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Interpreting the Strategic Environmental Assessment Protocol to the Espoo Convention

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Abstract: *In 2022, the Espoo Convention Implementation Committee issued its first findings and recommendations regarding compliance with the Protocol on strategic environmental assessment, providing at the same time useful guidance for interpreting the Protocol. While the specific guidance prepared by the Committee remains to be confirmed in 2023 by the Meeting of the Parties to the Espoo Convention, it marks the Committee's first in-depth examination of the Protocol's transboundary practice. The paper provides a brief analysis of the Committee's interpretation of Article 10 of the Protocol, aimed at assisting Parties in implementing their obligations.*

Keywords: *Espoo, implementation, interpretation*

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1. Introduction

The 1991 UNECE[1] Espoo Convention on environmental impact assessment on a transboundary context (the Convention) and its 2003 Kyiv Protocol on strategic environmental assessment (the SEA Protocol)[2] are, arguably, two of the most important international instruments in the field of sustainable development. By establishing a predictable procedural assessment track, they allow major projects, plans and programmes to be scrutinized not only by the authorities of the State where they are being undertaken, but also by other States and, very importantly, by the public.

In 2010, the International Court of Justice noted: "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".[3] At the same time, according to the Court, "… general international law [does not] specify the scope and content of an environmental impact assessment."[4]

Viewed in the light of the Court's conclusions, the Convention and the SEA Protocol are ever more relevant since they set up a framework for performing transboundary environmental impact assessments. Fortunately, with the entry into force on 26 August 2014 of the first amendment to the Convention,[5] both international instruments[6] currently allow countries outside the UNECE to join and use their provisions for environmental impact assessment.

Countries wishing to accede to the Convention and the SEA Protocol realize however, that the provisions of the two treaties provide but a framework upon

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[1] United Nations Economic Commission for Europe.

[2] *Convention on Environmental Impact Assessment in a Transboundary Context*, Espoo, Finland, 25 February 1991, United Nations, Treaty Series, vol. 1989, p. 309; *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Conte*xt, Kiev, 21 May 2003, United Nations, Treaty Series, vol. 2685, p. 140.

[3] *Case concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J Reports, para. 204.

[4] *Case concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J Reports, para. 205.

[5] The new para. 3 of Article 17 provides that: "Any other State, not referred to in para 2 of this Article [States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to para 8 of the Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence in respect of matters governed by this Convention, including the competence to enter into treaties in respect of these matters.], that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties. The Meeting of the Parties shall not consider or approve any request for accession by such a State until this paragraph has entered into force for all the States and organizations that were Parties to the Convention on 27 February 2001."

[6] The Protocol already contained a similar provision.

which UNECE states have built an increasingly complex system of rules and recommendations. This system was and still is under development, as this paper will illustrate, by mainly two bodies: the Meeting of the Parties and the Implementation Committee.[1] It should be noted that all bodies created under the Convention also serve the SEA Protocol.

The Meeting of the Parties was established in accordance with Article 11 of the Convention and Article 14 of the SEA Protocol. Its role is to "keep under continuous review the implementation of this Convention" in order to improve "environmental impact assessment procedures in a transboundary context."[2] The Meeting of the Parties has been very active in this role, adopting various recommendations, guidelines and implementation decisions particularly in the field of environmental impact assessment.[3] Many of these were the result of the work undertaken within the Implementation Committee (the Committee). The establishment of this body was, however, somewhat complicated.

2. The Implementation Committee

Under the Convention (and the SEA Protocol), the Meeting of the Parties can establish "such subsidiary bodies as it considers necessary for the implementation of [the Convention/Protocol]".[4] The power to set up subsidiary bodies was however added only after the Meeting of the Parties established the Implementation Committee in 2001, to assist Parties to the Convention to "comply fully with their obligations under the Convention [and the Protocol]".[5] As the role of the Committee became ever more important, some Parties inquired into its legitimacy, in the absence of clear conventional provisions. This perceived lack of legitimacy was eventually overcome with the entry into force of the second amendment to the Convention. This amendment specifically refers to a compliance procedure "as a non-adversarial and assistance-oriented procedure adopted by the Meeting of the Parties".[6]

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[1] The Parties established other bodies as well (see https://unece.org/environment-policyenvironmental-assessment/overvieworganigram-bodies), but their role is predominantly managerial.

[2] Article 11 of the Convention, as amended in 2004. Article 14 of the Protocol contains similar provisions.

[3] The Convention entered into force on 10 September 1997, and the Protocol on 11 July 2010.

[4] See doc. ECE/MP.EIA/4, annex IV, decision II/4. After the entry into force of the Protocol, the mandate of the Implementation Committee was specifically extended to Protocol matters – see doc. ECE/MP.EIA/SEA/2, decision V/6–I/6.

[5] Para. 4 of the Appendix to decision III/2 (doc. ECE/MP.EIA/6).

[6] Art. 14 bis of the second amendment to the Espoo Convention (decision III/7). The amendment entered into force on 23 October 2017.

The Committee consists of eight Parties to the Convention, who each appoint a representative and an alternate. They have two main instruments for assessing compliance of Parties in order to establish whether the Parties in question require assistance. The first such instrument is a submission brought by a Party in respect of another Party's compliance or in respect of its own compliance. The second is the initiative of the Committee "where [it] becomes aware of possible non-compliance of a Party with its obligations"[1].

The number of Committee initiatives is significantly larger than the number of submissions, as Parties have been rather reluctant to use this instrument individually.[2] However, collectively, within the Meeting of the Parties, states have been much more willing to engage and shape the Committee's proposals following particular Committee initiatives.

When examining submissions and Committee initiatives, the Committee members were confronted with very specific issues of implementation requiring the interpretation of treaty provisions. In respect of the Convention, the Committee has already developed a substantial body of findings and recommendations, containing specific interpretations, most of which have been endorsed by the Meeting of Parties.[3]

In respect of the SEA Protocol, the Committee has just recently adopted its first findings and recommendations.[4] The interpretation offered by the Committee in this particular instance is particularly welcome since Parties are still grappling with transboundary procedures for plans and programmes. The Committee itself has also struggled for six years before finalizing its findings and recommendations.

It has to be stressed that the Committee cannot require Parties to the Convention or to the SEA Protocol to do or not do something. It can only issue recommendations that need to be confirmed by the Meeting of the Parties. Whether a recommendation confirmed by the Meeting of the Parties

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[1] Para. 5 of the Appendix to decision III/2 (doc. ECE/MP.EIA/6).

[2] See the information provided on the Committee's webpage at https://unece.org/environment-policy/environmental-assessment/implementation-committee.

[3] Including contested interpretations such as "notification is necessary unless a significant transboundary adverse transboundary impact can be excluded" (to be examined in a future contribution) – see Opinions of the Implementation Committee (2001-2020) available at https://unece.org/sites/default/files/2021-02/Implementation%20Committee%20opinions%20to%202020_MOP-8_2020.pdf

[4] Findings and recommendations on compliance by Serbia with its obligations under the Protocol in respect of the Energy Sector Development Strategy of the Republic of Serbia for the Period up to 2025 with Projections up to 2030 and the Programme for the Implementation of the Strategy for the Period 2017-2023 – doc. ECE/MP.EIA/IC/2022/5 (Findings and recommendations).

is mandatory for the Party concerned remains a matter to be debated.[1] Parties do not however refuse to implement recommendations for reasons concerning their legal nature.

3. The SEA Protocol (and the Espoo Convention)

Before discussing the Committee's interpretation of the SEA Protocol in a specific case, it is useful to recall briefly the substantial scope of the SEA Protocol with reference to the Espoo Convention.

As indicated above, the two international treaties are some of the most important instruments in the field of sustainable development. In its preamble, the Espoo Convention specifically refers to "the need to ensure environmentally sound and sustainable development".[2]

While the purpose of most other international environmental law instruments is to protect specific components of the environment (air, water, soil), areas, species or groups of species, the Espoo Convention and the SEA Protocol aim at integrating the environmental protection goals into the economic decision making. According to the same preamble, the parties to the Convention are "aware of the interrelationship between economic activities and their environmental consequences".[3]

As its title indicates, the Espoo Conventions aims to regulate in a transboundary context. This context appears when a project, or an activity as defined by the Convention, to be undertaken on the territory of one of the Contracting Parties, is likely to have a significant adverse transboundary environmental impact on the territory of another Contracting Party. The Convention regulates the specific procedural steps[4] that need to be undertaken in order to ensure that environmental conditions from the likely affected Contracting Party are given proper consideration in the authorization process of that specific project.

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[1] See Timo Koivurova, 'The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)" in Geir Ulfstein, *Making Treaties Work, Human Rights, Environment and Arms Control*, Cambridge University Press, 2007, p. 233.
[2] Espoo Convention, second preambular paragraph.
[3] Espoo Convention, first preambular paragraph.
[4] A very brief summary of the succession of procedural steps provided by the Convention can be found in Timo Koivurova, 'The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)" in Geir Ulfstein, *Making Treaties Work, Human Rights, Environment and Arms Control*, Cambridge University Press, 2007, p. 219-220.

These procedural steps require a constant dialogue between the authorities of the states concerned, the Party of origin, i.e. the state where the project is intended to be executed and the affected Party.

Unlike the predominantly transboundary, international perspective of the Convention, the SEA Protocol aims at the national procedures. While technically a Protocol to the Espoo Convention, because of this national perspective, the Secretary of the Convention has called it a "unique legal instrument"[1].

The strategic environmental impact assessment of plans and programmes conducted before environmental impact assessments of individual projects/activities undertaken under such plans/programmes further opens the array of options available to public authorities when making sustainable development decisions.[2] Whereas, for example, in the case of the environmental impact assessment of a thermal power plant, the authorities may choose whether to build it or not or to change some technical requirements, a strategic environmental impact assessment of a plan for energy production might include choices between coal and other fossil fuels or renewable sources of energy.

While some sort of environmental impact assessment had existed almost all over Europe before the adoption of the Espoo Convention, many countries in the UNECE region "had no strategic environmental impact assessment practice"[3]. Article 2 paragraph 7 of the Espoo Convention already provided at the time of its adoption that "… Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes."

The efforts towards adopting the SEA Protocol began in earnest at the end of the 1990s, after the entry into force of the Espoo Convention on 10 September

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[1] Tea Aulavuo, "Implementation of the UNECE Protocol on SEA to the convention on environmental impact assessment in a transboundary context (Espoo Convention)" in Barry Sandler and Jiří Dusík, *European and International Experiences of Strategic Environmental Assessment. Recent progress and future prospects*, Routledge, New York, 2016, p. 131.

[2] Jan de Mulder, "The Protocol on Strategic Environmental Assessment: A Matter of Good Governance", *Review of European Community & International Environmental Law,* vol. 20, no. 3/2011, p. 232; see also Ion Gâlea and Carmen Achimescu, "L'apparence de modernité de la Convention de Belgrade de 1948 relative à la navigation sur le Danube", *In honorem Flavius-Antoniu Baias*, Hamangiu, 2021

[3] Jerzy Jendroska and Stephen Stec, "The Kyiv Protocol on Strategic Environmental Assessment", *Environmental Policy and Law*, vol. 33, no. 3-4/2003, p. 105.

1997,[1] and ended with the Protocol's adoption in Kyiv on 21 May 2003. The SEA Protocol entered into force on 11 July 2010.

4. The assessment of Serbia's compliance under the SEA Protocol

In 2014, the Committee began the assessment of the situation in Serbia following information submitted by an NGO alleging non-compliance with the Convention in respect of building an additional unit to a thermal power plant.[2] During the compliance procedure, the Committee noted that the construction of the additional unit had been already envisaged under Serbia's Spatial Plan and Energy Development Strategy.[3] After deciding to examine compliance with the Convention under a separate procedure[4] and concluding that the SEA Protocol was not applicable to the Plan,[5] the Committee continued with the assessment of the Energy Development Strategy.

In 2019, the Committee found that there was a profound suspicion of non-compliance by Serbia with its obligations under the SEA Protocol regarding the Strategy and the Programme of its implementation, and decided to begin a Committee initiative regarding this matter.[6]

On 29-31 March 2022, the Committee found Serbia in non-compliance with several articles of the SEA Protocol.

5. Serbia's Energy Development Strategy and its Implementation Programme

In 2013, Serbia notified several of its neighbouring states about its draft Energy Strategy, forwarding them the draft document together with a report on the strategic environmental assessment prepared in accordance with the national legislation. While Serbia notified countries that had not ratified the SEA Protocol, it failed to provide the Committee proofs of notifying other

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[1] Nick Bonvoisin, "The SEA Protocol" in Barry Sandler et al., *Handbook of Strategic Environmental Assessment*, Earthscan, New York, 2011, p. 167.
[2] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 1, p. 3.
[3] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 3, p. 3.
[4] Serbia later brought the project [activity in accordance with the Convention] in compliance with the Convention, and the assessment was closed – see ECE/MP.EIA/SEA/11/Add.1, decision IS/1e, ECE/MP.EIA/IC/2016/4, paras. 43–44.
[5] See ECE/MP.EIA/IC/2019/6, para. 100.
[6] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 11, p. 5.

Parties to the SEA Protocol.[1] In its letter dated 13 November 2013, Serbia requested replies to its notification to be provided by 1 December 2013.[2]

Having received no comments from the countries it had notified, the Serbian authorities approved the Energy Strategy on 4 December 2015.

In 2016, Serbia prepared an Implementation Programme of the recently adopted Strategy. On 24 July 2017, it notified[3] the potentially affected Parties, including the countries that had not notified, regarding the Strategy,[4] requesting them to send comments within 30 days of the receipt of the documentation.

Except Bulgaria, all countries notified replied within the set deadline indicating they wished to participate in the procedure. However, the Serbian authorities considered only the comments made by Romania. Serbia refused to consider Croatia's comments of 29 November 2017 and, because of a disagreement concerning language/translation issues, did not continue the transboundary procedure with Hungary. On 26 October 2017, Serbia approved the Programme, without informing any of the notified countries.

6. The Committee's assessment

The Committee made a number of findings in respect of Serbia's compliance with the provisions of the SEA Protocol, as well as several good practice recommendations regarding the transboundary procedure. They mostly fall outside the scope of this paper. In respect of the implementation of Article 10 of the SEA Protocol, the Committee had to interpret its provisions, in order to assess Serbia's compliance. According to the Committee, "clarification of certain aspects of application of Article 10" were required "with a view to facilitating future implementation of the Protocol by its Parties."[5]

7. Article 10 of the SEA Protocol

As the Committee itself noted[6], the "essence" of its assessment concerned the interpretation and application of Article 10 of the SEA Protocol. The text of

[1] The parties concerned confirmed that they had not received the notifications. See Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 57, p. 12.
[2] Findings and recommendations, paras. 17-29, pp. 6-8 – see note 16.
[3] The notification also included the report on strategic environmental assessment of the Programme.
[4] Possibly triggered by the correspondence with the Committee.
[5] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 46, p. 10.
[6] Ibidem.

the Article provides, under the heading Transboundary consultations, the following:

"1. Where a Party of origin considers that the implementation of a plan or programme is likely to have significant transboundary environmental, including health, effects or where a Party likely to be significantly affected so requests, the Party of origin shall as early as possible before the adoption of the plan or programme notify the affected Party.

2. This notification shall contain, inter alia:

(a) The draft plan or programme and the environmental report including information on its possible transboundary environmental, including health, effects; and

(b) Information regarding the decision-making procedure, including an indication of a reasonable time schedule for the transmission of comments.

3. The affected Party shall, within the time specified in the notification, indicate to the Party of origin whether it wishes to enter into consultations before the adoption of the plan or programme and, if it so indicates, the Parties concerned shall enter into consultations concerning the likely transboundary environmental, including health, effects of implementing the plan or programme and the measures envisaged to prevent, reduce or mitigate adverse effects.

4. Where such consultations take place, the Parties concerned shall agree on detailed arrangements to ensure that the public concerned and the authorities referred to in article 9, paragraph 1, in the affected Party are informed and given an opportunity to forward their opinion on the draft plan or programme and the environmental report within a reasonable time frame."

Briefly, Article 10 of the SEA Protocol requires Parties to notify Parties likely to be affected by the implementation of a plan or programme, provides for the minimum content of the notification itself, sets an indicative timeline and the steps that need to be taken during that timeframe, and provides for a consultations' framework.

Of all the obligations above, the Committee interpreted, in the context of its specific assessment of Serbia's compliance, what a reasonable time schedule for transmitting comments meant in a concrete case (Art. 10 para. 2 (b) and what the detailed arrangements were supposed to include (Art. 10 para. 4). In this context, the Committee noted that its interpretation was required because Article 10 was less specific than the Convention's corresponding articles,[1]

[1] Mainly Article 3 (Notification) of the Convention.

and because "the existing related guidance and Parties' good practice under the Protocol were limited".[1]

7.1. Reasonable time schedule

Article 10 para. 2 (b) requires the Party of origin to indicate in its notification to the affected Parties "a reasonable time schedule for the transmission of comments". The Committee noted that Serbia had given 18 days for a response to its notification regarding the Energy Strategy and 30 days for a response to its notification regarding the Implementation Programme of the said Strategy.

In determining whether the deadlines set by Serbia were reasonable, the Committee referred to several "factors" that had to be clarified among the Parties. According to the Committee, these "factors" may include:

"a) the complexity and the scale of the draft plan/programme;

b) the volume of the documents transmitted to the affected Party;

c) the time needed for ensuring translation of relevant parts of documents into the national language of the affected Party".[2]

Presumably, after considering the "factors" above,[3] the Committee reaches the conclusion that the time frames given by Serbia (18 and 30 days) are not reasonable (too short) and thus not in compliance with art. 10 para 2 (b) of the SEA Protocol.

After reviewing the timeline of the replies given by the notified affected Parties, it appears that 60 to 90 days could have been a reasonable deadline. For example, in both cases, the Bulgarian authorities replied after more than two months from the receipt of the notification that they did not consider themselves affected. Similarly, Croatia provided its comments several months after the expiry of the deadline given by Serbia.

7.2. Detailed arrangements

Article 10 para. 4 of the SEA Protocol requires Parties to agree on the detailed arrangements to ensure that the public and the authorities can provide their views on the notification of the affected Party. The Committee offered several examples of matters that might require detailed arrangements: "timing and means for consultations, including public participation in the affected Parties,

[1] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 46, p. 10.
[2] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 72, p. 15.
[3] The Committee does not explain how it arrived to this conclusion.

issues to be covered, translation of documents and interpretation during any meetings."[1]

The absence of agreement on the language of consultations, including the translation of documents, deprives, according to the Committee, the public concerned of the opportunity to efficiently participate in the transboundary procedure. The Committee made clear that Parties share an obligation to agree on detailed arrangements to ensure the effective participation of the public and the authorities.[2] Thus, when a Party requests to discuss the language of consultations,[3] the other Party is under an obligation to reply and both Parties are required to reach an agreement.

It should be noted that the Committee did not deal with the language of consultations *per se*. Thus, it did not respond to the argument provided by the Party of origin that a request for translation of documentation into the language of the affected Party was not supported by the provisions of Article 10 of the SEA Protocol.

8. Conclusions

The Committee's contribution to the interpretation and application of Article 10 aims, as in the case of other interpretations it provided regarding the Convention, at encouraging Parties to exchange views and reach agreement. Short deadlines and lack of reply are clearly not conducive to meaningful exchange. Similar to previous assessments of compliance under the Espoo Convention, the Committee has found again that the major difficulties do not lie in the national legislation. Even less so under the framework provided by the SEA Protocol, where years of trainings and legislative assistance in drafting national laws[4] have ensured a fairly compliant body of legislation in all Parties.

Parties continue to have difficulties in adequately communicating with each other. Whether this situation stems from linguistic difficulties or other reasons, it is yet to be established. Under the Espoo Convention for example, this author noted that correspondence would simply get lost between or within

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[1] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 75, p. 16.
[2] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 75 p. 16.
[3] As Hungary did.
[4] Tea Aulavuo, "Implementation of the UNECE Protocol on SEA to the convention on environmental impact assessment in a transboundary context (Espoo Convention)" in Barry Sandler and Jiří Dusík, *European and International Experiences of Strategic Environmental Assessment. Recent progress and future prospects*, Routledge, New York, 2016, p. 143-145.

public authorities responsible with transboundary issues, sometimes because of rapid succession of personnel.

This is not an easy matter to rectify. However, by drawing the attention to these issues, the Committee encourages Parties to consider various means to avoid issues of non-compliance generated by administrative glitches. Setting longer deadlines for example, might be easier to accomplish for strategic environmental assessment of plans and programmes than in the case of transboundary environmental assessments of projects where an active project developer wishes to swiftly finalize the administrative procedures and obtain the construction permit.

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