EIA to be undertaken for 'proposed activities that are likely to have a significant adverse impact on the environment'. In accordance with the precautionary principle, Principle 17 sets a low threshold of proof when deciding whether an EIA is necessary. Most formulations are similar.[2] Article 7 of the ILC's Articles on Prevention of Transboundary Harm refers merely to "possible transboundary harm." Article 206 of the 1982 UN Convention on the Law of the Sea requires only "reasonable grounds for believing that planned activities ... *may* cause substantial pollution of or significant harmful changes to the marine environment..."

The practice of the parties in *MOX Plant* and *Pulp Mills* similarly shows that, where activities with a known risk of potentially significant pollution are involved, the necessity of an EIA can be presumed, even if the actual risk is a small one[3]. In two other cases the

[2] ILC, 2001 Articles on Transboundary Harm, Arts. 1, 2(a), 7; 1987 UNEP Goals and Principles of Environmental Impact Assessment , Principle 1; 1982 UNCLOS, Art. 206; 1991 Convention on Transboundary EIA, Art. 2(3); 1992 Convention on Biological Diversity, Art. 14.

[3] *MOX Plant Case (Provisional Measures)* ITLOS No. 10 (2001); *Pulp Mills Case (Provisional Measures)(Argentina v. Uruguay) ICJ Reports 2006*.

ITLOS found that the risk of harm to the marine environment 'could not be excluded'[4]: in *Land Reclamation* it expressly ordered the parties to assess the risks and effects of the works, while in *Southern Bluefin Tuna* its order allowed catch quotas to be increased by agreement only after further studies of the state of the stock. The outcome in these cases shows that an EIA must be undertaken if there is some evidence of a risk of significant harm to the human or natural environment – even if the risk is uncertain and the potential harm not necessarily irreparable.

The process employed for carrying out an EIA is not set out in any international instrument. An EIA will normally take place before authorisation is granted, but it may occur in several stages, for example in schemes which require an "initial environmental examination" followed by a full EIA only if a likelihood of significant harm is then identified.[5] In cases involving complex projects, where the time between initial authorisation and eventual operation is prolonged, it may be necessary to conduct several EIAs - or at least to review and revise the initial EIA - before a plant is authorised to commence operations. Some states rely on the operator or developer to carry out the EIA, subject to approval by an environmental agency or ministry. This was the model adopted by Uruguayan law and challenged unsuccessfully in *Pulp Mills*. In other legal systems a more formal process is conducted by independent inspectors. This model is the one used by the IFC, also challenged unsuccessfully in *Pulp Mills*, although the first EIA carried out for the IFC had to be redone following a critical report by the IFC ombudsman.

The International Court's conclusion that transboundary EIA is a requirement of customary or general international law is no surprise given the growing body of treaties that require one, including the Espoo convention, as well as the instances of state practice and the policies of international lending agencies. Few states faced with litigation are likely to deny that there is an obligation in international law to carry out a transboundary EIA and Uruguay did not do so in *Pulp Mills*. What states may do instead is

[4] *Southern Bluefin Tuna (Provisional Measures)*, (1999) ITLOS Nos. 3&4, para. 79; *Land Reclamation (Provisional Measures)*, (2003) ITLOS No. 12, para. 96.
[5] See *e.g.* 1991 Protocol on Environmental Protection to the Antarctic Treaty, Article 8 and Annex I ; UNEP EIA Goals and Principles, Principle 1.

deny that the circumstances require an EIA (no risk of transboundary harm) or argue that an EIA in fact was carried out. In *Pulp Mills* Uruguay chose the latter option. Argentina responded by arguing that the EIA was inadequate: that alternative sites should have been assessed and that other matters had been overlooked or inadequately evaluated. The significant question in the case was thus not the obligation to do an EIA but what that obligation entailed.

2. Content of an EIA

The Espoo Convention describes environmental impact assessment as 'a procedure for evaluating the likely impact of a proposed activity on the environment'.[6] The object of such an EIA is to provide national decision-makers with information about possible environmental effects when deciding whether to authorize the activity to proceed and what controls to place on it. An EIA is fundamental to any regulatory system which seeks to identify environmental risk, integrate environmental concerns into development projects and promote sustainable development. It is a tool which aids informed decision-making, but it does not determine whether a project should proceed or how it should be regulated. Those decisions are for the relevant public authority, balancing the information provided by the EIA against whatever other considerations are considered decisive, including economic development. Seen from this angle, it is clear that a 'satisfactory' EIA need not show that there will be no risk of environmental harm. It will be sufficient if it provides the necessary information about the project's likely impact and follows the proper process.

In its *Pulp Mills* judgment the Court noted that "it is for 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

[6] 1991 Convention on Environmental Impact Assessment in a Transboundary Context, Article 1(vi). See generally Wathern (ed) *EIA: Theory and Practice* (London, 1988); Glasson, Therivel, Chadwick, *Introduction to EIA* (2nd ed, London, 2005); Wood, *EIA: A Comparative Review* (2nd ed, Harlow, 2003) Ch 1; Holder, *Environmental Assessment* (Oxford, 2004); Holder and McGillivray (eds) *Taking Stock of Environmental Assessment* (London, 2007).

assessment." (at para. 205). This paragraph makes two important points. First, an EIA need not be specifically required by law, but can be required as part of the authorisation or permitting process. What matters is that some means exists to ensure that an EIA is carried out. Secondly, while the "specific content" of each EIA is for the state to determine, there must be an EIA and it must have regard to "the nature and magnitude of the proposed development and its likely adverse impact on the environment". The Court is not here saying that the content of an EIA is for the state to decide in its sole discretion. On the contrary, it is reflecting the views of the ILC and the arguments of the parties based on that commentary. The ILC 2001 Commentary contains the following explanation:

> "(7) The specifics of what ought to be the content of assessment is left to the domestic laws of the State conducting such assessment. [*fn omitted*] For the purposes of article 7, however, such an assessment *should contain an evaluation of the possible transboundary harmful impact of the activity*. In order for the States likely to be affected to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them.
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> (8) The assessment *should include the effects of the activity not only on persons and property, but also on the environment of other States*. The importance of the protection of the environment, independently of any harm to individual human beings or property is clearly recognized."[7]

It is apparent from the commentary that whatever else may be required by national law, international law requires at a minimum that an EIA assess possible effects on people, property and the environment of other states likely to be affected. If national law does not ensure that such an assessment is carried out – for whatever reason - then there is inevitably a breach of the obligation to do a transboundary EIA.

In that eventuality, we can observe from *Pulp Mills*, *Land Reclamation* and *Southern Bluefin Tuna* that, in the absence of any inquiry process comparable to the Espoo Convention, provisional measures applications to international courts may be the best

[7] *ILC Report* (2001) GAOR A/56/10, commentary to Article 7, at pp. 402-5. Article 7 provides: "Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment."

remedy available to a potentially affected State seeking to enforce the obligation to carry out a transboundary EIA.[8] In *Pulp Mills*, Argentina failed in its attempt to secure provisional measures, but in *Land Reclamation* the ITLOS ordered the parties jointly to assess the risks and effects of the proposed works, while in *Southern Bluefin Tuna* the effect of its order was that catch quotas could only be increased by agreement after further studies of the state of the stock. The outcome in these cases suggests that if an EIA has not been undertaken and there is some evidence of a risk of significant harm to the environment – even if the risk is uncertain and the potential harm not necessarily irreparable – an order requiring the parties to co-operate in prior assessment is likely to result even at the provisional measures stage.

But what if an EIA has been carried out? How far. If at all, is it open to challenge in an international court?

3. Challenging an EIA – judicial review

The question whether an international court can review the adequacy of an EIA was posed by the *MOX Plant* and *Pulp Mills* disputes. In both cases the applicable treaty was silent about what is required in an EIA. Both complainants favoured a prescriptive approach, drawing on detailed standards from European Community law or the 1991 Espoo Convention to fill out the applicable treaty provisions. The respondent states each argued that their EIAs already met the highest international standards and they relied on scientific evidence and the judgment of independent bodies – the European Commission and the World Bank respectively - to justify the conclusion that other states were not at risk.

Using litigation to challenge the adequacy and conclusions of an EIA is not unknown in national law. What constitutes an EIA in accordance with international law is a question of law, for lawyers to answer, not technicians. The national caselaw tends to emphasise that an EIA need not address every aspect of a project in depth, and that its purpose is to assist the decision-maker and alert the public, not to test every possible hypothesis or

[8] *Southern Bluefin Tuna (Provisional Measures)*, para 79; *Land Reclamation (Provisional Measures)*, para 96.

provide detailed solutions to problems that have been identified.[9] UNEP's Goals and Principles say only that "[t]he environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5). Plainly this involves an exercise of judgment. In *Pulp Mills*, Argentina's advocates devoted a great deal of energy to pointing out alleged inadequacies, mistakes, and flaws in the various environmental assessments carried out on the Botnia proposal. They argued that key issues were ignored in the EIA, in particular the choice of alternative sites. They appeared to be inviting the Court to hold that both the Botnia EIA and the IFC EIA were insufficient, and did not sustain the decision to authorise the plant.

EIAs on such large projects are often the focus of intense controversy, both in national courts and increasingly in international courts. Those opposed will rarely be satisfied by an EIA, however voluminous and detailed, so it was no surprise that Argentina made these arguments. Uruguay responded that the relevant question is whether the assessments actually undertaken provided evidence on which it was reasonable to base the decisions DINAMA, the Environment Ministry, and the IFC took with respect to the likely impact on the river or Argentina. It also argued that an EIA is not required to assess risks that are too remote, or are merely speculative. The EIA, in its final form as approved by DINAMA, inter alia covered the possible transboundary impact of the Botnia plant, the river's flow characteristics (including reverse flow), air pollution, water quality, biodiversity, eutrophication and the occurrence of algae blooms, and alternative sites.[10] On this basis Uruguay argued that its environment agency Dinama had been duly diligent in considering all the relevant matters before the decision to authorise the plant was taken.

The Court noted that neither the Espoo Convention nor the UNEP EIA guidelines required assessment of alternative sites, but it went on to find that Uruguay had in fact assessed other sites. It accepted Uruguay's arguments, based on the ILC commentary, that the

[9] See *Prineas v. Forestry Commission of New South Wales*, 49 LGERA (1983) 402; *Belize Alliance of Conservation Non-Governmental Organisations v. Dept. of Environment*, UKPC (2003) No.63; *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

[10] DINAMA, Botnia EIA Report, UCM, Vol. II, Annex 20.

scope and content of an EIA are not specified by general international law. It is thus for each party to determine on a case by case basis what is required "having regard to the nature and magnitude of the proposed development and its likely adverse impact." (para 205). This formulation and the finding on alternative sites appears to leave open the possibility of reviewing the adequacy of an EIA in appropriate cases, and it would not be unreasonable to conclude that the Court did so here but found nothing wrong with the EIA undertaken by Uruguay, apart from the failure to make timely notification to Argentina as required by the Statute. On this basis it seems unlikely that an international court will be prepared to set aside an EIA carried out in good faith on the basis of substantial scientific and technical evidence. It may well do so, however, if the EIA is demonstrably inadequate, a conclusion supported by jurisprudence of the WTO Appellate Body reviewing the adequacy of risk assessments under the SPS Agreement. In *Japan - Measures Affecting the Import of Apples*,[11] it held that "Under the SPS Agreement, the obligation to conduct an assessment of 'risk' is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of a phytosanitary measure. The Appellate Body found the risk assessment at issue in *EC - Hormones* not to be 'sufficiently specific' even though the scientific articles cited by the importing Member had evaluated the 'carcinogenic potential of entire categories of hormones, or of the hormones at issue in general.'" Judicial review of an EIA will require a strong case to be successful, but it is potentially available in any international court with jurisdiction over the dispute.

There is one human rights aspect to the *Pulp Mills case* - although it was not argued or decided in those terms – public consultation open to residents of the affected state. The Court found that there had in fact been public consultation by Uruguay, but it nevertheless went on to hold in categoric terms that "no legal obligation to consult the affected populations arises for the parties from the instruments invoked by Argentina." (para 216). This goes beyond what Uruguay had argued, and it seems tenable only if confined literally to the instruments invoked by Argentina. Properly argued there should have been no difficulty persuading the court of the general principle that public

[11] WTO Appellate Body, WT/DS245/AB/R (2003) para 202.

consultation is a necessary element of the EIA process, as it is under Article 2(6) of the Espoo Convention. For me this is the only surprise in the entire judgment.

4. Implications for Espoo

Espoo is of course a regional convention, and a European one at that. It is the lex specialis for the parties to it, but it cannot be assumed that its terms have been translated into customary international law, and the ICJ in *Pulp Mills* does not say that they have been. For the same reason it is difficult to rely too heavily on Espoo when interpreting the provisions of other treaties, such as UNCLOS or the Statute of the River Uruguay. In *Pulp Mills* the ICJ interpreted Article 41 of the Statute in accordance with customary international law, not Espoo, and in comparable cases customary law will remain more relevant for this purpose than Espoo. Several elements of Espoo are not found in customary law. In particular there is no listing of activities likely to cause transboundary harm, no detailed prescription of the contents of an EIA, and no provision for an enquiry process in disputed cases. It will always be harder to challenge a failure to do an EIA in an international court that under the Espoo enquiry process.

Nevertheless, the main elements of EIA in customary international law closely track the main elements of the Espoo Convention. There is an obligation to do an EIA in situations where significant transboundary harm is likely; the likelihood of harm can be assumed for the kind of activities listed in Appendix I of Espoo; the provisions on notification and co-operation are all reflected in customary international law; post-project analysis – or monitoring – is required in both. The relationship between treaty and custom in this case is incestuous in the sense that both feed off, replenish, and reinforce each other. This is often the case in international law, but it does not mean that the two are identical, or that one displaces the other. An agreed text such as Espoo will almost always be more detailed than customary law, and it may contain institutional provisions that customary law cannot replicate. It is understandable that a party to international litigation may wish to rely on Espoo, but in practice, outside Europe, the UNEP Guidelines and World Bank policies have been of greater weight in international litigation.