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Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context

Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol on Strategic Environmental Assessment

Working Group on Environmental Impact Assessment and Strategic Environmental Assessment

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Compliance and implementation

Draft guidance on the implementation of the Convention drawing on opinions of the Implementation Committee – Annotated outline of key issues

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The present document constitutes an annotated outline of key issues for the preparation of the guidance on the implementation of the Convention (drawing on opinions of the Implementation Committee). The guidance aims to address issues of implementation arising from the provisions of the Convention text in force, but also reflect on the implementation of the amended text under the second amendment (not yet in force). The preparation of the guidance document is foreseen in the workplan of activities for the period up to the seventh session of the Meeting of the Parties to the Convention, adopted by the Meeting of the Parties at its sixth session (decision VI/3–II/3). The activity is carried out under the leadership of the Committee Chair and a Committee member for Protocol matters. The Working Group will be invited to consider the report on the preparation of the guidance and the present annotated outline on key issues, presented by Mr. Jendroska, and to provide guidance for the further development of the document.

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The Convention on Transboundary Environmental Impact Assessment
Guidance

Article 1
Definitions

For the purposes of this Convention,

A. Scope of Article 1

Article 1 deals with the use of terms. It assigns special meaning to certain words and expressions used in the text of the Convention, as underlined in the opening text of the Article: ‘for the purposes of this Convention’. The definitions listed in Article 1 aim to assist the authorities of the Parties, and sometimes the public, in understanding, interpreting and applying the provisions of the Convention that are all of a general nature. The same definitions should be referred to when interpreting texts adopted by the bodies of the Convention, including the Meeting of the Parties and the Implementation Committee.

B. Party, Party of origin, Affected Party, Concerned Parties (i-iv)

(i) "Parties" means, unless the text otherwise indicates, the Contracting Parties to this Convention;
(ii) "Party of origin" means the Contracting Party or Parties to this Convention under whose jurisdiction a proposed activity is envisaged to take place;
(iii) "Affected Party" means the Contracting Party or Parties to this Convention likely to be affected by the transboundary impact of a proposed activity;
(iv) "Concerned Parties" means the Party of origin and the affected Party of an environmental impact assessment pursuant to this Convention;

The first four definitions bear upon the subjects that are under an obligation to implement the provisions of the Convention, in general, and specifically to undertake the environmental impact assessment procedure, as well as other subsequent procedures and activities, under certain conditions. These subjects are defined in relation to the specific obligations they have. All Parties have the general obligation to implement the provisions of the Convention in their national legislation and practice. There are specific obligations, and rights, under the Convention attached to the Party or origin and the affected Party, respectively, and they also have additional joint obligations.

Article 1 defines Parties as ‘Contracting Parties’ to the Espoo Convention. Contracting Parties are those states and regional economic integration organizations that have ratified, accepted, approved or acceded to the Convention in accordance with the provisions of Article 17. They have thus expressed their consent to be bound by the provisions of the Convention, usually following a decision of their national law making bodies. Currently, there are three states, Iceland, the Russian Federation and the United States of America, that although they signed the

Convention, they did not ratify it, and as a consequence are not Contracting Parties to the Convention.

The Convention assigns the most important role in the environmental impact assessment procedure to the Party of origin. This Party is defined in Article 1 as the 'Contracting Party … under whose jurisdiction a proposed activity is envisaged to take place'. The Party of origin sits at the very center of the environmental impact assessment procedure. It does so both from a factual and from a legal point of view. Factually, the proposed activity that is likely to have a significant adverse transboundary impact will take place under the jurisdiction of the Party of origin. It is important to note that the Convention does not refer to the territory of the Contracting Party, but to its jurisdiction. Therefore, the Convention applies to any territory that falls under the jurisdiction of the Contracting Parties. By way of declarations, some Contracting Parties have excluded territories under their jurisdiction from the application of the Convention.

The affected Party, defined by the Convention as the Contracting Party 'likely to be affected by the transboundary impact of a proposed activity' takes, together with the Party of origin the center stage of the transboundary environmental impact assessment procedure. Most of the actions taken according to the procedure by the Party of origin will have the affected Party as the recipient. The definition does not directly link the transboundary impact of a proposed activity with the territory under the jurisdiction of an affected Party, since the impact includes not only physical effects, but also '… includes effects on cultural heritage or socio-economic conditions resulting from the alterations to those factors'. However, one should also take into account the subsequent definition of transboundary impact where an 'area' must be clearly identified.

Finally, according to the Convention, 'Concerned Parties means the Party of origin and the affected Party of an affected environmental impact assessment pursuant to [the] Convention'. There are constant references in the text of the Convention to the concerned Parties. This stresses that in order to implement many obligations under the Convention, the Party of origin and the affected Party need to cooperate closely.

C. Proposed activity (v)

(v) "Proposed activity" means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure;

A. Concept of "activity" - genesis
B. Activity in Espoo Convention and similar concepts under relevant other UNECE instruments and EU directives
C. Proposed activity
D. Major change
E. Subject to a decision
F. Decision of competent authority
    a. relation to art.2.3 and article 6.1
    b. relation to other instruments (Aarhus Convention, EIA Directive etc)
G. "in accordance with an applicable national procedure

D. Environmental Impact Assessment (vi)

(vi) "Environmental impact assessment" means a national procedure for evaluating the likely impact of a proposed activity on the environment;

A. Procedure
    a. Substantive vs procedural approach to EIA
    b. Definition in EIA directive
B. National procedure - meaning of “national”
C. Approaches to EIA
D. EIA and OVOS/expertise
E. EIA vs SEA
F. EIA and biodiversity assessment
G. EIA and industrial safety consideration

E. Impact, Transboundary Impact (vii-viii)

(vii) "Impact" means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors;

(viii) "Transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party;

The two definitions of impact and transboundary impact are essential in the construct of the transboundary environmental impact assessment procedure. In fact, this procedure needs to address the very significant adverse transboundary impact of a proposed activity. The qualifiers ‘significant’ and ‘adverse’ are mentioned further on in the text of the Convention (Article 2 paragraph 1) and are not defined by the Convention. In this respect, the Appendix III only provides for some general criteria to assist in the determination of the environmental significance of activities listed in not listed in Appendix I.

The definition of impact is a very broad one, encompassing practically any possible effect caused by a proposed activity on the environment. Moreover, the Convention adheres on an extended understanding of the environment that includes ‘human health and safety, flora, fauna, soil, air water, climate, landscape and historical monuments or other physical structures or the interaction among there factors’. Impact, as defined by the Convention also ‘includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors’. This broad definition is sometimes overlooked in the process of assessing the transboundary environmental impact. For this reason, the Committee stressed that the definition specifically included ‘considerations of human health and safety and socioeconomic conditions among the impacts to

be considered in the preparation of the transboundary EIA documentation and in the consultations.[2]

This impact will be transboundary when it is caused within an area under the jurisdiction of a Party by 'a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party'.

F. Competent authority (ix)

(ix) "Competent authority" means the national authority or authorities designated by a Party as responsible for performing the tasks covered by this Convention and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity;

A. Authority
    a. public authorities vs private bodies
    b. definition of public authorities in Aarhus Convention
B. Competent authority
C. Authorities responsible for performing the tasks covered by this Convention
D. Authorities entrusted by a Party with decision-making powers regarding a proposed activity

G. The public (x)

x) "The Public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups.

A. Genesis and legislative history
B. Relation to Aarhus Convention
C. Concept of "the public" and its derivatives
D. Foreign public

Article 2
General provisions

11. If the Party of origin intends to carry out a procedure for the purposes of determining the content of the environmental impact assessment documentation, the affected Party should to the extent appropriate be given the opportunity to participate in this procedure

A. The scope of Article 2

As its heading makes very clear, article 2 lists the general obligations Contracting Parties have under the Convention. By general, the Convention does not mean vague. In fact, Contracting

[2] ECE/MP.EIA/IC/2013/2, para. 69

Parties have very clear obligations beginning right with the first paragraph. This paragraph, for example, requires Parties to take, either individually or jointly, all measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities. It thus presents, in few words, the purpose of the Convention, to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities. Therefore, Parties should be guided by this purpose when authorizing activities that can have such an impact. In order to do this, they need to establish a national legal framework to implement the provisions of the Convention, and to design an environmental impact assessment procedure that would permit public participation and preparation of substantial environmental impact assessment documentation. This environmental impact assessment procedure should be undertaken prior to the authorization of various activities and include a transboundary element, with special attention paid to notification to potentially affected Parties.

Article 2 allows Parties to expand the application of the provisions of the Convention to activities that are not listed in Appendix I but are likely to cause a significant adverse transboundary impact, and the Convention provides, in Appendix III, guidance for identifying criteria to determine significant adverse impact.

The Convention attaches great importance to public participation in environmental impact assessment procedures, and paragraph 6 of Article 2 is a proof of this. It requires the Party of origin to provide an opportunity to the public in the areas likely to be impacted by the proposed activities to participate in 'relevant environmental impact assessment procedures regarding proposed activities'. In addition, this opportunity has to be equivalent to 'that provided to the public of the Party of origin'.

Article 2 paragraph 7 clarifies that the provisions of the Convention are to be applied to specific activities. Parties are, nevertheless, encouraged 'to apply the principles of environmental impact assessment to policies, plans and programmes'. Since the entry into force of the Protocol on Strategic Environmental Assessment, Parties have a specific instrument to use when authorizing policies, plans and programmes.

Parties are also allowed, under Article 2 paragraph 8 to design their environmental impact assessment procedures in order to allow for the protection of industrial and commercial secrecy as well as national security.

Finally, the Convention allows, as many other international instruments in the field of environment protection, for more stringent measures to be implemented. At the same time, it does not affect other general international law obligations that Parties have in respect of activities taking place on their territory, such as the no-harm principle.

A. Role of general provisions
B. National procedure vs transboundary procedure
C. Relation to other UNECE instruments

A. Appropriate and effective measures (paragraph 1)

1. 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.

A. General principle
B. Prevention
C. Individually or jointly
D. Significant impact
E. Adverse impact

B. Establishment of an environmental impact assessment procedure (paragraph 2)

2. Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

A. Core obligation
A. Necessary legal, administrative or other measures to implement the provisions of this Convention
B. Establishment of an environmental impact assessment procedure
C. “that permits”
D. “likely”
E. EIA and public participation
F. Role of documentation in EIA

C. Prior to a decision (paragraph 3)

3. The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

A. Scope of obligation - relation article 6
B. EIA “prior” to a decision
C. Decision to authorize or undertake a proposed activity

D. Notification (paragraph 4)

4. The Party of origin shall, consistent with the provisions of this Convention, ensure that affected Parties are notified of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

Paragraph 4 contains the most important provision of the Convention, requiring Parties of origin to notify affected Parties when an activity on their territory fulfills two condition, namely it is listed in Appendix I and is likely to cause a significant adverse transboundary impact. A separate article (Article 3) contains detailed rules on the implementation of the obligation to notify.

Neither the Convention itself nor the applicable international rules provide for an exception, and therefore absence of diplomatic relations cannot be considered legitimate reason for not applying the Convention. [VI - 5(e)] - applicable to other articles as well.

E-mail is a widely used, commonly acceptable and rapid means of communication and information exchange, including in public international relations, and the legal validity of electronic means of communication for the purposes of notifying is acknowledged. [VI - 5(f)]

Also reiterates its recommendation that even a low likelihood of a significant adverse transboundary impact should trigger the obligation to notify affected Parties (see decision III/4, annex IV, para. 28), and that notification is necessary unless a significant transboundary impact can be excluded (see decision IV/2, annex I, para. 54). [VI/2 - 5(7)]

Entrusting the proponent of an activity with the carrying out of the procedure for transboundary environmental impact assessment is not adequate, unless the proponent is the State. [V/4 - 6(b)]

Parties retain records of the means of communication, dates and addresses, and that communications should be sent in parallel by other means, for example simultaneously by post and e-mail. [V/4 - 8(a)]

As a Party of origin, consult potential affected Parties early as to whether notification was necessary, in order to avoid problems when a notification comes at a very late stage in the procedure (ECE/MP.EIA/WG.1/2007/3, para. 13)

As a Party of origin, send the notification both by post and by electronic means, taking into account the legal limitations on electronic communications in some countries (ECE/MP.EIA/WG.1/2007/4, para. 28)

Armenia decided to notify all four of the neighbouring countries about the planned construction of the planned nuclear power plant in line with article 3 and appendix I of the Convention. It had the legal obligation under the Convention to notify Azerbaijan, the only neighbouring country that was a Party to the convention. The notification of the other neighbouring countries, which were not Parties to the Convention, was done on a voluntary basis. [AZ vs AR - ECE/MP.EIA/IC/2012/6, para. 11]

Furthermore, regarding Georgia and Turkey, the letter specified that as these two countries were not Parties to the Convention, Armenia had no obligations toward them under the Convention. [AZ vs AR - ECE/MP.EIA/IC/2012/6, para. 17]

The Parties had early recognized that the Convention did not include a clear provision as to which authority in the affected Party the notification would have to be sent to, and for this reason

the first meeting of the Parties had established, by its decision I/3, the points of contact. Furthermore, while acknowledging that a decision of a Meeting of the Parties does not constitute a legally binding obligation and thus would not be subject to compliance review, the Committee reiterates its earlier conclusion that a Party of origin would have fulfilled its obligation under the Convention when the notification was sent to the authority nominated for this purpose by the affected Party. In the view of the Committee, this was relevant for the good functioning of the Convention.

E. Activities not listed in Appendix I (paragraph 5)

5. Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether one or more proposed activities not listed in Appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed. Where those Parties so agree, the activity or activities shall be thus treated. General guidance for identifying criteria to determine significant adverse impact is set forth in Appendix III.

Appendix III

1. In considering proposed activities to which Article 2, paragraph 5, applies, the concerned Parties may consider whether the activity is likely to have a significant adverse transboundary impact in particular by virtue of one or more of the following criteria:
(a) *Size*: proposed activities which are large for the type of the activity;
(b) *Location*: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention, national parks, nature reserves, sites of special scientific interest, or sites of archaeological, cultural or historical importance); also, proposed activities in locations where the characteristics of proposed development would be likely to have significant effects on the population;
(c) *Effects*: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment.
2. The concerned Parties shall consider for this purpose proposed activities which are located close to an international frontier as well as more remote proposed activities which could give rise to significant transboundary effects far removed from the site of development.

Paragraph 5 contains a straightforward provision. Parties have an obligation to consult on the likelihood of a significant adverse transboundary impact of activities not included in Appendix I. The request for consultation can come from the affected Party. However, a Party of origin acting in good faith and genuinely concerned about the effect of activities it intends to authorize can also request consultations. According to this provisions, activities not listed in Appendix I are likely to have significant adverse transboundary impacts because of certain circumstances. Some of these circumstances are described in Appendix III as criteria for assessing the likelihood and

the significance of adverse transboundary impacts. There criteria are very general. Parties are nevertheless free to use other criteria.

The first two criteria, concerning size and location, are self-explanatory. The third criterion however, is more susceptible to very broad interpretations. It refers, for example, to proposed activities that cause additional loading which cannot be sustained by the carrying capacity of the environment. Could greenhouse gases be considered as such additional loadings in the context of the global efforts to mitigate climate change? Parties will need to answer to this question in the future.

F. Opportunity to participate (paragraph 6)

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.

A. Scope of obligation - relation to article 3.8 and article 4.2
B. Opportunity to participate
C. “in the areas likely to be affected”
D. “Equivalent opportunity”
E. Relation to Aarhus Convention

G. Plans and programmes (paragraph 7)

7. Environmental impact assessments as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes.

The development and entry into force of the Kyiv Protocol has rendered this provisions more or less redundant. Parties that have not yet acceded to the Protocol can, however, still make use of this provision. It can provide a good legal framework for those countries Parties to the Convention who intend to become Parties to the Protocol and want to test beforehand their administrative capacity in steering the transboundary procedures for policies, plans and programmes. The Convention requires such states to apply the principles of environmental impact assessment and not its detailed provisions.

H. Protection of information (paragraph 8)

8. The provisions of this Convention shall not affect the right of Parties to implement national laws, regulations, administrative provisions or accepted legal practices protecting information the supply of which would be prejudicial to industrial and commercial secrecy or national security.

By its very nature, the environmental impact assessment procedure requires countries and developers to make public a large amount of information concerning proposed activities. In some situations, the disclosure of this information would be prejudicial to industrial and commercial secrecy or to national security. Parties are allowed under paragraph 8 to regulate the protection of such information in the context of the environmental impact assessment procedure. Their regulations need, however, to be drafted in such a way as not to make the procedure devoid of content. The capacity of the affected Party and of the public to participate in the procedure should not be substantially affected by such regulations.

I. More stringent measures (paragraph 9)

9. The provisions of this Convention shall not affect the right of particular Parties to implement, by bilateral or multilateral agreement where appropriate, more stringent measures than those of this Convention.

This standard provisions allows Parties, individually, bilaterally or multilaterally, to go beyond the obligations they have under the Convention. Current practice shows, nevertheless, that Parties still have difficulties in implementing the provisions of the Convention. The paragraph allows countries that, for various reasons, see the conventional provisions as insufficient, to further develop them. If more Parties see the same need, their collective action might influence the amendment of the Convention.

J. Other obligations (paragraph 10)

10. The provisions of this Convention shall not prejudice any obligations of the Parties under international law with regard to activities having or likely to have a transboundary impact.

The Committee noted that 'article 2, paragraph 10, of the Convention is meant to make it clear that following the obligations related to notifying potentially affected Parties and conducting, if appropriate, other steps of transboundary procedure, does not release the Parties from observing relevant obligations under other international instruments, unless such instruments specifically provide so.'[3] This paragraph states that at the time when the Convention was adopted, its provisions did not prejudice obligations countries had under international law. It also assumes that before it ratifies the Convention, a country makes an assessment of its international law obligations with regard to activities having or likely to have a transboundary impact in order to ensure that the provisions of the Convention will not prejudice its obligations.

The Committee also turned this obligation round in order to emphasize that ' following the obligations stemming from any international instrument can by no means be interpreted as an excuse for not observing the requirements of the Convention related to notifying potentially affected Parties and conducting, if appropriate, other steps of transboundary procedure.'[4] Therefore, Parties have the obligation to ensure consistency of their international obligations.

[3] ECE/MP.EIA/IC/2010/2, para. 41
[4] ECE/MP.EIA/IC/2010/2, para. 41.

K. Determination of content of the environmental impact assessment documentation (paragraph 11)

11. If the Party of origin intends to carry out a procedure for the purposes of determining the content of the environmental impact assessment documentation, the affected Party should to the extent appropriate be given the opportunity to participate in this procedure.

The second amendment to the Convention, which has not yet entered into force, has introduced this provision in the text of the Convention. It is targeted at the Party of origin, more as an invitation than as an obligation to allow the affected Party to participate in the scoping.

Article 3
Notification

A. Scope of Article 3

Article 3 is essential in the overall economy of the Convention and the first standard by which the Implementation Committee evaluates the proper implementation of the Convention. The first question being asked a possible case of non-compliance refers exactly to this matter, whether a notification has taken place or not. Notification has come to be seen as a sign not only of good will but also of good faith in relation to Parties to the Espoo Convention. In respect of nuclear activities, for example, many Parties notify broadly[5], sometimes even countries that are not parties to the Espoo Convention. This is a welcoming development in the implementation of the Convention, although, in the specific case of such proposed activities, it also signals a need to legitimize the construction or expansion of a nuclear power plant in the face of strong domestic and sometimes international opposition. Nevertheless, the willingness of such countries to go through the procedure, which is properly started by the notification and to submit their project, which in the case of nuclear activities generally involves considerations relating to national security, to the scrutiny of other countries, is appreciated by all Parties.

Article 3 refers not so much as to the actual obligation to notify, which can be found specifically in previous article, but to the procedure accompanying the notification, such as the timing of the notification, the contents of the notification, the responses of the affected Parties and so forth. Clearly, this article does not cover all questions raised in the practice of transmitting and responding to notifications. It would have been impossible. Its good faith implementation however, can nevertheless steer parties through the process without insurmountable difficulties.

It should be underlined that the provisions of this article need to be applied not only by the Party of origin, but also by the affected Party. Notification, as a process, needs the cooperation and active involvement of all concerned Parties.

B. Notification (paragraph 1)

[5] See for example Hungary, which notified 30 countries concerning the planned expansion of its nuclear power plant at Paks.

1. For a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact, the Party of origin shall, for the purposes of ensuring adequate and effective consultations under Article 5, notify any Party which it considers may be an affected Party as early as possible and no later than when informing its own public about that proposed activity.

i. Who notifies

Even if, as mentioned above, notification, as a process, needs the cooperation and active involvement of all concerned Parties, the Meeting of the Parties made it very clear that the obligation to notify rests solely with the Party of origin. Decision V/4 specifically states that: '[t]he Party of origin is responsible for ensuring that notification under article 3 is carried out properly'.[6] Therefore, the Party of origin has not only the obligation to notify, but it also has to ensure that the whole process of notification follows the requirements of article 3. This should not be, however, interpreted, as giving absolute freedom to the affected Party or Parties in dealing with the notification they receive. They have to follow the provisions of the Convention as well.

In the vast majority of cases, notification would be done directly by the Party of origin. But the possibility exists, and it has been used, to notify the potentially affected countries through an intermediary. Practically, the notification was drafted by the Party of origin, sent to the intermediary who forwarded it to the potentially affected countries indicated by the Party of origin, collected the responses and forwarded them in return to the Party of origin. The Meeting of the Parties has seen this approach as exceptional, and therefore Parties could use it only under 'exceptional circumstances'.[7] In the specific case where it was used, the lack of diplomatic relations was considered to be an 'exceptional circumstance'. It would be difficult to say what other situations would qualify as 'exceptional circumstances', especially since the Meeting of the Parties acknowledged email as a valid means of notifying under the Convention.[8]

In clarifying the legal consequences of notifying through an intermediary, the Implementation Committee and the Meeting of the Parties have stressed, once again, that the obligation to notify rests solely with the Party of origin.[9] The Meeting of the Parties noted that the use of an intermediary 'does not release a Party from its obligations under the Convention'.[10] Moreover, when a Party chooses to use the services of an intermediary, it should be aware that it 'retains the responsibility for any actions or omissions of the intermediary in the process of notification'.

In conclusion, the Party of origin has to notify potentially affected countries either directly or, under exceptional circumstances, indirectly with the assistance of an intermediary. In this latter

[6] para. 6(a)
[7] Decision VI/2, para. 5(b)
[8] Decision VI/2, para. 5(f)
[9] Decision VI/2, para. 5(a)
[10] Decision VI/2, para. 5(a)32

case it retains, however, all responsibility towards the potentially affected countries as well as towards the bodies of the Convention, for any actions or omissions of the intermediary, even when this intermediary is one of the bodies of the Convention.

ii. What activities need to be notified

Article 3 paragraph 1 puts forward a double test for identifying the projects which need to be notified. First, the concrete project needs to belong to one of the categories found in the Appendix I list. Compared to the second test, this test is a relatively easy one and for most projects it is straightforward whether they fit into one of the categories mentioned above. The second test, however, requires preparation and analysis in order to demonstrate whether the project is likely to cause a significant adverse transboundary impact.

iii. To whom should the notification be sent

According to the same paragraph 1 of Article 3, the Party of origin should direct its notification to the Party which it considers may be an affected Party. Specifically, as decided by the Meeting of the Parties (decision I/3), the notification 'shall be transmitted to the relevant point of contact'.[11] While the transmittal of the notification, by email, to the point of contact, remains the easiest way to notify, in many instances, the information that some Parties provide on their point of contacts is outdated and emails containing important notifications go unread. This was acknowledged by the bodies of the Convention and Parties of origin were encouraged to 'send the notification both by post and by electronic means, taking into account the legal limitations on electronic communications in some countries.[12] While this encouragement refers to 'legal limitations' it clearly covers practical difficulties such as the ones mentioned above.

Another often used channel for transmitting the notification is through the foreign affairs ministries and embassies of the concerned countries. In most cases it does not only ensure the safe transmittal of the notification but also raises the attention of other public bodies, besides the one providing the point of contact, to important activities.

iv. Timing

According to Article 3, paragraph 1, the notification should be sent 'as early as possible and no later than when informing its own public about the proposed activity'. This provision practically requires parties of origin to assess the significant adverse transboundary impact from the first moments when the authorization of an activity is considered. While it leaves parties some margin of appreciation into the actual moment to send the notification it also sets a clear deadline, 'no later than when informing its own public about the proposed activity'. The Committee noted that the practice of Parties concerning the timing of the notification varied not only from Party to Party but from one activity to another and for this reason recommended that 'each Party clarify

[11] ECE/MP.EIA/IC/2012/6, para. 26
[12] ECE/MP.EIA/WG.1/2007/4, para. 28

the timing of notification in bilateral and multilateral agreements or directly bilaterally and multilaterally'.[13]

Based on the provisions of Article 3, paragraph 1 and the recommendation of the Committee, the following interpretation can be suggested. As a rule, Parties of origin are requested to notify as early as possible. It can happen at various moments, but no later than when informing the public about the proposed activity. As an exception, Parties could notify at the time when informing their public about the proposed activity, but this should be the exception. The strict deadline, 'no later than when informing its own public about the proposed activity' should be seen more as a means for evaluating compliance with the provisions of the Convention and not as indicating the precise moment of the notification.

v. Means of notification

The Convention does not prove for the actual means of notification leaving Parties to decide on this matter. For this reason, the Meeting of the Parties has noted that modern and inexpensive means of communication could be employed for the purposed of notification. According to the Meeting of the Parties, '[e]-mail is a widely used, commonly acceptable and rapid means of communication and information exchange, including in public international relations, and the legal validity of electronic means of communication for the purposes of notifying is acknowledged'.[14] Previously, however, a more cautious approach was preferred, and Parties of origin were recommended to 'send the notification both by post and by electronic means, taking into account the legal limitations on electronic communications in some countries'.[15]

Clearly, regardless of the means chosen to notify, the Party of origin has to ensure that the notification reaches the possibly affected parties. Therefore, a Party of origin wishing to truthfully engage in transboundary consultation would check whether the possibly affected parties had indeed received the notification before attaching the legal consequences provided by Article paragraph 4 to any lack of response to its notification.

vi. Translation

The EIA is essentially a procedure designed to inform the national decision maker about the likely environmental consequences of its decision to authorize certain activity. As such it will be conducted in the language of this decision maker. The Espoo Convention brings a foreign element into this procedure, the possibly affected party but does not address an essential matter pertaining to the involvement of possibly this affected party into the procedure, the language issue. This has been left for the Parties to the Convention to settle. The easiest solution has been to deal with this matter on an ad-hoc basis. However, when confronted with repeated transboundary EIA procedures, parties chose to insert specific provisions on translation and languages to be used during the procedure in bilateral and multilateral agreements. The Meeting

[13] ECE/MP.EIA/10 - p. 109
[14] Decision VI/2, para. 5(f)
[15] ECE/MP.EIA/WG.1/2007/4, para. 28

of the Parties acknowledged these approaches in Decision V/4 where it noted that: '[u]nless provided for in a bilateral or multilateral agreement or other arrangement, the concerned Parties should, when sending or responding to the notification, agree at the start of the procedure for transboundary environmental impact assessment on the scope of the documentation to be translated'.[16] Moreover, in the same decision the Meeting of the Parties provided some guidelines on the documentation to be translated, which should 'at a minimum, include the non-technical summary and those parts of the environmental impact assessment documentation that are necessary to provide an opportunity to the public of the affected Party to participate that is equivalent to that provided to the public of the Party of origin'.[17]

Clearly, the whole of the notification should be translated.

The cost of this translation should be borne, according to the Meeting of the Parties by the Party of origin 'in line with the polluter pays principle'.[18] Parties can, however, agree on another arrangement concerning costs. As to the notification, it is expected that the Party of origin will always cover the costs of translating the information contained in the notification.

vii. Correspondence

Because of the central role played by the notification, Parties, and especially the Party of origin, need to ensure the correspondence between them takes place orderly. Thus, the Meeting of the Parties invited them to: 'retain records of the means of communications, dates and addresses',[19] in order not only to answer possible future inquiries into their compliance with the provisions of the Convention, but also to prove good faith and good neighbourliness. Moreover, as mentioned above, parties were encouraged to send communications 'in parallel by other means, for example simultaneously by post and e-mail'[20].

Moreover, in order to ensure that the notification has been well received, Parties of origin were encouraged, 'as a matter of good practice [to] request an acknowledgement of the notification'.[21]

viii. The purpose of notification

Coming back to the provisions of Article 3, paragraph 1, one should clearly note the main purpose of the notification, 'ensuring adequate and effective consultations under Article 5'. This underlines the clear state to state nature of the obligations contained in the Convention. While the involvement of the public is an important part of the transboundary EIA procedure, the essential part of the procedure, as designed under the Convention, takes place at a governmental level. The entire procedure is shaped by the results of bilateral or multilateral consultations. A strict appeal

[16] para. 6(f)
[17] Decision V/4, para. 6(f)
[18] Decision V/4, para. 6(f)
[19] Decision V/4, para. 8(a)
[20] Decision V/4, para. 8(a). See also ECE/MP.EIA/WG.1/2007/4, para. 28
[21] ECE/MP.EIA/WG.1/2006/4, para. 13 (b)

to the provisions of the Convention, without proper governmental discussion, while possible can considerably lengthen the process and leave all parties dissatisfied with the results.

C. Contents of the notification (paragraph 2)

2. This notification shall contain, inter alia:
(a) Information on the proposed activity, including any available information on its possible transboundary impact;
(b) The nature of the possible decision; and
(c) An indication of a reasonable time within which a response under paragraph 3 of this Article is required, taking into account the nature of the proposed activity;
and may include the information set out in paragraph 5 of this Article.

The Convention does not provide for a comprehensive content of the notification. In Article 3 paragraph 2 it sets some essential information that should be included in the notification, but allows parties to include any other information they see as necessary.

i. The factual information

Article 3 paragraph 2 provides that the notification shall contain information on the proposed activity, including any available information on its possible transboundary impact. There are two categories of information referred to in this paragraph. First, there is the general information on the proposed activity. Such general information pertains to the technical description of the activity and its location. Secondly, the notification needs to include 'any available information on [the activity's] possible transboundary impact'. It is assumed that the Party sending the notification, the Party of origin, has at least some information of the possible transboundary impact of the activity, on which it based its conclusion that a notification is necessary. Such information could pertain, for example, to the proximity of the border or the likely impact on border waters.

ii. The legal information

Under Article 3 paragraph 2, the Party of origin must also provide information on the nature of the possible decision.

iii. The reasonable timing for the response

In addition to the factual and the legal information that needs to be included, in accordance with Article 3, paragraph 2, the notification also has to indicate: 'a reasonable time within which a response … is required, taking into account the nature of the proposed activity'. Here again, the Convention leaves to Parties the decision on how long this time should be. It provides two elements of control: this time should be reasonable and it should take into account the nature of the proposed activity. When setting the time within which a response is required, the Party of origin should consider different elements, besides the nature of the proposed activity, such as the decision making process in the affected Party. It should also allow for reasonable requests of extending that deadline. Very importantly, it should 'as a matter of good practice, request an

acknowledgement of the notification'[22] and begin to calculate the remaining time only after receiving this acknowledgement.

This reasonable timing for the response should be used more as a means to ensure relative certainty in the domestic EIA process and not to prevent possibly affected parties in engaging in the transboundary EIA. Thus, if it does not affect substantially the EIA process, responses from the possibly affected Parties should be taken into consideration even after the expiry of the time for response.

iv. Other information

If the Party of origin possesses more detailed information on the environmental impact assessment procedure, which is generally the case, as well as more information concerning the proposed activity and its likely significant adverse transboundary impact, it can make this information available to the affected Party at the moment of the notification. This situation is clearly prescribed in Article 3 paragraph 2. The reasons for such an approach are the need to accelerate the procedure, on one hand, and on the other to give the affected Party as much information as possible in order to be able to prepare comments from an early stage in the procedure.

D. The response to the notification (paragraphs 3 and 4)

3. The affected Party shall respond to the Party of origin within the time specified in the notification, acknowledging receipt of the notification, and shall indicate whether it intends to participate in the environmental impact assessment procedure.

4. If the affected Party indicates that it does not intend to participate in the environmental impact assessment procedure, or if it does not respond within the time specified in the notification, the provisions in paragraphs 5, 6, 7 and 8 of this Article and in Articles 4 to 7 will not apply. In such circumstances the right of a Party of origin to determine whether to carry out an environmental impact assessment on the basis of its national law and practice is not prejudiced.

The response of the possibly affected Party can be either positive, indicating the intention to participate in the environmental impact assessment procedure or negative, indicating the intention not to participate in the procedure. The lack of response within the set reasonable deadline amount to a negative response as well.

Both the Party of origin and the affected Party have obligations in respect of the response. First, the affected Party is under an obligation to respond within the deadline specified in the notification,[23] of course if this deadline is reasonable. In case the affected Party does not

[22] ECE/MP.EIA/WG.1/2006/4, para. 13 (b)

[23] 'As an affected Party, always respond within the deadline specified in a notification' - ECE/MP.EIA/WG.1/2006/4, para. 13 (c)

consider the deadline as reasonable it should, nevertheless, inform the Party of origin of this view and request an extension of the deadline. This extension should be reasonable as well.

Second, the Party of origin needs to verify whether the notification has been indeed received before concluding that an affected Party does not wish to participate.[24] Sending the notification implies a genuine intention to involve the possibly affected Party in the environmental impact assessment procedure and for this reasons technical incidents in the process of transmission and receipt should not substantially impact the procedure.

i. The positive response

According to article 3, paragraph 3, the affected Party that intends to participate in the environmental impact assessment procedure needs to indicate this intention in its response to the Party of origin. The Meeting of the Parties indicated that this will to participate in the transboundary environmental impact assessment procedure should be clear.[25] Moreover, the affected Party 'may or may not express an opinion on the substance or the merits of the proposed activity which was the subject of the Party of origin's notification, without this causing prejudice to the future exchanges and consultation between the two Parties.'[26]

Another major issue to be settled is the timeliness of the response. According to the Convention, if the time provided for the response is reasonable, the affected Party should be able to manifest its intention easily and clearly. There are, however, particular situations that required clarifications. Thus, for example, the Meeting of the Parties noted that '[w]hen a Party of origin entrusts the notification procedure to an intermediary, the fulfilment of the conditions set out in article 3, paragraph 3, is to be established from the correspondence between the affected Parties and the intermediary, unless otherwise agreed upon between the Parties concerned and the intermediary'.[27] Moreover, '[a]ny miscommunications between the Party of origin and the intermediary should have no impact on the application of the provisions of the Convention'.[28] In decision VI/2, the Meeting of the Parties, following a recommendation from the Implementation Committee, tried to establish a framework for an environmental impact assessment procedure that involves a third party, acting as an intermediary between the Party of origin and the affected Party, a situation which was not envisaged by the Convention.

In respect of timeliness, the Meeting of the Parties also noted that '[a] Party that responds by electronic means to a notification within the time specified for response has fulfilled its obligation under article 3, paragraph 3, as regards the timeliness of the response'.[29] Of course, as mentioned above, Parties should 'retain record of the means of communication, dates and

[24] ECE/MP.EIA/WG.1/2006/4, para. 13 (d)
[25] Decision VI/2, para. 5(i).
[26] Decision VI/2, para. 5(i).
[27] Decision VI/2, para. 5(c).
[28] Decision VI/2, para. 5(d).
[29] Decision VI/2, para. 5(g).

addresses, and that communications should be sent in parallel by other means, for example simultaneously by post and email'.[30]

ii. The negative response

The negative response to a notification can take, according to paragraph 4 of Article 3, two forms. The affected Party can indicate that it does not intend to participate in the environmental impact assessment procedure. This approach should be followed as a matter of curtesy and, moreover, the affected Party could also indicate the reasons why it does not wish to participate in the procedure. Paragraph 4 envisages, nevertheless, a second approach, the lack of response within the time specified in the notification. While this idea is very clearly stated in the text of the paragraph, a short delay in the response, if it does not affect the on-going procedure, could be accepted. Moreover, since the Convention attaches very clear consequences to the lack of response, Parties were invited, 'as a matter of good practice, [to] take action to confirm that the notification has been received before assuming that the lack of response indicated that an affected Party does not wish to participate'.[31]

The negative response has a clear consequence attached to it. According to paragraph 4, 'the provisions in paragraphs 5, 6, 7 and 8 of this Article and in Articles 4 to 7 will not apply…' These provisions regulate the transboundary environmental impact assessment procedure, and thus, neither the Party of origin nor the possibly affected Party that has responded negatively to the notification are bound to follow them in respect of the specific proposed activity.

E. Provision of additional information (paragraphs 5 and 6)

5. Upon receipt of a response from the affected Party indicating its desire to participate in the environmental impact assessment procedure, the Party of origin shall, if it has not already done so, provide to the affected Party:
(a) Relevant information regarding the environmental impact assessment procedure, including an indication of the time schedule for transmittal of comments; and
(b) Relevant information on the proposed activity and its possible significant adverse transboundary impact.

6. 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.

Paragraphs 5 and 6 of Article 3 regulate the provision of additional information by both the Party of origin and the affected Party. Naturally, it is the Party of origin that should first provide such

[30] Decision V/4, para. 8(a).
[31] ECE/MP.EIA/WG.1/2006/4, para. 13 (d)

information, once an affected Party has indicated its desire to participate in the environmental impact assessment procedure. Paragraph 5 requires the Party of origin to provide two sets of information, while paragraph 6 requires the affected Party to provide information.

i. Legal information

Under paragraph 5, the Party of origin is required to provide relevant information regarding the environmental impact assessment procedure, including an indication of the time schedule for transmittal of comments. Practically, from the information provided, the affected Party needs to the deadlines for transmittal of comments and how will these comments be taken into account during the environmental impact assessment procedure.

ii. Factual information

The Party of origin is also required to provide relevant information on the proposed activity and its possible significant adverse transboundary impact in case this information was not provided at the moment of the notification or when additional information, not provided with the notification, is available. The affected Party also has the obligation to provide, when requested by the Party of origin, information relating to the potentially affected environment under its jurisdiction. The Party of origin cannot, however, ask for any information. First, this information should be reasonably obtainable. Then, the information should be necessary for the preparation of the environmental impact assessment documentation.

Form the provisions of the Convention requiring this information to be furnished promptly, one can infer that the affected Party should not undertake additional studies concerning the potentially affected environment under its jurisdiction, but provide already existing information. In this situation, a reasonable time for providing the information would clearly be shorter than the one needed to respond to the notification. According to the Guidance on notification, the quality of information provided by the affected Party is dependent on the information on the proposed activity that was provided by the Party of origin … [at the moment of the notification]. If the Party of origin has provided sufficient information … [at this moment], the affected Party will be in a better position to know what information it should provide'.[32]

The Convention also allows for information to be provided through a joint body where one exists. Such bodies created for environmental protection or for border waters management regularly exchange various types of information, and already have agreed formats and points of contact. This is extremely important, especially when providing detailed technical information.

F. Absence of notification (paragraph 7)

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

[32] ECE/MP.EIA/12, para. 43.

discussions on whether there is likely to be a significant adverse transboundary impact. If those Parties agree that there is likely to be a significant adverse transboundary impact, the provisions of this Convention shall apply accordingly. If those Parties cannot agree whether there is likely to be a significant adverse transboundary impact, any such Party may submit that question to an inquiry commission in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact, unless they agree on another method of settling this question.

Within the notification procedure, paragraph 7 of Article 3 provides the framework for a special procedure which can be initiated when on two conditions: first, a Party considers that it would be affected by a significant adverse transboundary impact of a proposed activity and second, no notification has taken place in accordance with paragraph 1 of the Article. When these two conditions are met and the affected Party requests, the Parties need to have a meaningful dialogue to establish whether there is likely to be a significant adverse transboundary impact. This dialogue is made of an initial exchange of sufficient information and, if needed, of additional discussions. It is expected that following this dialogue, Parties agreed on the significant adverse transboundary impact. But if they don't, any Party can ask an inquiry commission, a special ad-hoc body that can be established under the Convention, to advise 'on the likelihood of significant adverse transboundary impact'. The inquiry commission is a method of settling the question of the likelihood of significant adverse transboundary impact. But Parties can agree on any other method as long as it settles this question.

The Convention does not specify any deadline for the establishment of an inquiry commission, but the Committee noted that if the affected Parties learn about the projects after they had been implemented, '…the application of Article 3, paragraph 7, would be deprived of its purpose'.[33] In such case, the affected Parties would be only left with the submission procedure. The Committee also considered reasonable 'to follow the procedure under article 3, paragraph 7, before making a submission'.[34]

i. The inquiry commission

Following the work of the only inquiry commission created until now, the Meeting of the Parties and the Implementation Committee have drawn several conclusions. They have been careful to stress that the decision of the inquiry commission is final, cannot be challenged or changed in any way. It is very similar to an arbitration tribunal. In theory, it gives a scientific answer and not a legal one to the question of likelihood of impact. According to the Meeting of the Parties '[a]ny subsequent studies or analyses, including findings of the environmental impact assessment documentation … by no means have any effect on the validity of the … inquiry commission, even if they show no actual significant adverse transboundary impact of the activity in question'.[35]

[33] ECE/MP.EIA/IC/2013/4, para. 59.
[34] ECE/MP.EIA/IC/2013/4, para. 59.
[35] Decision V/4, para. 5.

The decision of the inquiry commission is not only final, but it also '… takes effect immediately'.[36] If the inquiry commission finds that a significant adverse transboundary impact is likely, notification should quickly follow, in accordance with the provisions of Article 3, paragraph 1.[37] Moreover, '[i]f the public of the Party of origin has already been informed about the proposed activity, the notification should be sent immediately'.[38]

The Implementation Committee has considered whether the final opinion of the inquiry commission has a retroactive effect or 'whether the obligations stemming from the Convention apply in such a case only after the inquiry commission has found the activity likely to have a significant adverse transboundary impact'.[39] While it found the latter,[40] the Implementation Committee also noted that the request for establishment of an inquiry commission has a suspensive effect in relation to the activity in question.[41] In arriving to this conclusion, the Committee referred to the preamble of the Convention and to the principle of prevention.

G. Public participation (paragraph 8)

8. 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, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.

A. Scope of obligation - relation to article 2.6 and article 4.2
    a. who is obliged
    b. responsibility
    c. practical arrangements
B. in the areas likely to affected
    a. relation to "public concerned" under the Aarhus Convention and EIA Directive
C. Obligation to inform the public
    a. means of informing the public
    b. content of information
D. Obligation to provide possibilities for making comments or objections
    a. means
    b. scope of comments or objections
    c. relation to obligations under Aarhus Convention
E. Directly to the competent authority or through the Party of origin
F. "where appropriate"

[36] ECE/MP.EIA/2008/6, para. 38.
[37] ECE/MP.EIA/2008/6, para. 38.
[38] ECE/MP.EIA/2008/6, para. 38.
[39] ECE/MP.EIA/2008/6, para. 45.
[40] ECE/MP.EIA/2008/6, para. 46.
[41] ECE/MP.EIA/2008/6, para. 48.

Article 4
Preparation of the environmental impact assessment documentation

1. The environmental impact assessment documentation to be submitted to the competent authority of the Party of origin shall contain, as a minimum, the information described in Appendix II.

A. Scope of obligations
B. Concept of environmental impact assessment documentation
C. Approach to documentation in OVOS/expertise systems
D. Information described in Appendix II as a minimum
D. Role of scoping

2. The Party of origin shall furnish the affected Party, as appropriate through a joint body where one exists, with the environmental impact assessment documentation. The concerned Parties shall arrange for distribution of the documentation to the authorities and the public of the affected Party in the areas likely to be affected and for the submission of comments to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin within a reasonable time before the final decision is taken on the proposed activity.

A. Scope of obligation - relation to article 2.6 and article 3.8
B. Distribution to authorities in the areas likely to be affected
C. within a reasonable time
D. relation to Aarhus Convention
E. Subject matter of comments

Article 5
Consultations on the basis of the environmental impact assessment documentation

The Party of origin shall, after completion of the environmental impact assessment documentation, without undue delay enter into consultations with the affected Party concerning, *inter alia*, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact. Consultations may relate to:
(a) Possible alternatives to the proposed activity, including the no-action alternative and possible measures to mitigate significant adverse transboundary impact and to monitor the effects of such measures at the expense of the Party of origin;
(b) Other forms of possible mutual assistance in reducing any significant adverse transboundary impact of the proposed activity; and
(c) Any other appropriate matters relating to the proposed activity.
The Parties shall agree, at the commencement of such consultations, on a reasonable time-frame for the duration of the consultation period. Any such consultations may be conducted through an appropriate joint body, where one exists.

A. Scope of obligation - relation to article 3 and article 4
B. “After completion”
C. Actors involved in consultations
D. Timing and form of consultations
E. Subject matter of consultations
F. Results of consultations

Article 6
Final decision

1. The Parties shall ensure that, in the final decision on the proposed activity, due account is taken of the outcome of the environmental impact assessment, including the environmental impact assessment documentation, as well as the comments thereon received pursuant to Article 3, paragraph 8 and Article 4, paragraph 2, and the outcome of the consultations as referred to in Article 5.

A. Scope of obligation - relation to article 1 (v) and 2.3
B. Obligation to take “due account”
C. Form of the decision
D. Obligation to clearly indicate final decision
E. Relation to other instruments

2. The Party of origin shall provide to the affected Party the final decision on the proposed activity along with the reasons and considerations on which it was based.

A. Scope of obligation
B. Reasons and considerations
    a. relation to “due account”
    b. form
C. Methods of providing the decision

3. If additional information on the significant transboundary impact of a proposed activity, which was not available at the time a decision was made with respect to that activity and which could have materially affected the decision, becomes available to a concerned Party before work on that activity commences, that Party shall immediately inform the other concerned Party or Parties. If one of the concerned Parties so requests, consultations shall be held as to whether the decision needs to be revised.

Paragraph 3 attempts to regulate a situation sometimes encountered in practice. Under this paragraph, Parties have two obligations, namely to promptly inform each other about the additional information on the significant transboundary impact of a proposed activity and to consult, when requested. The purpose of consultations is the revision of the final decision.

This provision applies only before the commencement of work on the specific activity. After works commence, the provisions of Article 7 apply.

Article 7
Post-project analysis

A. Scope of Article 7 and Appendix V

Unlike Article 3, which is an essential part of the environmental impact assessment procedure as envisaged by the Convention, Article 7 plays a somewhat less important part in the overall architecture of the Convention. It practically completes an environmental impact assessment procedure that began with a notification under Article 3. The post-project analysis has enjoyed little attention compared to the other steps of the environmental impact assessment procedure. For this reason, the Meeting of the Parties invited Parties to develop more on the post-project analysis in their subsequent agreements under Article 8.[42] Recently however, the Implementation Committee has paid increasing attention to this analysis, especially when the affected Party was not entirely satisfied with the manner the procedure was conducted and the outcomes of this procedure.

In its two paragraphs, Article 7 sets the framework of the post-project analysis, allowing nevertheless for a considerable liberty to Parties, and indicates the steps to be followed when there is a significant adverse transboundary impact. Moreover, Appendix V to the Convention sets in more detail the specific objectives that could be achieved when undertaking a post-project analysis.

B. The post-project analysis, including its objectives (paragraph 1 and Appendix V)

1. The concerned Parties, at the request of any such Party, shall determine whether, and if so to what extent, a post-project analysis shall be carried out, taking into account the likely significant adverse transboundary impact of the activity for which an environmental impact assessment has been undertaken pursuant to this Convention. Any post-project analysis undertaken shall include, in particular, the surveillance of the activity and the determination of any adverse transboundary impact. Such surveillance and determination may be undertaken with a view to achieving the objectives listed in Appendix V.

Appendix V Post-project Analysis

Objectives include:

(a) Monitoring compliance with the conditions as set out in the authorization or approval of the activity and the effectiveness of mitigation measures;
(b) Review of an impact for proper management and in order to cope with uncertainties;
(c) Verification of past predictions in order to transfer experience to future activities of the same type.

The post-project analysis is a procedure in itself, conducted after the main environmental impact assessment procedure proper has been finalized. The initial evaluation of whether this analysis

[42] Decision IV/1, para. 5.

should be carried out takes place at the request of any Party. Most likely it will take place following a request from the affected Party, possibly in cases when this Party was not satisfied with the final decision, the outcome of the environmental impact assessment procedure. The post-project analysis will take place only in respect of an activity 'for which an environmental impact assessment [had] been undertaken pursuant to … [the] Convention'.

As mentioned above, Parties have a considerable liberty to determine '… whether, and if so to what extent, a post-project analysis shall be carried out…'. The implementation of this Article thus relies heavily on the good-will of Parties, particularly on that of the Party of origin. Unlike the notification, it does not provide for a mechanism to address a refusal from the Party of origin to carry out a post-project analysis. In such case, the affected Party could seek the assistance of the Implementation Committee, although the Committee has not dealt with such issue until now.

The rest of the paragraph guides Parties through the required methods and objectives of the post-project analysis. Therefore, according to this paragraph, the analysis would gather the necessary information from the surveillance of the activity and would use this information in order to determine whether there is any adverse transboundary impact. In Appendix V, the Convention sets out the objectives that could be achieved by undertaking the surveillance and determination.

Appendix V lists three such objectives. The first of these objectives deals with 'monitoring compliance with the conditions as set out in the authorization or approval of the activity and the effectiveness of mitigation measures'. This is an extremely important objective and should be the main concern of the affected Party. It is expected that in all states that adhere to the rule of law, the final decision would be implemented fully. However, the possibility exists for different readings, by the authorities of the Party of origin and the affected Party of the same final decision. For this reason, monitoring of compliance and effectiveness would definitively assure the affected Party that the environmental impact assessment procedure was conducted in good faith in order to reduce or control the significant adverse transboundary environmental impact. Clearly, when the Party of origin proceeds or allows the activity to proceed without closely following the conditions set out in the final decision and implementing the control and mitigation measures, an issue of compliance with the provisions of the Convention may arise.

The full implementation of a final decision, especially in respect of activities as substantial as those listed in Appendix I, can be a difficult and lengthy operation. For this reason, in the process of surveying the activity it is important to review impacts as identified during the environmental impact assessment procedure in order to assess their control, especially when certain information is missing. Appendix V thus lists as an objective, the 'review of an impact for proper management and in order to cope with uncertainties'.

The last objective listed in Appendix V concerns the 'verification of past predictions in order to transfer experience to future activities of same type'. This objective is more prospective in purpose but very useful, especially when a Party of origin contemplates authorizing more than one activities of a certain nature, such as a string of dams on a river or in a particular region.

It is assumed that the initial impact(s) assessment during the environmental impact assessment procedure, would have been reduced or controlled as a consequence of the procedure. The

determination to be performed under the post-project analysis could, however, conclude that the significant adverse transboundary impact, identified initially, was not properly addressed be the final decision. In such case, the Party of origin should take steps to amend its final decision, involving both the public and the affected Party in this process. This might explain why there has not been much practice concerning the implementation of Article 7.

C. The outcomes of the post-project analysis (paragraph 2)

2. When, as a result of post-project analysis, the Party of origin or the affected Party has reasonable grounds for concluding that there is a significant adverse transboundary impact or factors have been discovered which may result in such an impact, it shall immediately inform the other Party. The concerned Parties shall then consult on necessary measures to reduce or eliminate the impact.

The post-project analysis might arrive to the conclusions that there is a significant adverse transboundary impact or indications of such likely impact. In this situation, the only requirements contained in Article 7 are to inform and to consult. Thus when having ‘reasonable grounds’ for a positive conclusion on the significant adverse transboundary impact, either Party must ‘immediately’ inform the other Party and afterwards, both Parties must ‘consult on necessary measures to reduce or eliminate the impact’.

Since the Convention does not require Parties to reach a certain agreement following their consultations, it could be assumed that these consultations can break without agreement. It should be however noted that the Implementation Committee has consistently referred to the principle of prevention and how this should conduct the behavior of the Parties. Refusing to any measures to reduce or eliminate a proven significant adverse impact might fall contrary to this principle, as well as to other provisions of the Convention, such as those of Article 2 para. 1.

Article 8
Bilateral and Multilateral Cooperation

The Parties may continue existing or enter into new bilateral or multilateral agreements or other arrangements in order to implement their obligations under this Convention and under any of its protocols to which they are a Party. Such agreements or other arrangements may be based on the elements listed in Appendix VI.

A. Scope of Article 8

Article 8 encourages Parties to continue or to enter into any form of arrangement, whether a legally binding one or a non-binding document, in order to implement their obligations under the Convention. Having to deal with a low interest from Parties to conclude such documents, the Meeting of the Parties interpreted this reluctance as unwillingness to conclude binding documents. It therefore recommended Parties ‘consider developing informal agreements, such as

bilateral guidelines, common declarations and memorandums of understanding, in cases where bilateral and multilateral agreements are inappropriate'.[43]

The conclusion of these agreements, binding or not, serves two purposes. First, they develop the provisions of the Convention, introducing practical elements, such as translation of documents, or specific deadlines that could not be included in the Convention and that can be very different from one geographical context to another. Second, but not less important, they contribute at building trust between Parties, removing the ad-hoc, case by case character of each transboundary impact assessment of a proposed activity. By negotiating the framework for their future transboundary impact assessment procedures, Parties discover and understand each other's domestic environmental impact assessment system which removes the need for lengthy explanations at the notification stage.

B. Contents

Appendix VI of the Convention contains suggestions concerning the contents of bilateral or multilateral agreements or other arrangements, but the Meeting of the Parties and the Implementation Committee have also contributed with specific suggestion on what such arrangements could include. The Meeting of the Parties noted that '[t]here was a continuing need for Parties to establish bilateral and multilateral agreements to identify direct contacts and to address differences in, inter alia, language, the payment of processing fees, the time frames and deadlines, how to proceed when there is no response to a notification, the procedural steps, the timing of public participation (e.g. whether in screening or scoping), the interpretation of various terms (including "major change to an activity", "significant" impact, "reasonably obtainable information" and "reasonable alternatives"), the content of the environmental impact assessment (EIA) documentation and the requirement for post-project analysis'.[44] As a rule, all provisions of the Convention, which are, naturally, worded in a general way, can be further clarified or explained in bilateral or multilateral agreements or arrangements. The Implementation Committee recommended, for example, addressing in such agreements the transfer and distribution of the environmental impact assessment documentation,[45] as well as issues related to consultation.[46]

Article 9
Research programmes

The Parties shall give special consideration to the setting up, or intensification of, specific research programmes aimed at:
(a) Improving existing qualitative and quantitative methods for assessing the impacts of proposed activities;

[43] Decision V/4, para. 9.
[44] Decision IV/1, para. 5
[45] Article 4, para. 2. See ECE/MP.EIA/10, p. 110.
[46] Article 5. See ECE/MP.EIA/10, p. 110.

(b) Achieving a better understanding of cause-effect relationships and their role in integrated environmental management;
(c) Analysing and monitoring the efficient implementation of decisions on proposed activities with the intention of minimizing or preventing impacts;
(d) Developing methods to stimulate creative approaches in the search for environmentally sound alternatives to proposed activities, production and consumption patterns;
(e) Developing methodologies for the application of the principles of environmental impact assessment at the macro-economic level.

The results of the programmes listed above shall be exchanged by the Parties.

A. Scope of Article 9

There has been very little experience in implementing this provision and it is expected that once transboundary environmental impact assessment will see widespread use by Parties, specific research programmes will be undertaken to further explain and develop practices and methodologies of such assessment. Given the current absence of research programmes concerning transboundary environmental impact assessment, the Implementation Committee has urged Parties to 'share research results, not only from research intro transboundary environmental impact assessment, but also from research in connection with national environmental impact assessment that could be also useful to others in the transboundary context, e.g. in the areas of evaluation, monitoring and methodological research'.[47] This encouragement expands the scope of Article 9, but as the conventional provision, has not been implemented in practice.

It can be argued that Article 9 operates as a technology transfer provision between the developed UNECE countries and less developed ones. It should be noted that this provision deals with the scientific aspects of the environmental impact assessment procedure and not with the legal ones. For this reason, it is possible that lessons learned from developed countries can be applied in less developed countries.

B. Objectives of the research programmes

Article 9 contains a list of specific objectives of the research programmes to be conducted by Parties. They pertain to major issues concerning the environmental impact assessment procedure. Research programmes can aim at one or several of these objectives.

The first of such objective is the improvement of existing qualitative and quantitative methods for assessing the impacts of proposed activities. The objective recognizes the difficulties of current methods and underlines that both the level of detail and the amount of information are relevant in determining the impact of proposed activities.

Secondly, the research programmes should lead to a better understanding of cause-effect relationships and their role in integrated environmental management. This objective pertains to

[47] ECE/MP.EIA/10, p. 111.

the analysis of the information gathered and takes into account that the environmental cause-effect relationships are, generally, difficult to determine because of the influence of various environmental factors.

Thirdly, research programmes should deal with the analysis and monitoring of the efficient implementation of decisions on proposed activities with the intention of minimizing or preventing impacts. Such programmes could, for example, be part of a post-project analysis.

Fourthly, Parties are also encouraged to develop, through their research programmes, creative approaches in the search for environmentally sound alternatives to proposed activities, production and consumption patterns. This is a very ambitious objective, and it is expected that many Parties regularly conduct research into this matter, even if they don't necessarily view it as research connected with environmental impact assessment.

Finally, the research programmes should aim at developing methodologies for the application of the principles of environmental impact assessment at the macro-economic level. Parties are thus encouraged to consider the impact of their decisions on the environment not only at the proposed activity level, but also at a higher level, of macro-economic decision-making. This objective makes reference to the principles of environmental impact assessment even if the Convention does not actually list such principles.[48] While they can, however, be inferred, from its provisions, it is useful to recall that in the last preambular paragraph, Contracting Parties note the 'Goals and Principles on environmental impact assessment adopted by the Governing Council of the United Nations Environment Programme'.

Article 10
Status of the Appendices

The Appendices attached to this Convention form an integral part of the Convention.

Scope of Article 10

Article 10 is a formal provision of the Convention that stresses the essential role of the 7 appendices. Since some of them tend to be overlooked it is useful to briefly introduce them here. First, Appendix I lists the activities to which the provisions of the Convention, of the appendices, should apply in case there is a significant adverse transboundary impact. Appendix II contains the list of information that has to be reflected in the environmental impact assessment documentation. Appendix III, one of the appendices sometimes overlooked, lists criteria useful in determining the environmental significance of activities not listed in Appendix I, in accordance with Article 2, paragraph 5. Appendix IV regulates the creation, composition and functioning of the inquiry procedure, in accordance with Article 3, paragraph 7. Appendix V deals with the objectives of the post-project analysis regulated by Article 9. Appendix VI

[48] This is not the only substantial provisions that makes reference to principles of environmental impact assessment. Article 2 para. 7 also makes such reference when encouraging parties to apply the principals of environmental impact assessment to policies, plans and programmes.

contains elements for bilateral and multilateral cooperation to be included or regulated in bilateral or multilateral agreements or other arrangements. Finally, Appendix VII regulates the arbitration procedure, pursuant to Article 15, paragraph 2. As no dispute between parties was submitted to arbitration, there is no practice on the implementation of this Appendix.

Article 15 Settlement of disputes

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
(a) Submission of the dispute to the International Court of Justice;
(b) Arbitration in accordance with the procedure set out in Appendix VII.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this Article, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

Scope of Article 15

Article 15 contains standard provisions on the settlement of disputes between the Parties to the Convention. Again, since no dispute between the parties was settled under this article, there is no practice on the implementation of this Article. Moreover, there is not much practice to draw upon from the implementation of similar provisions on the settlement of disputes found in other conventions.