

Links between the EIA Convention and the Industrial Accidents Convention

The EIA Convention and the Industrial Accidents (IA) Convention were both elaborated under the auspices of the UNECE, which also serves as the secretariat for both conventions. The relationship between the two conventions is not confined to institutional matters, but extends to similarities of subject matter, approach and procedures, especially with regard to risk and environmental impact assessment. Both conventions are concerned with the responsibility of states not to cause damage to the environment of other states. This principle is enshrined in the Declaration of the Stockholm Conference on the Human Environment (to which the preamble of both conventions refers) and furthermore recognised as a rule of customary international law. They also stress the important issue of public participation in the different phases of environment-related decision-making and to this effect establish provisions to promote the participation of the public, including access to information and, in the case of the IA Convention, access of the public to justice.

Extension: include the following Articles under the EIA Convention and under the heading of 'Public Participation'. So far only Article 3.8 is included.

<i>Items</i>	EIA Convention
4. Public Participation	<p style="text-align: center;">Article 2 General Provisions</p> <p>6. The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.</p> <p style="text-align: center;">Article 3 Notification</p> <p>8. The concerned Parties shall ensure that the public of the affected Party in the area likely to be affected be informed of, and be provided with possibilities for making comments or objections on the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.</p> <p style="text-align: center;">Article 4 Preparation of the Environmental Impact Assessment Documentation</p> <p>2. The Party of origin shall furnish the affected Party, as appropriate through a joint body where one exists, with the environmental impact assessment documentation. The concerned Parties shall arrange for distribution of the documentation to the authorities and the public of the affected Party in the areas likely to be affected and for the submission of comments to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin within a reasonable time before the final decision is taken on the proposed activity.</p>

Complementing Annex V - Overall assessment

Introductory Paragraph

3. The Convention on the Transboundary Effects of Industrial Accidents (hereinafter called the Industrial Accidents Convention) provides for Parties to take “appropriate measures [...] to protect human beings and the environment against industrial accidents by preventing such accidents as far as possible, by reducing their frequency and severity and by mitigating their effects”.

EIA and the Industrial Accidents Convention

8. Both conventions adopt a preventive approach seeking to prevent or minimise environmental damage before it occurs. Both conventions codify the procedural duties of international law, namely notification and consultation wherever the activities of one state are likely to affect the rights and interests of another state. The detailed impact assessment procedures of the conventions clarify these general principles in their application to the field of international environmental law.

9. Despite similarities of subject matter, approach and procedures, the scope and application of the two Conventions, however, differs in many respects. A first distinction arises in that the EIA Convention applies to proposed activities likely to cause a significant adverse transboundary impact, and not to existing ones. Nevertheless, “proposed activity” is defined broadly in Article 1 (v) to include any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure. Therefore, existing activities that are to be decommissioned or expanded may also lie within the scope of the EIA Convention. As to the scope of the EIA Convention, Parties must ensure that an EIA is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I. Appendix I directly identifies potentially hazardous projects on the basis of clearly identified thresholds. In some cases however, these thresholds are merely vaguely identified by using words such as “large” or “major”. In addition to the activities specified in Appendix I, Article 2.5 requires concerned Parties at the request of one such Party to enter into discussions on whether a proposed activity (not listed by Appendix I) is likely to cause a significant adverse transboundary impact. Accordingly, if the Parties so agree (Appendix III sets out guidelines to assist the determination of environmental significance here), the project will be treated as if it were listed in Appendix I.

In contrast, the IA Convention applies to both existing and proposed activities. Article 2.1 provides that it shall apply to the prevention of, preparedness for and response to industrial accidents capable of causing transboundary effects, including the effects of such accidents caused by natural disasters. Hence, while most provisions of the Convention apply to “hazardous activities”, the range of activities to which the IA Convention applies is determined in a way different to the EIA Convention. Rather than listing a set of specific categories of activities, the IA Convention sets a quantitative standard based on the presence of hazardous substances at threshold levels (set out in Annex I) to determine whether the activity is within the scope of the Convention. For the Convention to apply then, these thresholds have to be surpassed and the activity must furthermore be capable of causing transboundary effects in the event of an industrial accident.

These different approaches make it difficult to establish when a particular activity falls within the scope of both Conventions. Nevertheless, the very wide category “Integrated chemical installations” may cover most hazardous activities. Further guidance on the precise activities to be included under this heading was given at the 1992 workshop on methodological aspects of EIAs in Stockholm and can, in addition, be inferred from the UN International Standard Industrial Classification of All Economic Activities. Furthermore, if a proposed hazardous activity within the scope of the Industrial Accidents Convention is not listed in appendix I to the EIA Convention and a risk assessment has found that it is likely to have a transboundary impact in the event of an accident, it should be subject to an EIA if a consultation has been started in accordance with article 2, paragraph 5, of the EIA Convention.

Overall, the IA Convention appears to cover a narrower range of activities than the EIA Convention, such that when a proposed activity qualifies as a hazardous activity under the IA Convention it is very likely that it also falls within the scope of the EIA Convention, either through being one of the types of activities listed by Appendix I or potentially through being likely to cause a significant adverse transboundary impact. Depending on how broadly the Parties to the EIA Convention define “Integrated chemical installations”, it is possible that virtually all proposed hazardous activities within the scope of the IA Convention would fall within the field of application of the EIA Convention.

10. The IA Convention establishes a procedure for assessing the risk of transboundary effects from industrial accidents that is, in many ways, similar to the EIA Convention. In fact, the risk assessment procedure includes the core elements of the EIA procedure as set out in Articles 3 – 6, though often in an amended or extended form. Article 4 and Appendix III of the IA Convention establish detailed procedures for the identification of hazardous activities, notification of affected Parties and consultations between the Party of Origin and the notified Party concerning the transboundary effects of the hazardous activity in the event of an industrial accident and measures to reduce or eliminate its effects.

Because of the overlap in scope of the two Conventions, there is a possibility that a Party to both Conventions would have to carry out an EIA and a risk assessment for the same proposed activity. To avoid such duplication, the Industrial Accidents Convention allows a Party that has already performed an EIA for the proposed hazardous activity in conformity with the EIA Convention to waive the requirement to perform the risk assessment procedure pursuant to the Industrial Accidents Convention. Correspondingly, Article 4.4 of the IA Convention establishes that "the final decision taken for the purposes of the Convention on Environmental Impact Assessment in a Transboundary Context shall fulfil the relevant requirement of this Convention".

11. The application of Article 4.4 should not pose any problems whenever the EIA Convention contains more stringent requirements than the IA Convention. Problems may, however, arise wherever the commitments under the EIA Convention are in fact less stringent and a Party performs an EIA and then relies on Article 4.4 to waive the requirement to undertake the more stringent risk assessment procedure under the IA Convention. Elements of the EIA procedure where potentially problematic differences arise have been identified as follows¹:

a) Regarding **consultations to determine whether the Convention applies** - relevant provisions: EIA Art. 3.7, Appendix IV; IA Art. 4.1 - 2, Annex II, Annex III.1.

We can find differences in the criteria used to assess whether an activity is within the scope of each convention and furthermore regarding the recourse to an inquiry commission.

b) Regarding the **content of the EIA/evaluation documentation** - relevant provisions: EIA Art. 4, Appendix II; IA Annex III.8, Annex V.

The different requirements for the content of the assessment documentation in the two conventions could pose problems if Art. 4.4 was used. One of the conditions for the use of Article 4.4 is that the EIA of the hazardous activity must include an evaluation of the transboundary effects of industrial accidents from the hazardous activity, which is performed in conformity with the terms of the IA Convention. For this condition to be fulfilled, the EIA documentation would have to include the matters to be considered under Annex V of the IA Convention.

There are two possible solutions to this problem. One course of action would be to interpret the IA Convention Annex V table of contents as illustrative guidelines, which are not binding on the Parties, so that the EIA of the hazardous activity could include only the elements required under the EIA Convention, but without breaching the terms of the IA Convention. The disadvantage of this solution is however that it could greatly reduce the effectiveness of the IA

¹ This analysis is based on the detailed report 'The Relationship between the Convention on Environmental Impact Assessment in a Transboundary Context and the Convention on the Transboundary Effects of Industrial Accidents, prepared by Donald Fitzpatrick (1995).

Convention. A preferable solution, which would enable the aims of both conventions to be fulfilled, would be to combine the matters listed in Annex V of the IA Convention with the required contents of the EIA assessment procedure to produce a single EIA document. The required contents of the EIA Convention are a minimum standard and could thus be expanded beyond this minimum to include the matters to be considered under the IA Convention procedure.

c) **Public information and public participation** - relevant provisions: EIA Art. 2.6, 3.8, and 4.2; IA Annex III.9, Art. 9.

The IA Convention is, more generally, concerned with environmental risks of a more serious nature than the EIA Convention and therefore imposes duties upon Parties to provide information to the public and to allow for public participation that are more stringent than those of the EIA Convention. Article 9.1 and the related Annexes of the IA Convention contain much more detailed requirements for the provision of information to the public than are found in the EIA Convention. However, this provision is not part of the risk assessment procedure and could therefore not be considered as one of the relevant requirements referred to in Article 4.4. A potential for disputes may however arise in that the public participation provisions of the EIA Convention apply only to the public of the affected Party, while the IA Convention does not make such a distinction. Nevertheless, other provisions of the EIA Convention may imply that the rules also apply internally to the public of the Party of origin (Article 1 (vi) defines EIA as a "national procedure"). In addition, the IA Convention goes beyond the EIA Convention by requiring the Parties to provide the public of the affected Party with the same rights of access to administrative and judicial proceedings as exist for its own nationals.

d) **Subsequent additional information** - relevant provisions: EIA Art. 6.3; IA Annex III.13.

These provisions relate to consultations being reopened, if requested, where additional information concerning the transboundary effects of the activity subsequently becomes available. A particular problem could arise here with regard to the limits on the time at which the information that can trigger new consultations becomes available. The EIA Convention refers to information that was not available at the time of the decision, but becomes available to a concerned Party before work on the activity commences. The IA Convention, in contrast, merely refers to information not available at the time of consultations and does not place an end limit to the reopening of consultations

Further dispute potential may arise from apparent differences in the provisions concerning:

e) The **content of initial notification** - relevant provisions: EIA Art. 3.2; IA Annex III.3.

f) The **provision of further information (public participation)** - relevant provisions: EIA Art. 3.5; IA Annex III.5.

The following **example** illustrates how apparently minor differences between the procedures of the conventions could create considerable potential for disputes if Article 4.4 was used:

Two neighbouring states, X and Y, are Parties to both conventions. There was a proposal to build a chemical plant in state X close to the frontier with state Y. An EIA was carried out in accordance with the EIA Convention, and consultations were held with state Y on possible transboundary impacts. State X took into account the views of state Y expressed in the consultations, but decided to authorise the construction of the plant. The plant is also a hazardous activity within the scope of the IA Convention, however Article 4.4 is applied waiving the requirement to perform the risk assessment pursuant to the IA Convention. In a situation where state Y wishes to hold new consultations because, for example, either during construction new scientific evidence reveals a greater likelihood of adverse impacts, or, after the plant begins to operate state Y experiences significant adverse impacts, state X could rely on Article 6.3 of the EIA Convention and claim that as information became available after work on the activity had commenced, it would therefore not be obliged to enter into new consultations. State Y, on the other hand, might argue that under Annex III.9 of the IA Convention it was entitled to request renewed consultations and that state X would have to participate in good faith.

Conclusions and further suggestions

The main link between the two conventions arises from the **specific reference of the IA Convention to the EIA Convention** with regard to conducting a single impact assessment procedure under the latter Convention in case a specific hazardous activity falls within the scope of both Conventions. However, the requirement that the EIA should comply with the procedures of both Conventions clearly requires further study, as there are differences between the content of the information in the procedure of the EIA Convention and the assessment procedure of the Industrial Accidents Convention. In particular, the potential for disputes in applying Art. 4.4 of the IA Convention may arise from the fact that the EIA documentation should include the (additional or more detailed) information requested under the IA Convention. In this respect appendix II to the EIA Convention only prescribes in general terms the minimum content of the environmental documentation and should include a reference to risk analysis as required by the Industrial Accidents Convention (annex V).

Accordingly, the following alternative responses to avoid duplication and to effectively implement both Conventions simultaneously without amending the current texts appear warranted:

- In order to satisfy the requirements of both Conventions and to limit the potential for conflict, it may be necessary to devise a single EIA procedure that complies with both Conventions. The simplest way to do this would be to identify the elements of the risk assessment procedure of the IA Convention that go beyond the EIA procedure under the EIA Convention and then combine these extra elements with the latter procedure. A set of guidelines on additional elements that would have to be thus included could be elaborated and presented to the Conference of the Parties to the IA Convention for consideration in order to create a harmonized procedure. This harmonized procedure could then be used whenever Parties to the IA Convention wish to take advantage of Article 4.4.

Such a set of guidelines could contain i) advice on when an activity is likely to be within the scope of both conventions; ii) specify which provisions of the IA can be counted as “relevant requirements” that can be waived by satisfactory performance of an EIA under the EIA Convention.

- Alternatively, the Party of origin and the affected Party could enter into a bilateral agreement governing the operation of Article 4.4. Such an agreement could specify which assessment procedure would have to be followed under which circumstances as well as which elements of the risk assessment procedure of the IA Convention could be regarded as “relevant requirements” which could be fulfilled by the EIA under the EIA Convention.
- Another possibility would be for the Party of origin to perform an EIA of the hazardous activity in accordance with the EIA Convention and then apply Article 4.4 in such a way that only requirements compatible with both conventions do in fact constitute “relevant requirements”. This option may, however, be difficult to apply in practice.