
PROBLEMS OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT

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SUMMARY

Countries of the UN ECE (Eastern and Central Europe) region signed the Convention on Environmental Impact Assessment in a Transboundary Context in Espoo, Finland on February 25, 1991. The required number of ratifications was collected by the summer of 1997 putting the Convention into force. It is a very detailed piece of international regulation, but quite a few unresolved practical problems remain. Hungary is a small country with six similarly small-sized neighbors, which means that a significant percent of our projects have transboundary effects. This paper identifies some of the problems with implementation of the Convention. It provides an example of issues nations must face in addressing the growing number of environmental problems which cross national borders. First we discuss some general problems; later, we analyze ones emerging from the special procedures.

1 ACTIVITIES THAT ARE LIKELY TO CAUSE A SIGNIFICANT ADVERSE TRANSBOUNDARY IMPACT

The term "activities that are likely to cause significant adverse transboundary impacts" is a central element of the Convention because it triggers the whole international negotiation process. A list of activities which will undergo the "Espoo Process," so named after the location of the drafting of the Convention, is contained in Appendix 1 of the Convention. However, the concept of distinguishing activities which are "likely to cause significant adverse transboundary impacts" is also part of the criteria for implementing the Convention. In the text of the Convention, the phrase seems to exercise a narrowing effect on the circle of activities listed in Appendix I of the Convention, i.e., the items of the list will undergo the Espoo Process only if they have significant adverse transboundary impact.

Appendix III of the Convention gives criteria to determine significant adverse impact, but it only refers to those cases in which Parties wish to extend the list of Appendix I. However, these criteria apply more generally, too. Appendix III proposes to consider the size of the activities ("proposed activities which are large for the type of the activity"), location ("proposed activities which are located in or close to an area of special environmental sensitivity or importance") and effects ("proposed activities with particularly complex and potentially adverse effects"). Interestingly enough Appendix III gives less weight to distance from the border, a criterion that was solely stressed in the Baaren meeting of the representatives of the Parties, especially dealing with this issue. The Baaren meeting concluded that size, sensitive areas and complexity are mostly subjective, while the distance from the border is the only trait which is entirely objective -- a number of kilometers. It is another problem altogether, that this "objective" measuring should be determined from type to type of the activities listed in Appendix I.

These criteria serve only in the initial step: parties entering the process. They can decide later on if, for a given case, the whole process of negotiations is unnecessary, even though the triggering criteria were met. Parties should consider at the beginning of the process whether the likely impacts are sufficiently significant to warrant continuation of the process over the longer term. Once they insist on the full negotiations in cases formally meeting the criteria but having less significant effects, the other Parties will tend to insist that the process be invoked for less significant impacts as well, so that the game brings loss of money, time and prestige for all of them.

1.1 Contact points

To begin the process, countries nominate a focal point. The issue of which body the countries will nominate as the focal point for exchanging information and leading the negotiations described in the Convention seems to be a clearly technical one; but it is interwoven with several deeper, more theoretical issues. The first is whether the process to carry out transboundary Environmental Impact Assessments (EIAs) is an administrative legal process or only an organizing task. If the activity takes place on our side, we are the "Party of Origin"; the decision about involving the other country, the "Affected Party," might easily be viewed merely as part of the administrative legal process dealing with fulfillment of EIA requirements such as those related to permitting of the given activity. But on the other hand, where we are the "Affected Party", there is no legal basis for an administrative law process: no client on Hungarian territory, no permit to be issued here, no substantial and procedural laws regulating the process to follow. This time the Affected Party is not an authority but rather a special client in an administrative case taking place on the other side of the border. Depending on the decision we make concerning the basic nature of the task, we will nominate an administrative body, a social institution or a hybrid contact point.

Deciding on the nature of the body to be granted the tasks of the contact point is not the only task: we must then decide which level of body should be chosen: local, regional or central-national. The subsidiarity principle would dictate the local or regional level: the local authority (or the local municipality) has first hand information about the concerned territories, population interests, and they are the closest to the border, too. They are also easy to reach and we can have the least bureaucracy when using this level. On the other hand, transboundary impact assessment cases might be very complicated, both professionally and politically. Besides, the contact point should have enough manpower to handle the information exchange and negotiation tasks quickly and effectively. Thirdly, if there is a joint body created by the Parties, as the Convention itself suggests, only the national level authorities will suit the body's needs. These viewpoints dictate the other solution: to grant it to the national level.

1.2 Sovereignty issues

The free flow of information to and from the country within which an activity is being undertaken and which may be adversely affected, is essential for an effective EIA process. Because of sovereignty issues, however, this information exchange may depend upon other parties to run smoothly.

- Theoretically, all the data concerning the territory and population of the Affected Party come from its contact point, as stipulated in Article 3, Point 6 of the Convention: "*An Affected Party shall at the request of the Party of Origin, provide the latter with reasonably obtainable information relating to the potentially*

affected environment under the jurisdiction of the Affected Party, where such information is necessary for the preparation of the environmental impact assessment documentation. The information shall be furnished promptly and, as appropriate, through a joint body where one exists." A strong motivation for providing this information stems from the fact that, although the Affected Party cannot be forced to produce the required information, once failing to do so, it will have less basis for argument during the negotiations. In addition, although the authorities of the Party of Origin cannot undertake any official steps to control the information coming from the other side of the border, the investor himself may do so because according to international private law he or she is fully entitled to make a contract with a consulting firm or with an expert in the territory of the Affected Party. In this way the investor can gain any important data for its analysis. Naturally, this kind of proper collection of data first will serve the interests of the investor, who is preparing for negotiations with the Affected Party, and is striving to prove that the environmental impacts on its territory are bearable and/or might be mitigated and controlled effectively.

- In the other direction, it is also important for the Affected Party to find information from the territory of the Party of Origin. This first might be necessary when there is suspicion that there is an activity planned, initiated or even started, that would significantly affect our country's territory and population. This situation is, partly, handled by Article 3, Paragraph 7: "When a Party considers that it would be affected by a significant adverse transboundary impact of a proposed activity listed in Appendix I, and when no notification has taken place in accordance with paragraph 1 of this Article, the concerned Parties shall, at the request of the Affected Party, exchange sufficient information for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact." If the dispute cannot be settled this way, parties will use an inquiry commission in accordance with Appendix IV or will choose another method to meet the same ends.
- What is not handled satisfactorily by the Convention is how the countries get into the position to initiate the aforementioned dispute, i.e., how they gain the basic information about the plans of activities on the territory of the Party of Origin. Fortunately, publicity, media, NGO's and environmental professionals of the countries are in a continuous, lively exchange of information, which makes it virtually impossible to keep a large investment plan a secret. In addition, it is not prohibited by international law, nor even can it be deemed as an unfriendly gesture towards neighbors, to scan the proper journals or to make cooperation agreements with our environmental NGOs operating close to the borders, asking them to whistleblow once there are signs of infringement of the Convention. The best solution is, however, when the Parties have a common standing body of their contact points which is empowered to search for "suspect" projects on a regular basis among the permitting authorities of both sides.

1.3 Cost bearing

In the transboundary environmental impact assessment cases there are several expensive procedural steps, on top of those generally emerging at solely the national level EIA. These include: a) translation of information concerning the impact area on the territory of the

Affected Party; b) translation of the short summary of the EIS (at least); c) translation of the comments on EIS; d) costs of participation of the public of the Affected Party in the public hearing(s) at the Party of Origin (travel, accommodation, interpretation); and d) negotiation costs, post project analysis costs, etc.

There are several principles that can be applied to help establish which parties should bear these costs:

- Follow direct or indirect references in the Convention. This principle should have priority. Unfortunately, there are no direct references to cost bearing in the Convention, although there are some which might be interpreted as indirect. For example, in Article 3, Paragraph 6, it seems quite reasonable to assume that Convention intends for the Affected Party to pay for the cost of collecting the reasonably obtainable information relating to the potentially affected environment. Article 4, Paragraph 2 hints at a common bearing of the expenses in saying: "the concerned parties shall arrange for distribution of the documentation."
- "Polluter Pays" principle. This general principle of environmental law seems also to be applicable in the special case of transboundary EIA. Some procedural steps, like post project analysis seem especially applicable.
- Cost control principle. It may be vital for the long term practical survival of the legal instrument of transboundary EIA that clients, municipalities or the authorities themselves should be sensitive to the cost implication of their actions. They should not dictate or create expensive procedural steps for the other party. For instance, if the comments made by the Affected Party must be translated by the Party of Origin, they should be careful not to produce a rather voluminous package of comments to be translated.
- Good neighbor principle. Some smaller amounts may not always have to be paid according to the other substantial principles, because it might easily happen that one Party wants to make positive gestures towards the other one.
- Unbalanced expenses principle. We have to consider that some tasks entail less expenses for one Party than for the other. Some translations, for instance, could be cheaper for one than for the other. It should be kept in mind that these comparative advantages should equalize each other in long run.
- "The investor's interest" principle. We just mentioned that in some cases it is the vested interest of the investor to collect data regarding the territory of the Affected Party. This collection of information is not mandatory, but once the investor volunteers to do it - serving his other own interests - it is natural that the expenses will be his/hers too.
- Constitutional, human rights principles. In some cases the use of the above principles would result in an unbalanced situation for the participants involved in the process. If so, then the general principles of equality of persons or the prohibition of differentiation according to citizenship or other bases will lead to different rules of cost-bearing.
- "Causa nocet domino." Finally, if no other principle works, in the last resort this Roman law principle must be activated: if none else can be charged, the person who actually spent the money or had other economic expenses shall him/herself bear the cost.

2 PROBLEMS FROM THE VIEWPOINTS OF THE PARTY OF ORIGIN, WHERE THE ACTIVITY IS TAKING PLACE

2.1 Timing of notification of an Affected Party

Article 3, Paragraph 1 uses the term “*no later than when informing its own public about that proposed activity.*” However, in some EIA systems there is no fixed date when the public has to be informed about the project. Another time factor is that the notification itself has to be prepared properly, which itself takes considerable time. In addition, the entire process has to be retailored once the Affected Party wishes to participate. Taking all of these into account, it seems unavoidable to send (initiate) the notification immediately after the possible adverse significant transboundary effects turn up in the case.

2.2 The content of the notification

On the meeting of the undersignees of the Convention in Geneva in 1996, the Canadian delegation presented a detailed list of all possible elements of the notification. This list is based upon a survey of the legal practice of all Parties to the Convention, which means that no country uses the full list. The full list contains: a) a description of the activity (the investor, the technology, the aim and reasons of the activity, location, expected impacts, used materials, energy, emissions, waste, transboundary impacts, mitigation measures, timing, maps); b) the contact point and the decisive authorities; c) EIA process (timing, right of the clients, possible decisions, legal remedies, public participation); d) deadline for the response (between 10 days and 4 months), request of information on the impact area on the territory of the Affected Party; and e) deadline for comments.

2.3 The problem of a late start of the international EIA process

A late start may take place because of two reasons. The first is when no notification occurred and the Affected Party only later realizes that the given activity might have significant adverse transboundary impacts. In such cases, Article 3, Paragraph 7 applies, and the inquiry process may result in a decision that the international EIA process should take place. In such cases, the ongoing domestic EIA process should be suspended. If the case is already in the court phase, the court decision should consider the faulty decision of the administrative authority to fail to involve the Affected Party. In any later phase the EIA process would be restarted. If at the time the notification was sent, the Affected Party had decided not to participate but later on it changed its view and expressed its desire to participate. In such case the Article 3, Paragraph 7 inquiry process does not apply and all the possible consequences (suspension of the process, negative court decision and EIA process restart) are optional to the authorities.

2.4 Consultations

The Convention does not regulate the time deadline for the Affected Party to send its comments on the EIS. This seemingly allows the Party of Origin to tailor the deadline to its own procedural timing, so that it may request the Affected Party to send the comments before the EIA process is scheduled to finish according to the law of the Party of Origin.

It is also open in the Convention who shall initiate the consultations. However, it seems to be a logical interpretation that the Party of Origin should not be forced to initiate the consultations, because they serve first of all the interests of the Affected Party. There might be cases, however, where the Party of Origin also considers the consultations important.

Another important question is the composition of delegations to the consultations. It is to be avoided to refer to the authorities in the delegation as “representatives to the investor.” Quite the opposite: it would be more realistic that the authorities of the two Parties (and the NGOs) speak on the same terms, rather than with the investor. It is another issue whether the investor should be obliged to participate in the consultations, although naturally it is in his/her interest.

2.5 Legal remedies for the affected party

Although the Convention only states that “*due account is taken of the outcome of the consultations,*” it should mean that the reasoning of the decision enlists the comments and all the answers of the authorities to them. Furthermore, we do not consider it unrealistic that, on a mutual basis, Parties allow each other (to each other’s interested legal and natural persons) the right of appeal or other legal remedies. This in some respects ensues from an interpretation of Article 2, Par. 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.*”

3 PROBLEMS FROM THE VIEWPOINTS OF THE AFFECTED PARTY

3.1 Sending information about the affected area

Article 3. Paragraph 6 speaks about “*reasonably obtainable information*” implying that the Party of Origin might not be obliged to conduct research, measurement or other expensive steps. On the other hand, it could be in the interests of the Party of Origin, or, more specifically, in the interests of the concerned municipalities. For this reason, the Affected Party contact point should refer all the notifications to the concerned municipalities or, in special cases, to those economic groups who might be interested in transboundary environmental impacts (e.g., using the border river for their purposes and a certain derogation of its quality would harm their economic activity).

It is a different issue that the Affected Party is slightly more obligated to collect the relevant information about the affected area in those cases in which it initiated the inquiry process according to Article 3, paragraph 7. The text of the Convention states that “*the Parties shall exchange sufficient information for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact*” seems to urge both Parties to produce substantial information about the impacts and about the affected areas.

3.2 Comments on the EIS

According to Article 4, Paragraph 2, the Party of Origin shall send the whole EIS documentation. This does not mean, naturally, that the Affected Party is obliged to translate the whole material, but it does not mean either that the Affected Party should do nothing. This

can be seen from Article 3. Paragraph 8 which contains obligations to both Parties: “*The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on the proposed activity...*”

Organizing the commenting process on the side of the Affected Party raises a national level constitutional issue in many countries: it is a widespread constitutional principle that foreign speaking clients must not suffer any harm from the fact that they do not speak the language of the administrative process, it is overlooked that the native citizens, who naturally speak the language of the administrative process, must not suffer harm from the fact that a part of the file is written in a foreign language. This loophole in our laws should be solved soon, as the cases with international elements become more frequent.

4 CONCLUSIONS

Many times it is said that environmental problems do not stop at the borders of the countries, yet international law and international private law is not well enough prepared to solve transboundary environmental issues. Many more multilateral and bilateral agreements are needed in this field until we reach a proper understanding of all the theoretical and practical problems of cooperation between two or more separate and different legal systems in solving environmental matters. The legal institution of transboundary environmental impact assessment and the Espoo Convention itself are good examples of how countries have tried to overcome this. These show a typical trait: we are at the beginning of a long development process in which the problems can already be seen, but life might still - and almost surely will - bring us a lot of surprises.

