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Transboundary procedures

Major legislative dilemmas for Implementing
the Espoo Convention and its Protocol on SEA in
the UNECE region and ways to address them in
national legislation

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Content

Rio Declaration - Principle 2

- States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 19

- States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

Substantive vs procedural obligations

- Substantive obligations
 - avoiding/minimising harm
 - compensating damage
- Procedural obligations
 - notification
 - transboundary procedure

- Application
 - mostly agreements concerning use of natural resources
- 2 specific agreements:
 - Convention on Transboundary EIA (Espoo) 1991
 - SEA Protocol of 2003
- Role
 - harmonization of national procedures
 - transboundary procedure

Teheran Convention

- Article 13. Environmental Emergencies
 - 2. For the purpose of undertaking preventive measures and setting up preparedness measures, the Contracting Party of origin shall identify hazardous activities within its jurisdiction, capable of causing environmental emergencies, and shall ensure that other contracting Parties are notified of any such proposed or existing activities. The Contracting Parties shall agree to carry out environmental impact assessment of hazardous activities, and to implement risk-reducing measures.
- Article 17. Environmental Impact Assessment
 - 1. Each Contracting Party shall take all appropriate measures to introduce and apply procedures of environmental impact assessment of any planned activity, that are likely to cause significant adverse effect on the marine environment of the Caspian Sea.

Transboundary procedure in international law

- General obligation – in most treaties related to shared resources
- Details of transboundary procedure
 - Espoo Convention
 - SEA Protocol
 - Industrial Accidents Convention
 - *EIA Protocol to Teheran Convention*
- Role
 - harmonization of national procedures
 - transboundary procedure
- EU law
 - EIA Directive
 - SEA Directive
 - IPPC/IED Directive
 - Seveso II Directive

Espoo Convention and SEA Protocol

- Espoo – project level
- SEA – strategic documents
- No Inquiry Commission in SEA protocol
- Transboundary procedure
 - Main focus of Espoo
 - Additional focus of SEA protocol
- Activities subject to transboundary procedure
 - Listed in Annex I plus possibility for other activities
 - No list – any strategic document

When transboundary EIA is required?

- Espoo Convention requires transboundary EIA for
 - proposed activity
 - which may have impact
 - significant
 - adverse
 - transboundary
- Prior to a decision to authorize or undertake a proposed activity

Definition of competent authority

- Under Art.1 (v) of the Espoo Convention
- „competent authority” means:
- *„national authority or authorities*
- *designated by a Party as responsible for performing the tasks covered by this Convention*
- *and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity”*

Basic obligations

- General obligation
- Obligations as Party of origin
- Obligations as affected Party

General obligation

- Article 2.1 requires
- *„The Parties shall,*
- *either individually or jointly,*
- *take all appropriate and effective measures*
- *to prevent, reduce and control*
- *significant adverse transboundary environmental impact from proposed activities”*

Espoo obligations and sovereign rights

- „initiation of the transboundary procedure under the Convention does not prevent the Party of origin from undertaking such proposed activities after having carried out the transboundary procedure, provided that due account is taken of the transboundary procedure’s outcome in the final decision” (EIA/IC/S/1, para 56 - ECE/MP.EIA/10)

Obligations as Party of origin

- Related to national EIA procedure
- Related to initiating transboundary EIA procedure - notification
- Related to conducting transboundary EIA procedure in co-operation with the affected Party

Obligations related to national EIA procedure

- Establishing proper framework for national EIA procedure
- Conducting in practice national EIA procedure

Proper framework for national EIA procedure - I

- Article 2.2 and 2.3 requires to establish national EIA procedure before a decision to authorise or undertake any activity
 - listed in Appendix I, and
 - other activity if so agreed under Article 2.5
- Such national EIA procedure shall permit
 - public participation
 - preparation of EIA documentation described in Appendix II

Proper framework for national EIA procedure - II

- Within such procedure the opportunity to participate provided for the public of the affected Party must be equivalent to that provided to its own public (Article 2.6)
- Such national EIA procedure shall be so constructed to permit conducting transboundary EIA procedure and taking due account of its results (Article 6.1)

Conducting national EIA procedure in practice - I

- Party of origin must ensure that before taking a decision to authorise or undertake any activity
 - listed in Appendix I, and
 - other activity if so agreed under Article 2.5
- a national EIA is conducted in a way that allows to identify whether such activity is likely to cause a significant transboundary impact

Conducting national EIA procedure in practice II

- In case such activity is likely to cause a significant transboundary impact
- appropriate arrangements are made to ensure that
 - potentially affected Party is duly notified
 - if potentially affected Party so wishes - transboundary EIA is conducted
 - in the final decision due account is taken of the results of transboundary EIA

Transboundary procedure

- Stage I initiation of the procedure
 - Notification
 - Confirmation from affected country
- Stage II – full procedure
 - Provision of information and documentation
 - Possibility for commenting (authorities and public)
 - Consultation
 - Final decision and Information about the decision
 - Post-project analysis (if applicable)

Initiation of the procedure

- „Normal” situation – procedure initiated by the Party of origin - - notification
- „Exceptional” situation – procedure initiated by the affected Party
 - In SEA Protocol and EIA and SEA directives – mandatory
 - In Espoo Convention – Inquiry procedure

Stage I - cd

- Screening
- Notification
- Response to notification
 - negative
 - lack of response or
 - response indicating no interest
 - positive response indicating interest in participating

Stage I

- Two possibilities
 - Art.3.7 - for activity listed in Appendix
 - alleged to have significant adverse transboundary impact
 - which was not notified
 - Art.2.5 - for activity not listed in Appendix I
 - alleged to have significant adverse transboundary impact
- Different legal character

Stage I - cd

- **Art.3.7 – activity from annex I**
 - need to clearly identify activity as listed in Appendix I
 - exchange of sufficient information
 - holding a discussion
 - possibility of referring the issue to an inquiry commission
- **Art.2.5 – activity not listed**
 - holding a discussion
 - criteria in Appendix III
 - agreement of both Parties needed

Notification

- **Timing (Art.3.1)**
 - as early as possible
 - no later than when informing its own public
 - before scoping (2nd amend - *Art 2.11*)
- **Target and form**
 - Points of contact
 - written form
 - Who notifies (Belarus/Ukraine)
- **Content (art. 3.2)**
 - format (ECE/MP/EIA/12)

Stage II

- Full transboundary EIA initiated as a result of:
 - request under Art.2.5 or Art 3.7
 - positive opinion of the Inquiry Commission
 - positive response to notification

Stage II - cd

- Information exchange (Art.3.5 and 6)
- Preparation of EIA documentation (Art.4 and App.II)
- Participation
 - public (Art.2.6, 3.8 and 4.2)
 - authorities (Art.4.2)
- Consultations (Art.5)
- Final decision (Art.6)
- Post-project analysis (Art.7)

EIA Documentation

- Different legal regimes for access to documents
 - National security
 - Copy rights
- Different scope of various documents prepared during EIA procedure
 - Belarus/Lithuania
- Differences in the decision-making
 - Poland/Germany -

EIA Documentation -cd

- Scoping
 - non-mandatory but recommended stage
 - opportunity for affected Party to participate in scoping (*Art.2. 11*)
- Content (Art.4.1 and App.II)
 - alternatives
 - transboundary impact
 - mitigation measures

Language

- Language of documentation
 - of notification
 - of EIA documentation (Belgium/Netherlands)
 - the final decision
 - other information (for example - from monitoring)
- Language of consultations and hearing (Italy/Croatia and Belarus/Lithuania)
- Approaches
 - Who makes arrangements?
 - Who pays?

Procedural steps

- Commenting on EIA documentation vs consultations
 - Different role of the public
 - Legal nature (Germany/Poland)
- Fulfillment of procedural steps – role of formal records
 - Belarus/Lithuania
 - Ukraine/Romania

Consultations

- Timing
 - start only after the EIA documentation is finalised (Polish-German example)
 - Parties shall agree on a reasonable time-frame for consultation period
- Format
 - authorised representatives of Parties concerned
 - level and venue to be agreed between parties

Public participation

- Public
 - national
 - from affected Party (from areas likely to be affected)
 - equivalent opportunities (Art.2.6)
- Joint responsibility of Parties concerned!
- Cases under Espoo and Aarhus Convention
- Possibility to submit comments (Art.4.2)
 - directly to the competent authority in the Party of origin
 - through the Party of origin (for example via Point of Contacts)

Public participation II

- Comments
 - concerning proposed activity
 - concerning EIA documentation
 - ‘any comments’ according to Aarhus
- Public participation at various stages
- Public to be informed about the final decision and possibilities to appeal (ECE/MP.EIA/8)