

# Transboundary Impact Assessment of coal and lignite related activities – legal obligations

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# Issues

- International law context and scope of obligations
- Espoo
- EIA Directive
- Industrial Emissions Directive
- Role of Aarhus

# Context

- General principles of international law
  - Trail Smelter case - arbitration tribunal
  - Nagymaros-Gabcikovo case – ICJ
  - Pulp Mill case - ICJ
- Rio Declaration on Environment and Development
  - Integration principle – Principle 4
  - Environmental Assessment – Principle 17
  - Responsibility for transboundary environmental damage - Principle 2
  - Transboundary procedure (Principles 18 and 19)

# Rio Principles 2 and 19

- States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and **the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States** or of areas beyond the limits of national jurisdiction (Principle 2)
- States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith (Principle 19)

# Espoo Convention – general obligation

- 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.\_

## Espoo Convention – activities subject to transboundary procedures in [Appendix I](#)

- 1. Crude oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 metric tons or more of coal or bituminous shale per day.
- 2. (a) Thermal power stations and other combustion installations with a heat output of 300 megawatts or more, ..
- 14. Major quarries, mining, on-site extraction and processing of metal ores or coal.

# Practice under Espoo Convention

- Coal/lignite power stations and mines normally subject to transboundary procedures (see for example Kostolac lignite power plant – EIA/IC/CI/6)
- But only
  - In case of significant impact on concrete neighbouring countries
  - Usually for those located close to an international frontier (App.III.2)
- No transboundary procedures for activities
  - located far away from any international frontier
  - having a significant impact on the quality of air and/or climate (for example for power stations those having significant share in total CO<sub>2</sub> emission in Europe) but not necessarily a significant impact on the quality of air/climate in any particular neighbouring country
- Odd example from Czech Republic and one of the „small Island states”

# Espoo Convention - definition of transboundary impact

- ) "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;

# Espoo Convention – obligation to distribute 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

# EIA Directive

- Reference to Espoo Convention
- No definition of „Transboundary impact”
- Transboundary procedure under art.7 applies
- „Where a Member State is aware that a project is **likely to have significant effects on the environment** in another Member State or where a Member State likely to be significantly affected so requests”
- Annex III in conjunction with art.3.1

# Annex III

- The **likely significant effects of projects on the environment** must be considered in relation to criteria set out in points 1 and 2 of this Annex, with regard to the impact of the project on the factors specified in **Article 3(1)**, taking into account:
  - (c) **the transboundary nature of the impact;**

# Industrial Emissions Directive

- No reference to Espoo Convention
- No definition of „Transboundary impact”
- Preamble (para 44) - „ the transboundary nature of pollution from industrial activities”
- Transboundary procedure under art. 26 applies
  - „Where a Member State is aware that the operation of an installation is likely to have significant negative effects on the environment of another Member State, or where a Member State which is likely to be significantly affected so requests”

# Public participation procedure under Aarhus Convention

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

# Espoo vs Aarhus obligations

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

# Public, public concerned and foreign public

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

# Identification of the public concerned

- Obligation to identify public concerned
- Affected or likely to be affected
  - Relation to impact
    - described in EIA documentation
    - technical guidance with assumed range of impact
  - Criteria for identifying range of impact
    - Not only routine impact but also impact related to accidents
- Having an interest
  - Not only legal or factual interest
- Climate change and approach to „having an interest”

# Conclusions

- In case of permitting coal/lignite activities having transboundary impact there are clear legal obligations
  - to initiate transboundary procedures (Espoo Convention, EIA Directive, IED)
  - to initiate transboundary public participation (Aarhus Convention)
- Practical implementation of these obligations does not match scientific evidence regarding transboundary impact of coal/lignite activities