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Abstract

International Environmental Law Requirements for Development Projects

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A. The problem

The realisation of huge construction projects as barrages and big industrial plants is of a big importance for so called developing countries. Industrial countries and in these countries domiciliated companies are often engaged in the realisation of such projects. They grant subsidies or insure the participating companies' financial risks.

As the realisation of such projects regularly entails significant harm to the environment, one has to know the requirements of international environmental law applicable to such enterprises. Furthermore it is questioned whether there are obligations to respect for third states and what their content may be.

B. Requirements of international environmental law for the realization of developments projects

I. Obligations owed to other states

The principles of territorial sovereignty and territorial integrity – both flowing out from the still existing state sovereignty – are the conceptual starting point in determining the (possible) obligations between states.

1. Procedural obligations

a) Information and consultation

If there risks to be or if there is (for whatever reasons) significant harm to the environment of another country, there is an obligation of mutual information and consultation. These obligations are nowadays part of customary international law. The obligations of consultation go one step further than the (mere) obligation of information insofar as comments and objections by a state likely to be affected are to be received and taken into account during the decision process, the planning and the concrete elaboration of the project.

b) Environmental impact assessment

An environmental impact assessment has to be carried out in respect of projects causing with a certain probability significant transboundary harm. This obligation is part of customary law. International law does not provide for any specifications as to the manner how to carry out the assessment.

c) Responsibility

The state responsible for the internationally wrongful act is under an obligation to cease that act and to perform the obligation in the future (Articles 29, 30 (a) ILC-Draft). The responsible State has to make full reparation (in the form of restitution, compensation and/or satisfaction) and to offer appropriate assur-

ances and guarantees of non-repetition (Articles 30 (b), 31, 34 et seq. ILC-Draft). These general consequences will not show any effect on the above mentioned procedural obligations, at least insofar as a concrete project is concerned.

d) Implications for the legality of the project

The breach of an international obligation cannot have any retroactive effects on the assessment of the legality of different facts. There is at least one exception to that principle: If the purpose and the subject of protection of the international obligations applicable in both circumstances are congruent with each other and if therefore an inseparable link between them can be assumed. Applied to our case, in which a project is realised under the breach of procedural obligations, this project is illegal, even if its realisation is lawful from a substantive point of view. To put it positively: A state may realise such a project not before having complied with its procedural obligations; this may imply to catch up these requirements before the project is realised. Reparation for the breach of this obligation does not (necessarily) imply the demolition of the project; there are rather other forms of reparation to be taken into consideration, especially satisfaction (Article 37 ILC-Draft).

2. *Substantive obligations*

a) Obligation not to cause serious transboundary environmental harm

The obligation not to cause serious transboundary environmental harm is – although it is of little importance in international environmental practice – undisputedly part of customary law.
Its elements may be specified as follows:

- There must occur harm (consisting of any immission to the „natural" or „artificial" environment) or a risk thereof to the environment. Thus the obligation not to cause serious transboundary environmental harm has preventive effects as already the risk of a damage is included.
- The environmental harm must be transboundary, i.e. it occurs on the territory of another state or in areas beyond the limits of national jurisdiction.
- There is a causal link between the act of the state and the environmental harm.
- The immission load and the circumstances in general in the state or in the areas beyond the limits of national jurisdiction concerned have to be taken into consideration to establish the „seriousness" of the environmental harm. The extent of the harm to be expected has to be included to determine the relevant threshold of risk.

b) The principle of equitable utilisation of shared natural resources

The principle of equitable utilisation of shared natural resources is nowadays recognised at least in the area of international water law for inland waters as being part of customary international law. There is strong evidence to argue for the extension of this principle's scope of application to other natural resources, as forests and mineral resources.

In order to specify the substantive scope of the principle, which is only possible in a very general manner, the following aspects are of a big importance:

- The principle implies procedural duties (information, consultation).
- All relevant factors for the utilisation of the shared natural resources are to be considered during the planning and realisation of such projects aiming to use shared natural resources. Especially the (utilisation-) interests of further concerned states are to be taken into account.
- In a narrow context with the aforementioned, an equitable balance of interests has to be reached as a result.

In any case, the circumstances of each individual case are of a big importance.

3. Development projects and the material scope of international environmental obligations

a) Intensity of the environmental harm

A state's economic situation should not be included in the process of interpretation and application of fundamental general substantive requirements of international environmental law, as this would not be in conformity with the actual state of international environmental law. Furthermore, this would risk to hollow out fundamental structures of international law (as territorial integrity) and would call the aim of environmental protection and thereby of international environmental law as such into question. Moreover, there are no specifiable criterias for taking into consideration the particular situation of developing countries and there is no evidence in state practice for that.

b) The due diligence standard

In order to specify the due diligence standard, the concrete situation of the particular state, e.g. as developing or developed state, has to be taken into account insofar as the state's objective possibility to maintain an effective state authority is concerned.

4. Circumstances precluding wrongfulness of a development project

The law of state responsibility recognizes different circumstances precluding the wrongfulness of a certain act of a state. They – especially necessity – may not be invoked as a ground for excluding the illegality of a project for the mere reason that it is a development project.

II. Obligations related to the territory

If a development project does not have any impacts on the territorial integrity of another state or on areas beyond the limits of national jurisdiction, requirements of international environmental law do only apply in exceptional cases.

C. The relevance of third states' behaviour under international law

I. Obligations of third states: The issue of assistance in the commission of an internationally wrongful act

International state practice is leading to the conclusion that there is a principle stating that aiding or assisting another state in the commission of an internationally wrongful act entails the international responsibility of the assisting state; thus the aid or assistance as such constitutes an (independent) internationally wrongful act. Such a principle is a reasonable and necessary element of the law of state responsibility.

Against the background of the characteristics of the law of state responsibility and based on Article 16 of the ILC-Draft, three constituent facts of the act of aid or assistance can be distinguished:

- The aid or assistance given must be linked narrowly and directly to the internationally wrongful act in question.
- This strong link between the aid or assistance and the internationally wrongful act must be recognisable for the aiding or assisting state.
- Finally, the aiding or assisting state must be bound by the same international obligation the other state is breaching.

Such a responsibility of third states based on aid or assistance to an internationally wrongful act would at any rate be limited to cases in which the realisation of the respective development project would breach a general international obligation (as the ones mentioned above).

Therefore only those state activities would amount to aid or assistance to the realisation of an internationally illegal development project which would promote its realisation in an active and substantive manner. A mere omission would regularly not be sufficient, as the intensity of the connection and the sufficiently narrow link are not given. If these objective conditions are met, the subjective conditions of „having to know" would regularly be given as well.

II. The principle of non-intervention

A breach of the principle of non-intervention by linking certain (economic) aid with the compliance with environmental standards is basically possible, as an element of coercion may be given. In general however, the purely internal character of the issue would be denied; thus the second element of the principle of non-intervention is not fulfilled.

D. Conclusion

The legitimate concern of taking into consideration the particular situation of developing countries (a concern that found its expression in the principle of a common but differentiated responsibility) is not to be met on the level of general, trans-sectoral requirements, but on the level of specific obligations for different areas of regulation and thus in international treaties.