The Espoo Convention & Kiev Protocol: Implementation, Compliance & Enforcement in the EU

Seminar on the Espoo Convention: 20 Years of Law, Policy & Practice
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Overview

- Introduction / definitions
- Findings of EU Dir. implementation reviews
- Findings of subsequent consultation / conference (EIA Directive)
- Findings of Convention implementation reviews
- Implementation gaps?
- Compliance / enforcement in EU (TEIA cases)
- Invoking direct application / effect where gaps?
- Other issues in relationship b/w international and EU law: transposition / dispute settlement
Introduction

• Convention & Protocol mixed agreements: ratified by both EU & MS
  ▫ Convention all, Protocol 15 MS

• Implementation & compliance expected from both, subject to Declarations made by EU & MS upon adoption:
  ▫ MS responsible for obligations not covered by secondary law (Convention)
  ▫ EU responsible for obligations covered by EU law (Protocol)
Introduction (cont)

• Implementation & compliance expected from both EU law (Commission) & international law (Implementation Committee / MOP)
• Focus here on the former
• Enforcement also considered (ECJ)
Implementation, Compliance & Enforcement: Relationship, Definitions

- Implementation – transposition
- Compliance – fulfilment of obligations
- Enforcement – to bring into compliance
- See international law documents:
  - ECE Kiev Guidelines ’03 / UNEP Manual ’06
- And EU documents:
  - Commission, Annual Reports on Monitoring the Application of Community law (’09 latest) / A Europe of Results—Applying Community Law ‘07
Implementation Reviews

- EU reviews 5-yearly for EIA, PP & SEA Dir’s
  - Most recent ‘09 (EIA & SEA), ‘10 (PP)
- TEIA matters raised in EIA Dir’ Review inc:
  - Define minimum timeframes for consultation
  - Require coordinated / joint / single procedures
  - Improve link with Protocol for SEA
- PP Dir’ Review focused on plans & programs
  - No specific reference to TEIA implications
  - Relationship b/w EIA & SEA Dir’s considered
  - Potential extension to other plans & programs
Implementation Reviews (cont)

• TEIA matters in SEA Dir Review inc:
  ▫ Consultation when proposal advanced inadequate (NGOs)
  ▫ Unclear boundaries: projects, plans, programs & application of EIA & SEA Dir’s
  ▫ No recommendation for consolidation of Dir’s (Commission)
  ▫ How to address policies & legislation?

• New Commission proposal expected ’12, ‘realistic policy options’ cited:
  ▫ No change, technical adaptation, amendment
EIA Dir Rev: Consultation / Conference

• For EIA Dir, public consultation & conference (Leuven, ‘10) explored reform options for TEIA:
  ▫ 53% of consultees favoured more detailed consultation (timeframes, translation)
  ▫ 48% of consultees favour specific framework for TEIA consent procedures
  ▫ Leuven participants recommend:
    • bilateral agreements
    • public scoping for alternatives
  ▫ Most replies from practitioners in support of merging EIA / SEA process & Dir’s
Other specific matters raised:
- Introduce obligation to make bilateral agreements (Netherlands EIA Commission / Sauer)
- Reform Art 7 so notification when sig impact likely (obj), not when MS is aware of this (subj) (ClientEarth)
- Reform Art 5(3) to require proponent to consider reasonable alternatives (FoE, Greenpeace, EEB)
- Implement PP requirements in transboundary context fully (Bonvoisin, Otawski, Okoburo)
Implementation Reviews: Convention

- Findings of Convention reviews may be different (Opinions of the IC, ‘01-’10)
  - Separate provisions on SEA / EIA preferred
- As to form:
  - PP to be included in legislation, not implementing regulations
  - Domestic implementing legislation needed for monist as well as dualist states
Implementation Gaps

- EIA Dirs ‘85 & ‘97 and PP Directive ‘03 imple. most aspects of Convention, but:
  - PP - distinct opportunities needed, concerned parties responsible, transboundary differences, non-discrimination & public concerned
- SEA Dir ‘01 imple. most aspects of Protocol, but:
  - Health effects
  - Regional development, mining additional sectors
  - Policies & legislation
Compliance / Enforcement

- Role of ECJ
  - Actions for failure to fulfil obligations
  - References for preliminary rulings

- See: Commission, ‘EIA of Projects – Rulings of the Ct of Justice’, ‘10

- TEIA case law
  - Screening:
    - C-133/94, Commission v Belgium
    - C-205/08, Umweltanwalt von Kärnten (Austria)
  - Participation / review:
    - C-216/05, Commission v Ireland
    - C-263/08, Djurgården (Sweden)
Compliance / Enforcement

• Invoking direct effect & application
  ‘...a provision in an agreement concluded by the [EU] with a non-Member country must be regarded as being directly applicable when, regard being had to its wording & the purpose & nature of the agreement, the provision contains a clear & precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.’
  C-213/03, Syndicate v EDF, para 39
  N.B. For ‘applicable’ here, read ‘effective’ b/c intention to confer rights on individuals in the case

• Potential to apply this interpretative technique to unimplemented provisions of Convention / Protocol?
Compliance / Enforcement

• Case law on use of technique:
  ▫ C-213/03, Syndicat v EDF (Athens Protocol)
  ▫ C-239/03, Commission v France (as above)
  ▫ C-308/06, Intertanko & others v Sec of State for Transport (UNCLOS)
  ▫ C-240/09, LZ v Slovak Env Ministry (Aarhus)

• But, conflict between Court & Parliament:
  ▫ Unimplemented provisions best addressed by law reform rather than judicial interpretation
  ▫ If not reformed or interpreted in this way, given Declarations to mixed agreements, MS are responsible for unimplemented provisions
Relationship b/w International /EU law

- View of international law on unimplemented provisions different to that of EU law
  - Provisions must be transposed for all Parties
- Does this mean no direct effect / application in monist jurisdictions like EU?
  - See IC, ‘Opinions of the IC, ‘01-’10’ regarding Romania & Armenia
  - Note Moldova & Ukraine also report reliance on direct app / effect in current Review of Implementation
Relationship b/w International & EU law (cont)

• Implications of C-459/03, Commission v Ireland (Mox Plant) - disputes b/w MS to be settled by ECJ
  ▫ Non-compliance of a MS raised by another MS – can submissions be made to NCPs like the IC?
    • IC Chair request for confirmation from Commission that EU law doesn’t prevent this (Jan 2011)
    • Unlikely to be a problem, as IC does not settle disputes
  ▫ However, check bilateral agreements between MS:
    • Are provisions in these for disputes to be heard by the ICJ e.g. still acceptable following MOX Plant?
Conclusions

• Implementation, compliance & enforcement with the Convention & Protocol a matter for both EU & international law
  ▫ EU reforming secondary law to fulfil obligations
• If gaps remain & direct application / effect are not invoked by ECJ
  ▫ MS are responsible as Parties to the mixed agreement
• *MOX Plant* should not prevent MS referring matters to IC – avoids disputes
  ▫ But reference to non EU dispute settlement in bilateral agreements may be an issue