Monitoring and Follow-up

Having studied the EIA in depth, not a great deal need be added regarding the duty of States to ensure the monitoring and post-operation evaluation of activities with potentially significant environmental impacts beyond reminding States that this obligation exists under international law as another branch of the no harm principle. The duty to monitor can be viewed as an intrinsic aspect of the EIA in long-term projects but as the EIA can often be viewed principally as a pre-project procedural step prior to authorisation, there are advantages in considering it distinctly alongside post-project evaluation.

Dedicated procedures for human rights monitoring are required under international treaties and these will be revisited briefly to show how major impacts from offshore oil and gas activities can be integrated into States’ human rights reports.

8.1 The Duty to Monitor Environmental Impacts

UNCLOS requires as follows:

204(1) States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized 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.

The duty to monitor and to conduct post-project analysis also connects to the requirement for baseline data in the EIA process.\(^1\) Change to the environment cannot be assessed if the initial state is unknown.

The majority in *Gabčíkovo Nagymaros* stated rather weakly that:

\(^1\) See Chapter 7.2.6.1.
The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty’s conclusion.\(^2\)

However, it did not specify unambiguously that such monitoring was required in all cases or only under the treaty in effect between the parties. Weeramantry in his separate opinion was less coy, holding that there must be “a continuing assessment and evaluation as long as the project is in operation...whether the treaty expressly so provides or not”\(^3\) as part of what he terms the ‘continuing environmental impact assessment’:

I wish in this opinion to clarify further the scope and extent of the environmental impact principle in the sense that environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring.\(^4\)

The majority in *Pulp Mills* endorsed this view in 2010: “once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken”.\(^5\) Within the EEA, the SEA Directive requires follow up monitoring of plans and programmes whether or not they have transboundary implications.\(^6\)

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4. Ibid 111–112 (citing also *Trail Smelter arbitration (United States v Canada)* 1941, 3 R1AA 1905 in support).
