



***Dam safety in the light of the Compendium on legal tools
applicable to planning, development and
monitoring of dams
(A project led by the Geneva Water Hub and IUCN)***

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Outline

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3. Convention on the Law of the Non-Navigational Uses of International Watercourses (UNWC) and the UNECE Convention on the Protection and Uses of Transboundary Watercourses and International Lakes (Water Convention)
4. Customary Principles of International Environmental Law and Multilateral Environmental Agreements (MEAs)
5. Human Rights Instruments and International Standards
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Methodology

An analysis of the main frameworks and principles to be considered when planning, developing or monitoring dams in general and large dams in particular

Six categories of tools:

- 1923 Geneva Convention
- Customary principles of international water law (IWL) and global water conventions
- Customary principles of international environmental law
- Multilateral Environmental Agreements (MEAs)
- Human Rights Instruments
- International Standards



1923 Geneva Convention

Adopted under the aegis of the League of Nations and ratified by only 16 states, this is the only global treaty specifically covering the construction and operation of dams.

Key principles:

- The right of every country to exploit hydraulic power within the limits of international law, in particular taking into account the duty of not causing significant damage to another riparian (arts. 1 and 4);
- The duty to enter into negotiation in case of disagreement between countries (art.3);
- The right to resort to an international investigation to find a common solution (art.2)



The UN Convention on the Law of the Non-Navigational Uses of International Watercourses (UNWC): maintenance and safety of dams

Article 26 - Installations

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.
2. Watercourse States shall, at the request of any of them which has reasonable grounds to believe that it may suffer significant adverse effects, enter into consultations with regard to:
 - (a) The safe operation and maintenance of installations, facilities or other works related to an international watercourse; and
 - (b) The protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.



The UN Convention on the Law of the Non-Navigational Uses of International Watercourses (UNWC) : protection of dams against attacks from non-state armed groups

Article 29 - International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.



Convention on the Protection and Uses of Transboundary Watercourses and International Lakes (UNECE Water Convention): no specific mention of dams

- Prevention, control and reduction of transboundary impact (arts. 2-3)
- Equitable and reasonable use (art. 2.2 (c))
- Duty to cooperate (art.9)



Customary principles of international environmental law

Some of the principles of international environmental law applicable to dam projects are:

- Sovereignty to exploit natural resources
- Duty not to cause damage
- Sustainable development
- Cooperation
- Access to judicial and administrative remedies
- Precautionary approach
- Duty to ensure prior notification
- Obligation to carry out EIAs
- Due diligence



Duty not to cause damage

“ (U)nder the principles of international law... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”

Trail smelter arbitration (United States/Canada), 1941



Duty to carry out an environmental impact assessment

“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 quality of its waters did not undertake an environmental impact assessment on the potential effects of such works” International Court of Justice, Pulp Mills on the Uruguay River (Argentina/Uruguay), 2010, para.204.



Multilateral Environmental Agreements

Seven Multilateral Environmental Agreements applicable to dams:

- 1971 Ramsar Convention on Wetlands of International Importance
- 1972 World Heritage Convention
- 1979 Convention on Migratory Species
- 1982 Convention on the Law of the Sea
- 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)
- 1992 Convention on Biological Diversity
- 1992 UN Framework Convention on Climate Change



The Espoo Convention: a global instrument

- The Espoo Convention includes “large dams and reservoirs” in its Appendix I
- Duty to carry out an EIA prior to a decision to authorize or undertake a proposed large dam or reservoir that is likely to cause a significant adverse transboundary impact
- The Party of origin has an obligation of notification to affected Parties of a proposed activity
- The Party of origin must consult with affected Parties concerning the potential transboundary impact of the proposed large dam or reservoir and measures to reduce or eliminate its impact
- The Espoo Convention only obliges Parties to take ‘due account’ of the outcomes of the EIA, comments received from authorities and the public, as well as outcome of consultations with the affected Parties

Espoo Convention, Arts 2(3), 3, 5, 6(1)



Human Rights Instruments

Dams have the potential to impact people and their livelihoods, specific instruments of international human rights law to be addressed are:

- 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)
- 1966 International Covenant on Civil and Political Rights (ICCPR)
- 1989 ILO Convention 169 Indigenous and Tribal Peoples Convention
- 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)
- 1981 African Charter on Human and People's Rights or Banjul Charter
- 1969 American Convention on Human Rights or the Pact of San José
- 1950 European Convention on Human Rights or the Convention for the Protection of Human Rights and Fundamental Freedoms



The Aarhus Convention: a global convention

- Specific mention of ‘dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres’ in annex I
- Application of the procedures of public participation, with respect to decisions on whether to permit such proposed activities



European Court of Human Rights: the “Budayeva and Others v. Russia” case (2008)

- Serious damage to a dam near the town of Tyrnauz in central Caucasus in 1999
- In July 2000, a mudslide destroyed the dam and caused severe destruction, resulting in 8 people dead and 19 allegedly missing people
- Need to ensure an early warning system and a monitoring of the river
- Failure to inform the population about the mortal risk
- ‘(T)here was no justification for the authorities’ omission in implementation of the land-planning and emergency relief policies in the hazardous area of Tyrnauz regarding the foreseeable exposure of residents, including all applicants, to mortal risk’. (para.158)
- Duty of a state to take preventive measures such as emergency relief policies and early warning systems to avoid negative impacts on the population



International standards

Initiatives from the private sector and other stakeholders to regulate development projects are relatively new but increasingly used. Standards for companies are still a work in progress, these offer guidance on how to articulate business activities while protecting the environment and ensuring respect for human rights.

- Hydropower Sustainability Assessment Protocol
- Performance Standards of the International Finance Corporation
- 2011 UN Guiding Principles on Business and Human Rights
- 2011 OECD Guidelines on Multilateral Corporations



Final remarks

- Dam safety is rarely addressed in international legal frameworks
- The maintenance and safety of dams is an element of transboundary water cooperation
- Several principles and norms of international water law, international environmental law and human rights law are relevant, such as:
 - Duty not to cause damage to the environment of other States (a counterpart of the principle of sovereignty over natural resources)
 - Principle of prevention : duty of States to take action in order to prevent and minimize possible environmental damage from dam
 - Principle of precaution: duty of States to take action to protect the environment from serious or irreversible damage even in the circumstances of scientific uncertainty