

Meeting of the Parties to the Espoo Convention, 8th session

Meeting of the Parties to the Protocol on SEA, 4th session

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**The Espoo Convention in a global context:
Its contribution to the development of international environmental law**

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Introduction

It is a great honor to be able to join this panel as an independent academic from Japan, a non-UNECE country - and to have an opportunity to present my views on the significance of the Espoo Convention in a global context, particularly focusing on its contribution to the development of international environmental law. My views are from three points of view, i.e. the precedent value of the Convention in the development of rules on EIA in international law; the synergy effects between the Convention and other international instruments; and the implications of the Convention in the context of non-UNECE regions, particularly with regard to the Asian region.

1. Some distinctive features of the Espoo Convention as a legal instrument : the basis of its strengths and weaknesses in a contemporary global context

Here are some distinctive features of the Espoo Convention as a starting point, as they are the basis of the strengths and weaknesses of the Convention in a global context. First, the Convention solely lays down "procedural" rules on transboundary hazardous activities. It means that the Convention places no restriction on the right of Contracting Parties (CPs) to decide to authorize or undertake such activities but requires that certain procedures are taken in the decision-making process as a precondition of such activities. Second, the Convention adopts a cross-sectoral approach in the scope of proposed activities that are subject to the procedural requirements. Third, the Convention formulates a continuous process of transboundary EIA (TEIA) that consists of notification,

preparation of EIA documentation, consultation, final decision, report of the final decision, post-project analysis. Fourth, it requires public participation in various stages of the process. Fifth, the Convention institutionalizes various mechanisms for restricting the discretion of a State of origin in undertaking EIA under Annexes I, II, III, IV and V. Sixth, it introduces mechanisms for ensuring compliance in a non-adversarial manner or for avoiding or resolving disputes. They include: review of compliance (Art. 14 bis), inquiry (Annex V) and arbitration (Annex VII). Seventh, the Convention is expected to be complemented by regional or bilateral agreements concluded by CPs (Annex VI). Finally, it involves extensive intervention into the relevant domestic systems, legal and administrative, of CPs for managing transboundary hazardous activities.

The state of the implementation of the Convention is relatively good, as seen in various levels of practice under the Convention on Slide 3.

2. The precedent value of the Espoo Convention in the development of rules on EIA in international law

Table 1 on Slide 5 shows the emergence and development of rules or commitments on EIA in international law. The precedent value of the Espoo Convention in the development of international environmental law can be summarized as follows. First, the Convention has contributed to the emergence of a customary rule of international law on TEIA by presenting some evidence of general custom, at least in the UNECE region. International tribunals recognized a customary duty to undertake an EIA concerning proposed activities that may have a significant adverse impact in a transboundary context in their judgments, an advisory opinion or arbitral award on several occasions in the 2010s. A reference to the international jurisprudence is included on the last slide. Second, the Espoo Convention has demonstrated how to make basic principles of international environmental law on harm-prevention, precaution and co-operation work effectively through the requirements of TEIA, in a particular context and concerning transboundary hazardous activities. Such legal implications were clearly confirmed by the Draft articles on transboundary harm adopted by the United Nations International Law Commission (ILC) in 2001. Third, the Espoo Convention constitutes part of the expanding fabric of treaty-rules or non-legally binding commitments on EIA whose number has increased since the 1990s. Fourth, the Convention has provided a leading model of a continuous process of managing transboundary hazardous activities from the viewpoint of procedural regulations. Various instruments have been following this precedent. Fifth, the Espoo Convention has shown an effective way to substantiate public participation in a transboundary context. Sixth, the Convention has indicated harmonization or

standardization of domestic EIA systems among relevant States as a critical factor of successful TEIA. Finally, the Espoo Convention confirms the importance of institutional mechanisms that continuously facilitate relevant States in undertaking TEIA and monitor the state of their implementation to make the procedures work.

3. Synergy effects between the Espoo Convention and other instruments

The next point on the significance of the Espoo Convention is the synergy effects between the Convention and other international instruments, which promote sustainable development in various ways. First, the Convention ultimately contributes to achieving the goals and principles of international regimes on various environmental issues, such as climate change, marine environmental protection *etc.*, by managing environmentally hazardous activities in a transboundary context. Second, there is a growing number of multilateral agreements (MEA) that include procedural regulations on transboundary hazardous activities. Consequently, one proposed activity is often subject to procedural regulation under the Espoo Convention and other instruments simultaneously. Table 2 on Slide 7 shows major MEAs that have overlapping procedural requirements or commitments on transboundary hazardous activities with the Espoo Convention. The Convention may substantially strengthen procedural requirements of other instruments by offsetting their limits based on its distinctive features as an advanced legal framework of TEIA. It may also lead to complementary interaction between implementation processes of multiple instruments where some kind of coordination is made among the relevant institutions. Such observation also applies to cases where one proposed activity that is subject to the Espoo Convention is regulated substantively by other instruments simultaneously.

4. Implication of the Convention in the context of non-UNECE regions, particularly with regard to the Asian region

The final point of my presentation is the implication of the Espoo Convention in the context of non-UNECE regions, particularly with regard to the Asian region where the legal framework for inter-State environmental co-operation is much less advanced than in the UNECE region. There is an increasing number of transboundary hazardous activities in the region. However, regional frameworks or bilateral arrangements are underdeveloped concerning TEIA. There is no statement of TEIA in the environmental policies of the *Asian Development Bank* (ADB) and the *Asian Infrastructure Investment Bank* (AIIB), either.

Nevertheless, there are some recent positive developments. First, since the mid-

2000s there has been growing awareness of the relevance of TEIA and of the Espoo Convention at various levels in the region. This has been reflected in: occasional participation of delegates of some Asian States both in MOPs and WG meetings and in panels organized under the Convention as a panelist; a series of regional workshops on TEIA, particularly in North-East Asia; and an increasing number of academic research papers on the relevance of TEIA in the region. Moreover, as the fruit of more than fifteen years work that took into account the experiences gained by CPs to the Espoo Convention, technical guidelines on the TEIA in the Lower Mekong Basin were finalized by an expert group of the Mekong River Commission (MRC) in September 2019 and agreed by the MRC Joint Committee members as a "working document" for further application. It may provide a valuable precedent in the region. It depends on how effectively it is implemented by the member States in the future. Second, almost all the Asian countries have adopted legislation or administrative measures on EIA, while they rarely include TEIA procedures. Finally, an arbitral tribunal confirmed the duties to undertake an EIA and to communicate the results between relevant States both as requirements under the United Nations Convention on the Law of the Sea (UNCLOS) and customary duties concerning disputes on ocean activities between Asian States.

The strengths and weaknesses of the Convention deriving from its distinctive features should be given more attention in an Asian context via an analysis of two options, namely promoting Asian countries' accession to the Espoo Convention or developing their own arrangements based on lessons learnt from the experience of the Convention. In this way, something can be done for achieving a better future.

Thank you.