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Final Report of the Task Force on Legal and Administrative Aspects of the Practical Application of Relevant Provisions of the Convention

Submitted by the Chairman of the task force In accordance with a decision by the Senior Advisers on Environmental and Water Problems at their sixth session (ECE/ENVWA/29, annex III, element 03.2.1.2).

Introduction

1. In accordance with a decision by the Senior Advisers on Environmental and Water Problems at their fifth session, a task force, with Germany as lead country, was set up to prepare a report on ways and means of developing and further strengthening the legal and administrative measures for the practical application of the provisions of the Convention on Environmental Impact Assessment in a Transboundary Context (ECE/ENVWA/24, annex II, element 03.2.1.1).

2. Experts from Albania, Austria, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Finland, Germany, Greece, Italy, Netherlands, Norway, Poland, Romania, Russian Federation, Slovak Republic, Spain, United Kingdom and the European Community (EC) participated in the task force.

3. The task force met four times: in Geneva (Switzerland) from 13 to 15 July 1992, in Berlin (Germany) from 7 to 9 September 1992, in Maastricht (Netherlands) from 24 to 27 May 1993 and in Freiburg (Germany) from 10 to 12 August 1993. Its interim report was submitted at the second meeting of the Signatories in December 1992 (ENVWA/WG.3/R.6).

4. On the basis of a survey of the text of the Convention and existing experience, the task force identified a number of items requiring further clarification. These relate either to clauses with a very general meaning (e.g. "reasonable time") or to situations which are not explicitly mentioned in the Convention (e.g. public hearings). Although the task force was aware that methodological aspects (such as clearer identification of proposed activities and significance of transboundary impact) could have legal consequences, it did not discuss these issues as they were dealt with in detail within another activity under the implementation of the Convention pending its entry into force. For reasons of time, the task force concentrated its discussions on the following matters:

(a) Provisions on time-limits for notification and submission of information;

(b) The content of the notification under Article 3, paragraph 2, of the Convention;

(c) Responsibility for the procedural steps that aim at participation of the public of the affected Party in the environmental impact assessment (EIA) procedures of the Party of origin;

(d) Responsibility for translations and the cost of translations.

5. The present report, which is based on and revises the interim report, describes possible ways and means of dealing with the above issues so as to facilitate the practical application of the Convention. Matters of a more general interest have been addressed. Problems related to exceptional cases have been given specific consideration. Nevertheless, bilateral or multilateral agreements or other arrangements containing detailed provisions on the issues in question could also facilitate the practical application of the Convention.

I. PROVISIONS ON TIME-LIMITS FOR NOTIFICATION AND SUBMISSION OF INFORMATION

6. The Convention provides in Articles 3 and 4 for a series of procedural steps by which the Party of origin notifies any Party which it considers may be an affected Party about a proposed activity, obtains information about the potential transboundary environmental impact of the proposed activity and submits the EIA documentation. The concerned Parties also have to arrange for public participation. Each of these steps needs to be taken within an appropriate time-scale.

A. Notification in accordance with Article 3, paragraph 1, of the Convention

7. Article 3, paragraph 1, provides that the Party of origin shall, for a proposed activity listed in Appendix I that is likely to cause a significant transboundary impact, 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". The purpose of the notification under Article 3, paragraph 1, is to alert the affected Party at the earliest possible stage to the fact that an activity which is likely to cause a significant adverse transboundary impact is proposed, and to give the affected Party the opportunity of indicating (under Article 3, paragraph 3) whether it wishes to participate in the

EIA procedure.

8. The earlier it is given, the more useful the notification will be. The timing of the notification depends also on the moment that the authorities in the Party of origin become aware of the proposed project. The application of this provision may therefore vary according to the procedural system in the Party of origin, depending especially on whether there is a scoping procedure. Basically, three different types of procedures can be distinguished:

(i) Procedures including a formal scoping procedure with mandatory public participation;

(ii) Procedures including a formal scoping procedure without mandatory public participation; and

(iii) Procedures without a formal scoping procedure.

9. The wording of Article 3, paragraph 1, of the Convention should, in principle, pose no problem for countries that have introduced a national scoping procedure as part of the EIA procedure which includes the mandatory participation of the public. These countries will have to notify affected countries no later than when informing their own public in the scoping procedure.

10. For other countries the situation is less clear. Where they have introduced a scoping procedure without public participation, there will be an opportunity, following a notification under Article 3, paragraph 1, for the affected Party to make comments to assist in the scoping procedure. It will generally be beneficial for the Party of origin to involve the affected Party in that procedure in order to clarify the issues to be studied. Therefore Parties of origin that have a scoping procedure without public participation should notify an affected Party during that scoping procedure.

11. In countries where no formal scoping procedure is required, it may not always be possible to notify an affected Party at the time that is most expedient for the purposes of Article 3. In these countries proponents of activities are not required to inform the authorities about their plans before preparing the EIA information required under domestic provisions. Where no scoping procedure exists, the Party of origin should notify any Party that it deems an affected Party as soon as the authorities of the Party of origin are informed about the proposed activity and before the EIA documentation is completed.

12. There could be cases when the Party of origin finds that a proposed activity is likely to cause a significant adverse transboundary impact only after informing its own public. In such situations, which are contrary to the provisions included in Article 3, paragraph 1, of the Convention, the Party of origin should notify the affected Party immediately. Furthermore, the Party of origin should recognize that its EIA procedure may be delayed to accommodate the interests of the affected Party pursuant to the provisions and time-frames of the Convention.

13. The issues dealt with here are also related to such questions as which Party is responsible for informing the affected Party's public, and how is this public to be informed about the activity and its potential environmental impact. These matters will be considered separately in chapters IV and V of this report.

B. Time-frame for responses in accordance with Article 3, paragraph 3, of the Convention

14. Article 3, paragraph 3, of the Convention requires the affected Party to respond to the Party of origin "within the time specified in the notification", and to indicate whether it intends to participate in the EIA procedure. The length of this time is not left entirely to the discretion of the Party of origin; in accordance with Article 3, paragraph 2, it must be "reasonable".

15. One of the criteria for whether a period is "reasonable" is stated in the Convention: the Party of origin shall take the nature of the proposed activity into account (Article 3, paragraph 2 (c)). Another important consideration in this context is the extent to which it is necessary for the affected Party to contact specific authorities within its jurisdiction, or experts, before it can decide whether or not to participate in the EIA procedure. On the other hand, it is desirable to avoid unnecessary delays in the EIA procedure in the Party of origin. The time specified by the Party of origin should always be sufficient to allow the affected Party to take an informed decision. A time of one to four months would seem reasonable.

C. Time-frame for the transmittal of information in accordance with Article 3, paragraph 6, of the Convention

16. Article 3, paragraph 6, of the Convention provides that 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...". The purpose of

this provision is to help the Party of origin to prepare the EIA documentation. The information shall be furnished "promptly".

17. The definition of the term "promptly" in this context depends on many individual aspects of the proposed activity in question; so it is difficult to specify how much time the affected Party has for transmitting the information. However, a number of criteria can be given on which this specification should be based. These include the nature, size and location of the proposed activity; the extent of the area in question; the environmental status of this area; existing information systems; the type and state of the licensing process for the activity; information access and ways and means of information transmittal, etc. Article 3, paragraph 6, does not require the affected Party to carry out lengthy research, but only to provide the Party of origin with "reasonably obtainable information".

18. Due to the fact that all these criteria are to be considered, it is suggested that it should be left to the concerned Parties in each case to specify the meaning of the term "promptly". However, in general, a period of up to four months might be sufficient.

19. Where the affected Party considers that the reasonably obtainable information relating to the affected environment is insufficient for the

purposes of the preparation of the EIA documentation, the Party of origin should allow the affected Party to specify either:

(a) The additional time that the affected Party will require to obtain this information; or

(b) Which additional information is required, so that the Party of origin may obtain it.

D. Time-frame for comments under Article 4, paragraph 2, of the Convention

20. Article 4, paragraph 2, of the Convention requires the concerned Parties to arrange for distribution of the EIA 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 "within a reasonable time before the final decision is taken on the proposed activity". It seems difficult to specify the length of time that is "reasonable" in this context. The provisions aim at:

- Ensuring that the time granted to the authorities and the public of the affected Party is adequate for their comments; and

- Allowing the Party of origin sufficient time for consideration of these comments before it takes its decision on the activity.

21. There seems to be almost no experience related to the length of time granted to the authorities and the public in affected countries for preparing their comments. Where the public of affected countries has been given an opportunity to participate in EIA procedures in a country of origin, the time allowed for comments was the same as that for the public of the country of origin.

22. Basically, the authorities and the public in the affected Party should be granted the same length of time for their comments as the authorities and the public in the Party of origin. However, in the case of comments from the authorities and the public in the affected Party, additional time might be needed for the translation of the EIA documentation and for the translation and transmittal of comments to the competent authority of the Party of origin. The time required for these administrative tasks should not be included in the period allowed for comments, but should be added to it. Thus, in a case where the authorities and the public in the Party of origin may comment on the EIA documentation within a month, the authorities and the public in the affected Party should also be given a month for their comments; and the time for translation and transmittal should be counted separately.

23. In any case, it seems advisable that, when applying the Convention, a clearly defined time-frame for comments should be set, based on the time-frame of the EIA and the decision-making process in the Party of origin. This limit should be adequate, i.e. long enough for:

- The translation of the EIA documentation (where the documentation is not translated before transmittal to the affected Party);

- The examination of this documentation by the authorities and the public of the affected Party;

- The formulation of comments by the authorities and the public;

- The translation of the comments;

- The transmittal of these comments to the competent authority of the Party of origin.

24. Therefore, it is suggested that:

- In each case a definite time-frame for comments from the authorities and the public in the affected Party should be specified;

- The amount of time granted for these comments should be equal to that given to the authorities and the public in the Party of origin, and should not include any time required for translation and transmittal.

II. THE CONTENT OF THE NOTIFICATION UNDER ARTICLE 3, PARAGRAPH 2, OF THE CONVENTION

25. Article 3, paragraph 2, describes the required content of the notification. In practice, the information included in the notification may, however, vary in detail, due, for instance, to the nature of the proposed activity. If the affected Party is notified very early such information could be comparatively brief since the Party of origin will have no detailed data available, whereas a notification given later in the process will probably contain more specific information. Thus, the actual content of the notification would depend on the particular moment in the EIA process when the affected Party is notified.

26. The notification should include sufficient information for the affected Party to arrive at an informed decision whether or not to take part in the EIA procedure. In addition, the Convention requires that the notification contain as much information as possible in each specific case. Furthermore, it would be useful for the Party of origin to address in the notification the subject of translation.

III. RESPONSIBILITY FOR THE PROCEDURAL STEPS THAT AIM AT PARTICIPATION OF THE PUBLIC OF THE AFFECTED PARTY IN THE EIA PROCEDURES OF THE PARTY OF ORIGIN

27. Article 3, paragraph 8, of the Convention requires the concerned Parties to ensure that the public of the affected Party in the areas likely to be affected is informed of, and 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. Similarly, under Article 4, paragraph 2, the concerned Parties shall arrange for distribution of the EIA 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. In either case the following questions should be answered:

- Whether the concerned Parties are to carry out those tasks jointly; or, if not,

- Which Party is to be responsible for which tasks in this context.

In this matter, the rights and obligations of each Party under international law should be borne in mind, for instance that the Party of origin will be able to conduct public hearings in the territory of the affected Party only with the consent of the latter Party.

28. For reasons of expediency and unless the concerned Parties agree otherwise, the tasks should be divided between them, and each Party should fulfil such tasks as fall within its own range of competence. Thus, the Party of origin should, in the context of Article 3, paragraph 8, provide the relevant information on the proposed activity to the affected Party; and, receive these comments and objections unless the comments and objections by the public of the affected Party are to be sent directly to the competent authority. The affected Party, on the other hand, should be responsible for specifying the arrangements for distributing the information on the proposed activity in its own country (by means of the press, posters, or other media); and, unless the comments and objections are to be transmitted directly to the Party of origin or its competent authority, should collect these comments and objections and forward them to the Party of origin or to its competent authority.

29. In the context of Article 4, paragraph 2, the Party of origin should transmit the EIA documentation to the affected Party and, unless the comments are transmitted directly to the competent authority, receive these comments. The affected Party should specify the arrangements for distributing the documentation to its own authorities and the public, and, unless the comments are to be forwarded directly to the Party of origin or its competent authority, collect these

comments and transmit them to the Party of origin or its competent authority.

30. To the extent possible, the transboundary information exchange should be carried out by the concerned Parties in the most direct way.

31. The way in which the tasks mentioned in Article 4, paragraph 2, are fulfilled should conform to the EIA procedure of the Party of origin, as this procedure is relevant to the proposed activity. The information should be made available to the public of the affected Party in accordance with the normal practice of that Party for the distribution of information.

32. Specific bodies, like coordination centres, or different procedures, which may be expedient in some cases, may be agreed upon by the concerned Parties.

IV. RESPONSIBILITY FOR TRANSLATIONS AND THE COSTS OF TRANSLATIONS

33. Participation of the affected Party, its authorities and its public in the EIA procedure in the Party of origin, as well as effective cooperation under the Convention, will often require translation of documents and verbal statements. In particular, one or all concerned Parties may be interested in the translation of the following matter:

- Notification of a proposed activity (Article 3, paragraphs 1 and 2);

- Response to that notification (Article 3, paragraph 3);

- Information to be given by the Party of origin upon receipt of a response from the affected Party (Article 3, paragraph 5);

- Information relating to the potentially affected environment (Article 3, paragraph 6);

- Information to the public about the proposed activity (Article 3, paragraph 8);

- Comments and objections by the public of the affected Party on the proposed activity (Article 3, paragraph 8);

- The EIA documentation (Article 4, paragraph 1);

- Comments on the EIA documentation by the authorities and the public of the affected Party (Article 4, paragraph 2); and

- The final decision on the proposed activity (Article 6, paragraph 2).

34. In each of these cases, the following questions should to be answered:

- Is translation necessary?

- Which of the concerned Parties should be responsible for and bear the cost of translation?

A. Necessary translations

35. The documentation mentioned above varies considerably in length. While information under Article 3, paragraph 1, of the Convention may be relatively brief, the EIA documentation (Article 4, paragraph 1) may consist of several hundred pages, according to the national requirements in the Party of origin. Also, the final decision on the proposed activity may, together with the reasons and considerations on which it is based, be a rather extensive document; although this again varies from country to country and from case to case.

36. However, translation is required in any case where language differences exist and where the language in which a document is produced may not be understood by those who should read it.

37. As far as the translation of the EIA documentation (Article 4 and Appendix II) is concerned, those parts of the EIA documentation that, in addition to the summary, deal with the environmental impact of the proposed activity in the territory of the affected Party or have a bearing on this impact should be translated. This would mean that, of the information listed in Appendix II, the following items would have to be translated:

- The description of the proposed activity and its purpose (paragraph a);

- The description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative (paragraph b);

- The non-technical summary including a visual presentation, as appropriate (maps, graphs, etc.) (paragraph i).

38. The following information, listed in Appendix II, would have to be translated only in so far as it concerns environmental impact in the affected Party:

- The description of the environment likely to be significantly affected by the proposed activity and its alternatives (paragraph c);

- The description of the potential environmental impact of the proposed activity and its alternatives and an estimate of its significance (paragraph d);

- The description of mitigation measures to keep adverse environmental impact to a minimum (paragraph e);

- The explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used (paragraph f);

- The identification of gaps in knowledge, and the uncertainties encountered in compiling the required information (paragraph g);

- The outline for monitoring and management programmes and any plans for post-project analysis, when included in the EIA documentation (paragraph h).

39. In view of the other items of information specified in the Convention, the need for translation should be determined as early as possible by the concerned Parties on a case-by-case basis. However, as a general rule, information addressed to the general public is more likely to require translation. In short, three categories of information can be distinguished:

(a) Documents which are likely to require translation, such as:

- The notification to be given by the Party of origin (Article 3, paragraph 1);

- The response to be given by the affected Party (Article 3, paragraph 3);

- The information to be given by the Party of origin (Article 3, paragraph 5);

- The information to be given by the affected Party (Article 3, paragraph 6);

(b) Information which is likely to require translation, but may need to be translated in full only in so far as it concerns transboundary impact, otherwise, a summary translation, relating to the following, may be sufficient:

- Information about the proposed activity (Article 3, paragraph 8);

- The final decision on the proposed activity (Article 6, paragraph 2);

(c) Information which will need translation in full where this is required by the administrative or legal procedures of the Party of origin, relating to the following:

- Comments and objections by the public of the affected Party, under Article 3, paragraph 8;

- Comments by the authorities and the public of the affected Party, under Article 4, paragraph 2.

B. Responsibility for and costs of translations

40. There could be different opinions as to whether it is more expedient (less time-consuming and less costly) for the Party giving the information (the Party of origin in the case of Article 3, paragraph 1, and the affected Party in that of Article 3, paragraph 6, of the Convention), or for the Party receiving the information to be responsible for the translations. On the other hand, the Party responsible for translation should also bear the costs of translation. A case can be made for the Party of origin for which the EIA is being carried out and whose domestic law governs the EIA procedure to be responsible for the translations. The affected Party on the other hand will only participate in the EIA procedure. Therefore, the Party of origin should be competent and responsible for the whole of the EIA procedure (excepting those merely procedural steps which, under international law, only the affected Party can carry out). Finally, in general, it would be easier for the Party of origin than for the affected Party to recover these costs from the proponent.

41. For these reasons the Party of origin should be responsible for translations and should also

bear the related costs, unless the concerned Parties have agreed otherwise. The concerned Parties may jointly establish or authorize organizations to translate the relevant documents. Such organizations would have to guarantee professional standards.

V. ORGANIZATIONAL QUESTIONS

42. Although it is self-evident that each Party may decide for itself which of its authorities should be charged with the tasks under the Convention, it is advisable that those authorities that already have responsibilities in relation to the EIA or similar procedures under domestic law should also assume the tasks described in the Convention. Such an arrangement would seem useful since, under the Convention, the EIA will, in practice, follow the domestic procedures of the Party of origin; and transboundary cooperation under Articles 2 to 7 of the Convention will take place within the framework of these procedures.

VI. PROPOSALS FOR FUTURE WORK

43. Current practice does not reflect a full implementation of the provisions of the Convention. There is at present a diverse experience in the field of EIA in a transboundary context, and it can be concluded that until now no uniform approach to transboundary information exchange has been followed. Approaches proposed in the present report could serve as guidance to competent national authorities in the practical application of relevant provisions of the Convention. Experience gained in following these approaches could be examined in due course.

44. In the meantime, further legal and administrative aspects which have not been highlighted in the present report could be considered in depth. Future activities could aim, for instance, at:

(a) The elaboration of a harmonized format for the notification documents under Article 3 of the Convention;

(b) The development of guidance in cases where the concerned Parties have different environmental quality standards;

(c) The consideration of mechanisms for quality control of the EIA documentation in a transboundary context;

(d) The elaboration of recommendations for the undertaking of public hearings in a transboundary context;

(e) The development of a model for bilateral or multilateral agreements, taking into account Appendix VI of the Convention and the findings of the present report.