

Applying Aarhus and Espoo Conventions in nuclear decision-making

Application of the Espoo Convention to nuclear energy-related activities
13 June 2017, Minsk

Issues

- Aarhus and Espoo Conventions – international law context and scope of obligations
- Concepts of public involvement
- Public, public concerned and foreign public
- Identification of the public concerned
- Key procedural elements
- Activities covered

Aarhus and Espoo Conventions – international law context

- The UN Rio Declaration on Environment and Development 1992 – codification of environmental law principles
- Jurisprudence of international courts

Context of Aarhus Convention - Rio

Principle 10

- Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Context of Espoo Convention

- General principles of international law
 - Trail Smelter case - arbitration tribunal
 - Nagymaros-Gabcikovo case – ICJ
 - Pulp Mill case - ICJ
- 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)

Rio Principles 2 and 19

- 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 2)
- 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 (Principle 19)

Transboundary procedure under Espoo Convention and SEA Protocol

- Legal nature:
 - Procedure between concerned governments
 - Governed by public international law
 - Applies only between Parties
- Key obligations
 - To notify potentially affected government(s)
 - Carried out transboundary procedure only if the potentially affected government(s) so wish
 - Joint responsibility of governments of concerned Parties for public participation
 - If there is transboundary procedure - public from affected Party (from areas likely to be affected) must have equivalent opportunities (Art.2.6)

Public participation procedure under Aarhus Convention

- Legal nature:
 - Obligations towards public
 - Non-discrimination clause (art.3.9)
 - Apply mostly rules of domestic law
- Key obligations
 - To conduct early and effective public participation procedure
 - To identify public concerned regardless of whether it its „own” public or foreign public
 - To provide equal opportunities to participate for the entire public concerned

Espoo vs Aarhus obligations

- obligations imposed by Aarhus are not dependent on obligations stemming from other international instruments
- whether in a domestic or transboundary context, the ultimate responsibility for ensuring that the public participation procedure complies with the Convention's requirements lies with the competent authorities of the Party concerned.

Concepts of public involvement in decision-making

- Goals of public involvement procedure
 - Informing the public – public is aware
 - Consulting the public – public is aware and heard
 - Public participation - public is aware , heard and its views are taken into account
 - Referendum - public is aware and decides
- Stakeholders vs public participation
 - Business
 - Trade-unions
 - Various agencies
 - Local authorities
 - Public
 - Stakeholder participation limited to a few well-established NGOs – is not public participation (Special UN rapporteur Catarina de Albuquerque)
 - Participation of NGOs in closed advisory groups - is not public participation (ACC/51)

Public, public concerned and foreign public

- Public
 - One or more
 - Natural or legal persons
 - Including NGOs
- Public concerned
 - Affected or likely to be affected, or
 - Having an interest
 - Including NGOs:
 - Promoting environmental protection
 - Meeting any requirements under national law
- Without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities (article 3.9)

Identification of the public concerned

- Obligation to identify public concerned
- Affected or likely to be affected
 - Relation to impact
 - described in EIA/SEA documentation
 - technical guidance with assumed range of impact
 - Criteria for identifying range of impact
 - Not only routine impact but also impact related to accidents
- Having an interest
 - Not only legal or factual interests
 - Everyone who shows interest
- Approach to ultrahazardous activities

Ultra-hazardous activity

- “An activity with a danger that is rarely expected to materialize but might assume, on that rare occasion, grave (more than significant, serious or substantial) proportions”,
- *Yearbook of the International Law Commission, 2001, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2)), draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, 2001, commentary to article 1, para. 2.*

Identification and notification of the public concerned – ACC/71

- In the case of decision-making on ultrahazardous activities like an NPP, being activities invariably of wide public concern, **particular attention must be taken at the stage of identifying the public concerned and selecting the means of notification in order to ensure that all those who potentially could be concerned in the decision-making, including the public concerned outside its territory, have a reasonable chance to learn about the proposed activities and their possibilities to participate.** In this regard, the public may potentially be concerned both because of the possible effects of the normal or routine operation of the NPP and because of the possible effects in case of an accident or other exceptional incident. In both cases, the decision-making may impact not only on tangibles, such as property or health, but also on less measurable areas, like quality of life. **For an ultrahazardous activity such as an NPP, members of the public may be affected or be likely to be affected by, or have an interest in, the environmental decision-making within the scope of the Convention even if the risk of an accident is very small.** In determining who is concerned by the environmental decision-making, the Committee also considers the magnitude of the effects if an accident should indeed occur, whether the persons and their living environment within the possible range of the adverse effects could be harmed in case of an accident, and the perceptions and concerns of persons living within the possible range of the adverse effects. It is clear to the Committee that **with respect to NPPs, the possible adverse effects in case of an accident can reach way beyond State borders and over vast areas and regions.**

Public participation procedure

- Notification –art 6.2
- Access to information – art.6.6
- Possibility to submit comments – art.6.7
- Due account taken of public comments – art.6.8
- Decision taken notified and accessible to the public- art.6.9

Decision-making which require public participation

- Plans, programs etc and their modifications (art.7 of the Aarhus Convention and SEA Protocol)
- Authorisation/licensing /permitting of specific projects (art.6 of the Aarhus Convention and Espoo Convention)
 - New projects
 - Changes and extensions
 - Updates and reconsiderations
 - Special case - life-time extension

Espoo – Rivne case (EIA/IC/CI/4)

- The Committee considered that there could be many reasons why Parties to the Convention would decide that the final decision on a proposed activity should be issued only for a limited period of time. Among the reasons, the Committee could identify:
 - The risks associated with such proposed activity;
 - The changes in the state of the environment;
 - The changes in the density of population;
 - The possible effects on human health;
 - The advancement of scientific knowledge as well as relevant developments in the regulatory framework
 - The development of the state of art in relation to mitigation measures.
- Clearly then, when the limited period of time expired, the Party of origin would have to re-evaluate such reasons and make the decision to extend the initial period of time or not.

Espoo – Rivne case (EIA/IC/CI/4)

- On the basis of the above, it was the view of the Committee that the decision to authorize a proposed activity subject to the Convention, according to the national procedure, only for a limited period of time meant that any subsequent decision to extend that limited period of time, whether in the form of a new license or amendment or renewal of the existing one, would, under the Convention, be another decision of a competent authority to authorize or undertake a proposed activity, triggering obligations under the Convention. In that context it becomes less relevant whether it is a new activity or a major change to an activity.

Approaches

- Changes interpreted broadly – not only to cover physical change in the project itself (AG Kokot in Case Krizan)
- Extension of lifetime as new activity or major change (Espoo IC in case Rivne)
- ACC in case Slovakia – art.6.10

ACC in Case ACC/41/Slovakia

- the clause “mutatis mutandis, and where appropriate” does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation
- “the clause ‘where appropriate’ introduces an objective criterion to be seen in the context of the goals of the Convention,
- “when the authority reconsidered or updated the operating conditions for an activity of such a nature and magnitude, and being the subject of such serious public concern, as this nuclear power plant, with the changes and increased potential impact on the environment as presented to the Committee, public participation would have been appropriate.”

Broad interpretation of changes

- to interpret provisions regarding changes to cover not only physical change in the activity itself but also changes in the surrounding environment, including the cumulative effect with other activities, as well as changes in the applicable legislative framework, in particular in relation to safety measures or environmental protection requirements (opinion of Advocate General Kokott in Case C-416/10 *Križan*)

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