

Seventh Seminar on Cooperation on the EIA Convention in the Baltic Sea Region

6 – 7 November 2014

Venue: Federal Ministry for the Environment, Building, Nature Conservation and Nuclear Safety,
Berlin, Germany

Minutes¹

1. Welcome and Practicalities

Germany welcomed the participants. Germany introduced the agenda, which was adopted.

2. Work on EIA Convention and SEA-Protocol

The *Espoo Convention Secretariat* informed that there had been temporary changes in the staffing of the Secretariat.

The Secretariat provided the following information about the present state of ratification:

- At the moment (6 November 2014) the Convention has 45 Parties (including the EU), the Protocol has 26 Parties.
- The first amendment of the Convention entered into force on 26 August 2014. However, 15 states had still to ratify the amendment for it has effect (including inter alia Latvia and Denmark).
- With regard to the second amendment eight ratifications are still missing.

The Secretariat – with additional information given by Lithuania – reported on the meeting of the Implementation Committee in September 2014 and the meeting of the informal network of the MEAs Chairs in October 2014 and gave an overview of forthcoming meetings. The next meeting of the informal network of the MEAs Chairs in April/May 2015 will focus inter alia on financial questions. The Secretariat also informed about the programme “Greening Economies in the Eastern Neighbourhood” (EaP GREEN), financed by the European Union and aiming at decoupling economic growth from environmental degradation and resource depletion. It provided an overview of the programme component implemented by the UNECE secretariat which involved a number of activities to promote the alignment of national legislation with the Espoo Convention and its Protocol on SEA and to build capacities on EIA and SEA procedures, including through pilot application of SEA and training events.

Germany addressed the pending compliance case at the Compliance Committee of the Aarhus Convention on the nuclear power project in Hinkley Point, UK (ACCC/C/2013/92 – DE and /91 – UK; see also item 6 on the agenda). In this case questions concerning the relationship between the Espoo Convention and the Aarhus Convention have been raised. The communicant alleges that under the Aarhus-Convention there is an obligation of the affected party to request a transboundary EIA procedure under the Espoo Convention in order to enable its public to participate. Furthermore, the communicant claims, that under the Aarhus-Convention there is also an obligation of the party of origin to notify the public of an affected party’s directly, even if the affected party itself does not request a transboundary EIA procedure under the Espoo Convention.

¹ The minutes were prepared by the host country.

The participant discussed these questions. Doubts and concerns were expressed as regards the communicant's view, which might put at stake the coherent interpretation and application of the two Conventions. It was proposed to inform the Espoo Bureau about the matter, in order to increase awareness among the Parties of the Espoo Convention.²

3. Ongoing transboundary EIAs and SEAs and case studies

The participants gave an overview of ongoing transboundary activities.

Poland made a presentation on transboundary EIA and SEA cases, in which Poland acts either as party of origin or affected party.

Lithuania introduced the projects in which it is party of origin or affected party. With regard to the proposed nuclear power plant in the region of Kaliningrad, Lithuania has sent comments to Russia. However, there has been no clear response and no information about the current state of procedure so far.

Latvia is an affected party in different cases listed in the appendix.

Estonia gave an overview of ongoing projects listed in the appendix.

Denmark reported on the state of play of the SEA carried out for the repository for Danish low and intermediate level radioactive waste. The documents will be sent out in due time. With regard to the Fehmarn Belt project in which Denmark and Germany are both parties of origin consultations of the competent authorities and the public have taken place in both countries. It could not be clarified yet, if a Danish sand excavation project which could cause impacts on the seabed's flora and fauna will require a transboundary EIA.

Sweden tabled an overview of the projects in which it is party of origin or affected party (cf. appendix). The notification for a new Swedish nuclear power plant project has not been sent out due to ongoing political discussions. With regard to some German wind farm projects and the German Offshore Grid Plan Sweden asked for additional written information on the state of play which Germany promised to submit. In this context some delegates recalled that there is an obligation of the party of origin to submit the final decision to the affected parties.

Finland summarized its ongoing projects (cf. appendix).

Germany

See the appendixes to this report.

² Note from the secretariat: this issue was raised at the meeting of the Bureau (Geneva, 5-6 February 2015), which agreed to forward it for discussion at the fourth meeting of the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment (Geneva, 26-28 May 2015). The Chair of the Implementation Committee briefly presented the ongoing informal cooperation of the Committee with the Aarhus Convention Compliance Committee. The Working Group agreed that the Implementation Committee and the Working Group should keep each other informed whenever there was a link between the two Conventions, and invited the Implementation Committee to liaise, as appropriate, with the Aarhus Convention Compliance Committee to ensure a coherent and coordinated approach to the interpretation of the two instruments.

4. Experience of large scale transboundary projects and plans/ programs

a) *Germany as an affected party: Characteristics and implications of Germany's federal structure*

In a presentation **Germany** explained its federal structure and the implications deriving from this structure for transboundary EIA procedures. Being a federal state Germany has no central competent authority for transboundary procedures. When Germany is affected by a foreign project the 'competent authority' on the German side will be the authority which would be competent for a project of the same kind in Germany. If a foreign project is capable of having significant environmental impacts in more than one German federal state (*Land*) authorities of all affected federal states (*Länder*) will be 'competent authorities' at the same time. However, not each of the competent German authorities has to declare its desire to participate to the party of origin. For the participation of Germany as a whole it will be sufficient for *one* of the competent authorities to declare Germany's wish to get involved irrespective of whether other competent authorities express this request too.

A second issue highlighted in the German presentation was the question of how and by whom comments of the public will be submitted to the party of origin. In Germany usually members of the public send their comments directly to the party of origin. This means that these statements will not be evaluated, bundled up and transmitted by the competent German authority. Only sometimes members of the public will send copies of their comments to the competent German authority too.

b) *Fennovoima NPP case: experience from Finland as a party of origin*

Finland gave a presentation on its experience with the transboundary case of Fennovoima NPP in which Germany participated as one of the affected parties. In this case, two German *Länder* declared their desire to participate in time. For Finland it might not have been clear that with these statements Germany as a whole, and not only the two respective *Länder*, had declared its wish to participate in the transboundary procedures. Therefore and with respect to the principle of equal treatment, Finland refused, at first, the participation by a third German *Land* which had expressed its wish to do so only after the expiration of the deadline. However, after explanations by Germany on its practice, the comments from the third *Land* were also taken on board.

Germany clarified that these unfortunate problems had occurred due to a lack of internal coordination and that Germany was currently working on legal and procedural solutions to avoid similar incidents in the future.

According to Finland's view it would be helpful for the party of origin if federal states acting as affected party could have a more coordinated internal procedure and only one answer for notification could be forwarded from the affected Party within the given timeframe. The answer could of course include all the national answers given within the affected party. Furthermore, it would facilitate the procedure if comments of the public and statements of the authorities of the affected party could be collected and sent bundled to the point of registration of the particular project.

Points discussed:

The discussion showed that in the Baltic Sea Region there is a variety of different arrangements and proceedings when carrying out transboundary EIAs.

- Time frame/ extra time

Some participants found it difficult to arrange for efficient participation when the party of origin according to its legal framework offers only rather narrow time frames. In these cases it could be helpful if informal information was provided by the party of origin before submitting the official notification to the affected party. Another way to cope with short time frames may be to put the documents on a website. Parties also have the opportunity to agree on longer time frames if this is necessary to ensure effective participation.

- How to proceed with comments?

Different opinions were expressed on the question if comments of the public should be collected and summarized by the competent authority of the affected party. Most participants were in favour of the affected party to summarize comments at least in complicated cases. In some countries the summary will also include remarks of the competent authority e.g. on the importance of a statement with regard to the national interest. It was also mentioned that it would be difficult for the affected party to prepare consultations with the party of origin when comments expressed by its own public are not known to the competent authority.

In Germany there is a common understanding that the comments of the public should usually be sent directly to the party of origin without any intermediary.

Different views were also expressed on the question at which stage of the procedure consultations should take place. Some participants spoke up for consultations to be carried out early in the procedure. Others referred to Article 5 of the Espoo Convention, which allows for some flexibility (“without undue delay”).

(c) *Experience of Poland: application of SEA in a transboundary context for the Polish Nuclear Power Programme – benefits, challenges and best practices*

Poland reported on the Transboundary SEA for the Polish Nuclear Power Programme (cf. appendix). This case was extremely challenging for Poland as a Party of Origin mainly due to the fact that several affected Parties were notified and involved in the procedure. When the SEA was initiated hardly any experience had yet been gained in terms of transboundary cooperation under the Protocol on SEA and the EU’s SEA Directive. The key issues which Poland faced were: coordination of the entire procedure where 10 Parties were notified and 7 of them participated, translations, contacts, setting time-frames, handle with comments from public etc.

In relation to cooperation with Germany, it is worth noting that Poland and Germany decided to apply the existing bilateral agreement on EIA also to SEA, since its application so far had proved to be effective. Thanks to this approach the entire transboundary SEA procedure has been facilitated. Within the procedure with Germany the competent authority in Poland received more than 35.000 comments in German which were divided in different groups and examined by external experts hired by the competent authority responsible for drawing up the draft Programme. Having received so many public comments from Germany, the authority in charge was confronted with practical challenges such as lack of human resources to deal with comments and translation issues.

In terms of content most of the comments were alike. The main point was that the use of nuclear energy was opposed to in general. The competent authority prepared a summary of all comments with explanations how these have been taken into account attached to the adopted Programme.

From the German perspective this procedure has been an excellent example of best practice in transboundary SEA.

5. SEA and EU Marine Strategy Framework Directive

a) Introduction of the EU marine Strategy Framework Directive: relationship with SEA

Germany gave a presentation on the EU Marine Strategy Framework Directive (MSFD); cf. appendix.

b) State of play in Sweden (Swedish Agency for Marine and Water Management)

Sweden presented its approach to implement the MSFD (state of play); cf. appendix.

c) Points discussed: Need for an assessment according to the SEA directive and a transboundary procedure according to the SEA protocol

Being a rather complex and difficult topic only a few aspects of the relationship between the MFSD and requirements deriving from the SEA Directive and the SEA Protocol could be addressed in the Seminar. Discussions will have to be intensified in the weeks ahead.

In the consultations taking place in HELCOM most parties have come to the conclusion that the programmes of measures (PoM) Member States have to develop according to the MFSD will require a national SEA.

Germany recalled that similar questions came up when the Water Framework Directive (WFD) was implemented and Member States had to establish national PoMs requiring an SEA. In this case the Member States acting as parties of origin notified their national PoMs to the parties possibly affected. In the end none of the parties affected expressed its wish to participate because there was a common understanding that the PoMs would not have significant negative impacts on the environment. In HELCOM it has been discussed if this approach can also be followed in the context of MFSD. From an Espoo point of view the procedure will only be acceptable if full compliance with the requirements of the SEA Directive and the SEA Protocol will be ensured.

The participants agreed that these questions have to be examined and discussed internally first before a common position can be found. It was proposed that an informal exchange of views could take place on the verge of the next EU EIA/SEA expert meeting (end of November).

6. Transboundary access to justice by members of the public, including NGO's (Report: Germany)

Germany reported on several developments concerning access to justice in environmental matters according to Art. 9 paragraphs 2 and 3 of the Aarhus-Convention. The ECJ-rulings in the cases Trianel and Altrip have clarified several questions with regard to Article 9 para. 2 of the Aarhus Convention. But today the focus is more on Art. 9 para. 3 of the Aarhus Convention. The ruling of the ECJ in the Slovak Brown Bear-case caused uncertainties in the deliberations of the national courts in Germany. Based on this ECJ-ruling controversial judgements have been issued, sometimes granting NGOs further access to justice, sometimes denying in similar cases the access. As a milestone the federal Administrative Court in Germany in September 2013 granted NGO's access to justice for the enacting

of an air-quality-plan for the first time. Furthermore it called on the national legislator to implement Article 9 para. 3 of the Aarhus Convention into domestic law.

A second key development took place in July 2014: The 5. Meeting of the Parties to the Aarhus-Convention adopted decision V/9h concerning the compliance of Germany with regard to access to justice in environmental matters. The Compliance Committee had concluded before that Germany's implementation of the Convention was not compliant. Germany has originally considered that the possibility to challenge the violation of provisions stipulating individual rights in administrative law and as well possibilities for appeals and the civil and criminal law are sufficient for a proper implementation of the Convention. But for the Compliance Committee any decision must be a possible subject to judicial review. This might lead inter alia to lawsuits by NGOs on plans and programs according to Art. 7 of the Aarhus Convention. The national implementation of the Convention shall allow citizens of other countries the possibility as well to participate in decision-making procedures and to grant means of access to justice according to Art. 9 II and III of the Convention. The Commission's proposal concerning a final directive on access to justice of 2003 was withdrawn in 2014 under the European Commission's Regulatory Fitness and Performance Programme. But this was done in the expectation of a new proposal for such a Directive by the Commission that is currently prepared. Its adoption and publication might take place in the first half of 2015 and could include follow-up amendments on Article 11 and 25 of the directives on EIA and Industrial Emissions.

A further development of interest concerns an ongoing compliance case (ACCC/C/2013/92 – DE and /91 – UK) for the nuclear power project in Hinkley Point (UK) (see also above). The communication alleges that Germany is in non-compliance with the Aarhus Convention, because the German Government has not requested a transboundary EIA procedure under the Espoo Convention. The second communication concerning the UK alleges non-compliance, because the UK did not notify Germany. In the hearing on both cases held by the Aarhus Compliance Committee in Geneva in September 2014 many relevant questions have been discussed: the relationship between the Aarhus and the Espoo Convention, and as well the relevance of Art. 6 II and Art. 3 II of the Aarhus-Convention in the case at hand. Art. 6 II might cover inter alia as well cases of transboundary EIA. Germany stated that if a transboundary EIA was denied by the screening made by the Party of origin and was not requested by a potentially affected Party, that there is no room for a further application of the Aarhus Convention on this potentially affected Party. But the question was raised, if Art. 3 II forces such a potentially affected Party to support its own population in receiving more information. Furthermore the question was discussed, if the Party of origin must directly inform the public of the potentially affected Party, e.g. by newspaper announcements, in order to comply fully with Article 6 para. 2 of the Aarhus Convention.

Germany points out that on the UNECE website of the Aarhus Convention all documents concerning this case are published. The next meeting of the Parties to the Aarhus Convention will take place in 2017 to adopt decisions on the case. In the meantime, Germany suggests that the constituencies under the Espoo Convention are also informed and involved in the discussion about these issues.

State of play - access to justice for NGOs

In a tour de table the participants gave an overview on their national legislation on access to justice for NGOs.

7. Experience of bilateral agreements under Espoo-Convention and SEA-Protocol

a) Estonian view/ comments by Finland and Latvia

Estonia gave a presentation on its bilateral EIA Agreements with Latvia of 1997 and with Finland of 2002. The Agreement with Finland is more detailed because inter alia experiences deriving from the first Agreement with Latvia have been taken on board. Both agreements provide for the involvement of a joint commission. The participation process usually takes about two months. Transboundary SEA is not included yet, but there are discussions to broaden the scope in the future.

Finland and **Latvia** affirmed that the bilateral agreements with Estonia have proven to be very useful instruments. They helped to strengthen cooperation and to improve the quality of transboundary EIA procedures.

b) Polish view

Poland introduced the bilateral EIA agreement with Germany. The agreement has proven to be a helpful tool for the practical application of transboundary EIA requirements. It reflects the specific administrative structures and different legal provisions in both countries and defines responsibilities and obligations of the parties, e.g. with regard to time frames and the translation of documents. Experience shows that these provisions have a positive effect on the quality of transboundary procedures and the performance of the authorities involved. An update of the agreement including provisions on SEA has been drafted and is supposed to be finalized in 2015. Both sides have agreed that in the meantime the EIA agreement shall be applied on SEA cases too.

Apart from the bilateral agreement with Germany there is also Polish-Lithuanian Agreement on EIA in force since 2004 which was applied successfully several times, but not so frequently. Thanks to this agreement the two countries have detailed provisions on how to proceed. It regulates in detail the following issues: notification, deadlines for responses, EIA documentation, public participation, making comments and statements, relevant authorities, translations and other.

Moreover, Poland currently has draft agreements under preparation with Slovakia and Belarus.

c) German view

In **Germany**, apart from the bilateral agreement with Poland, there is an informal bilateral declaration on transboundary EIA and SEA with the Netherlands and a regional trilateral declaration with Switzerland and France focused on the Upper-Rhine Region. These declarations contain guidelines. Although these guidelines are not legally binding they are generally applied in the respective procedures. In addition the German Environment Agency is working on a draft guidance on transboundary EIA. This guidance paper aims to support German authorities, especially those less experienced with transboundary procedures, by providing information and advice.

8. Any other business

a) Amendment of EU EIA-Directive (implementation – state of play)

The participants gave an outlook on ongoing activities in their countries to transpose the EU Directive 2014/52/EU into national law. The Directive will have to be implemented by the Member States until 16 May 2017.

Most of the Baltic Sea Countries are still analyzing the need for amendments of their national legislation. To this purpose ministerial working groups have been established, in some countries NGOs and developers have also been involved. Most participants expected that it will be necessary to make full use of the three years period to implement the Directive. One of the most challenging tasks will be the transformation of Art. 6 para 5. This provision requires Member States to make relevant information electronically accessible to the public by central portals or easily accessible points of access. For the transposition of this provision it will not be sufficient to provide for an adequate legal base. Organizational and technical measures as well as financial funding will have to be provided too.

From the perspective of the Espoo Convention, the amendment of Article 7 is worth of interest: According to the new Art. 7 paragraph 4 transboundary consultations may be conducted through an appropriate joint body. This provision is consistent with Art. 5 of the Espoo Convention. However, up to now only in special cases a joint body with representatives of countries of origin and affected parties has been established.

b) Transboundary EIA for Offshore Transmission Line (FIN)

Finland indicated an ongoing planning procedure for an offshore telecommunications cable from Finland to Germany (Sea Lion). The screening procedure is ongoing and it has not been decided yet, whether an EIA is needed for the project or not.

c) Next meeting

The next Meeting is scheduled for the second half of 2015 in **Lithuania**. The main topics will be 1) Assessment and reduction of transboundary impacts on transboundary watercourses and international lakes in the context of the Espoo Convention, the Protocol on SEA and the Helsinki Convention;

2) Effective public participation in SEA/EIA in the context of the Espoo Convention, the Protocol on SEA and the Aarhus Convention.

Lithuania considers inviting representatives of the Helsinki Convention and Aarhus Convention in the discussion.

9. Conclusions and Closing

Minutes of the Seminar will be provided by Germany. The participants agree that presentations shall be uploaded on the UNECE website.