Post-environmental Impact Assessment Monitoring of Measures or Activities with Significant Transboundary Impact

An Assessment of International Customary Law

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Environmental impact assessment (EIA) first developed as a regulatory tool under domestic law. One of the first jurisdictions to introduce EIA requirements and procedures was the United States (US), which in 1969 enacted the National Environmental Policy Act that comprised some EIA. Ever since, EIA legislation has been passed in various other jurisdictions. While domestic EIA procedures differ somewhat in frequency and sophistication, commentators have found that basic principles and EIA methodology are very similar worldwide. Under international law EIA is still a rather new concept. However, it has significantly gained in relevance as a regulatory tool under international law over the last decade.

Still, international law governing transboundary EIA remains rather vague. While international law does require (transboundary) EIA for specifically invasive measures, it does not comprise a comprehensive EIA regime prescribing specific content to be covered in an EIA or a detailed EIA procedure. However, some general principles appear to have evolved as universally binding international customary law.

One such procedural EIA principle is the obligation to continuously monitor measures or activities that require EIA in their operational phase (post-EIA monitoring). The primary purpose of post-EIA monitoring is to collect information on such measures and activities to ensure their compliance with conditions and standards as well as aid impact management and mitigation. Both the immediate and long-term benefits of undertaking monitoring as part

of EIA are widely recognized – although not always realized – in domestic laws. Yet, whether it is required by international law remains a subject of discussion.

Post-EIA monitoring is well established in international maritime law. The United Nations Convention on the Law of the Sea (UNCLOS) requires States to 'keep under surveillance the effect of any activity they permitted or in which they engage in order to determine whether these activities are likely to pollute the marine environment'. Since currently 168 out of 193 United

Nations (UN) member States are party to the UNCLOS, its provisions bind most States. Whether the UNCLOS provisions, or at least some of them, are binding upon non-members as customary international law remains disputed. Furthermore, even if the provisions of the UNCLOS concerning continuous monitoring of hazardous activities were binding as customary international law, such

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customary law would arguably only compel States to conduct post-EIA monitoring where effects on the marine environment are concerned.

Under general international environmental law a corresponding treaty provision, however, does not exist. Further, it appears that no stand-alone principle that would require post-EIA monitoring has evolved under general international environmental law thus far. Nevertheless, a general requirement of post-EIA monitoring under international law may derive from more general principles of international environmental law; those being the obligation to conduct transboundary EIA, the obligation to exchange information on a regular basis (obligation to exchange information) or the due diligence aspect of the obligation not to cause significant transboundary harm (no-harm rule). However, this relationship between an obligation to conduct or require post-EIA monitoring and the aforementioned principles of customary international law has thus far not been discussed in legal scholarship.

This article provides an overview of the relevant principles of customary international law in order to lay the foundation for such a discussion. It first gives a brief overview of the requirement to conduct transboundary EIA under international law, as well as the obligation to exchange information and the no-harm rule. It shows that while transboundary EIA requirements are not universally binding as treaty law, such requirements are established by customary international law. The article then discusses the obligation of post-EIA monitoring. It will analyse the acceptance of such an obligation as a stand-alone requirement of international law as well as its relation to the requirement to conduct transboundary EIA, the obligation to exchange information and the no-harm rule. Based on this analysis, the article argues that, while no specific obligation to conduct post-EIA monitoring exists, such an obligation may be based on more general principles of international environmental law.

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