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**Introduction to the international legal
framework of environmental assessment
and role of the Espoo Convention**

*Feasibility of the application of a transboundary environmental
impact assessment procedure as a tool for “greening” economies
and ensuring sustainable investments in Central Asian countries*

SUBREGIONAL WORKSHOP

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- Member of the State Environmental Council in Poland (since 2014)
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Content

- Origins and concept of environmental assessment
- Environmental assessment in international law
- UNECE Espoo Convention
- UNECE Aarhus Convention
- EU EIA Directive

Origins and development of environmental assessment

- US National Environmental Policy Act of 1969
 - covers: plans, programs, policies, legislative proposals, concrete projects
 - key role of discussing alternatives
 - concept of tiering
- Currently in all developed environmental national frameworks
- International and supra-national (EU) framework in Europe
 - Harmonization of national procedures
 - Transboundary procedure

Concept of environmental assessment

- Preventive tool related to planned activities which may have significant impact on the environment
- Scope
 - Environmental impact assessment (EIA):
 - individual projects
 - Strategic environmental assessment (SEA):
 - plans and programs
 - *policies*
 - *Legislation*
 - Habitat/biodiversity assessment
 - EIA and SEA limited to impact on habitat

Role of environmental assessment

- collection of information
- consideration of alternatives
- integration of environmental concerns with economic, social etc concerns
- avoidance of irreversible effects
- procedural tool
 - advisory vs decisive role
 - specific situation in case of significant adverse effect on integrity of Natura 2000 site

Alternatives

- For the activity
 - For example: highways or railroads
- Within the activity
 - Locational (northern or southern bypass)
 - Technological (concrete or asphalt)
 - Mitigation measures (speed limit or noise screen)
- Variant „0”
- Variant „the most ecological”

Concept of „tiering”

- Transport policy (SEA)
 - highways or railroads
- National highway program (SEA)
 - locational alternatives
- Regional/local land use plan (SEA)
 - locational alternatives
- Stretches (EIA)
 - technological and mitigation alternatives

Procedural steps

- Screening and informing about its results
- Stages
 - scoping
 - submitting assessment documentation
 - **taking into account the results of assessment in the decision**
 - informing about the decision together with reasons
- Obligatory elements (at various stages)
 - consultation with environmental authorities
 - public participation
- Transboundary consultation (if applicable)

SEA and EIA

- Procedural similarities
- Scope of assessment
 - Physical impact in EIA vs achievement of environmental objectives in SEA
 - Larger scale and less precise data
- Role in the procedure: developers in EIA vs planning agencies in SEA (see General Guidance..)
- Legal framework
 - One law with separate schemes for EIA and SEA – **YES**
 - One scheme for EIA and SEA – **NO**

Environmental assessment documentation

- Different names (report, statement, study)
- Obligatory elements
 - Description of activity
 - Description of environment to be affected
 - Alternatives
 - Description of impact
 - Mitigation measures
 - Gaps in knowledge
 - Non-technical summary

Environmental assessment in international law - general principles

- General principles of international law
 - Trail Smelter case - arbitration tribunal award of 1941
 - Nagymaros-Gabcikovo case – ICJ verdict of 1997
 - Pulp Mill case - ICJ verdict of 2010
 - Nicaragua vs Costa Rica - ICJ verdict of 2015
- Rio Declaration on Environment and Development
 - Integration principle – Principle 4
 - Environmental Assessment – Principle 17
 - Responsibility for transboundary environmental damage - Principle 2
 - Transboundary procedure (Principles 18 and 19)

Environmental assessment in international agreements

- 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

Development of legal framework in Europe

- EIA Directive 1985 – impact of projects
- Espoo Convention 1991 – transboundary impact of projects
- Habitat Directive 1992 – impact of plans, programs and projects on protected habitats (Natura 2000 sites)
- UNECE Aarhus Convention 1998 – access to information, public participation in decision-making and access to justice in environmental matters

- SEA Directive 2001 – impact of plans and programs
- Kiev SEA Protocol 2003 - transboundary impact of plans and programs

Concept of EIA Directive and Espoo Convention

- Based on Western EIA concept
 - designed for market economy
 - assuming well established development control
- Procedural and process oriented
- Obligations put on authorities

Definition of EIA in EU EIA Directive

- “environmental impact assessment” means a process consisting of:
 - (i) the preparation of an environmental impact assessment report by the developer...
 - (ii) the carrying out of consultations
 - (iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer..., and any relevant information received through the consultations...;
 - (iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and
 - (v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a.

Concept of OVOS/expertiza

- Traditions of OVOS/expertiza systems in Eastern Europe, the Caucasus and Central Asia
 - Designed for centrally planned economy
 - Substance oriented
- Two separate legal regimes
 - OVOS - responsibility of developer
 - Expertiza(s) - responsibility of various agencies

Key conceptual differences

- Legal character of environmental assessment
 - Procedural (intl standard)
 - Substantive (OVOS/expertiza)
- Responsibility
 - Authority competent to make a decision (intl standard)
 - Developer
- Conducted by
 - Authority competent to make a decision (intl standard)
 - Technical experts (OVOS/expertiza)
- Role of EIA report in the assessment
 - One of the elements of the assessment (intl standard)
 - Document summarising results of assessment (OVOS/expertiza)

Key practical features in EU countries

- Individual screening (usually)
- Individual scoping (usually)
- Nature of EIA Report
- Active role of competent authorities in providing individual conditions
- Statement of reasons
- Elaborated documentation and procedures at each stage

UNECE Espoo Convention and EU EIA Directive

- Both regulate the project level
 - 1 list of activities (projects) in Espoo
 - 2 lists of projects in EIA Directive
- Espoo Convention focused on transboundary procedure (EIA national procedure only in Art.2)
- EIA Directive focused on national EIA procedures (transboundary procedure only in Art.7)

Espoo convention - status and developments

- Adopted and signed in Espoo in 1991
 - entered into force 10 September 1997
 - status: 44 Parties
- First amendment - MOP II
 - definition of the public
 - open to non-UNECE countries
- Second amendment - MOP III
 - scoping
 - extended list of activities on Appendix I
 - review of compliance

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

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

SEA Protocol

- Adopted in 2003 in Kiev to cover strategic decisions (plans, programs and policies)
- Content
 - mostly about national framework
 - transboundary procedure in Article 10
- Status
 - Parties - 26 (including EU)
 - in force since July 2010

Aarhus Convention

- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
 - 1998 - adopted and signed in Aarhus (Denmark)
- Maastricht Recommendations on Public Participation 2014
- Aarhus Convention Implementation Guide 2000 and 2013
 - Available online and in hard copies
 - C-182/10 Solvay and Others and C-279/12

EIA Directive

- EIA Directive 85/337
- Amended by
 - Directive 97/11 of 1997
 - Public participation Directive 2003/35
 - Directive 2009/31/EC
- Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification)
 - amended by Directive 2014/52/EU
- Main EU legal instrument to implement
 - Espoo Convention
 - art.6 and 9.2 of the Aarhus Convention

Basic requirements art.2

- Projects likely to have significant effects on the environment are subject to
 - development consent
 - EIA procedure **before** development consent is granted
 - EIA can not be after consent! - C-215/06 (EC vs Ireland)
- EIA procedure is followed strictly
 - need for EIA to be interpreted broadly and strictly - C-72/95 (Kraaijeveld)
- EC Guidance materials

Projects subject to assessment – art.4

- Environmental assessment is required for projects likely to have significant effects on the environment
- Projects subject to EIA Directive are listed in Annex I and Annex II
 - Projects listed in Annex I – by definition are likely to have significant effects on the environment and therefore always require assessment
 - Projects listed in Annex II – Member States must determine (using screening methods and criteria listed in Annex III) if a project belonging to a category of projects listed in Annex II is likely to have significant effects on the environment and therefore assessment is needed

EIA Directive - procedural steps

- Screening for projects in Annex II – art.4.2 and Annex III
- Scoping – art.5.2
- Preparation of EIA documentaton – art.5.3 and Annex IV
- Consultation with environmental authorities – art.6.1
- Public participation – art.6,2- 6.6
- Transboundary procedure – art.7
- Decision and informing thereof – art. 8 -9a
- Post-project monitoring – art.8a.4
- Access to justice – art.11

EIA - practice in EU

- Full EIAs yearly – appr 20 000-25 000
 - In Poland – about 5000 yearly
- Average duration – 11,6 months
- Average costs – 1% of project costs (41 000 Euro per EIA average)
- Responsibility for conducting EIA procedure
 - In big/medium countries – local and regional authorities with general competence
 - In smaller countries – environmental authorities