

An Analyse of Convention on Environmental Impact Assessment in a Transboundary Context

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Abstract: As the first international law document to guide the procedure of transboundary environmental impact assessment, the Convention on Environmental Impact Assessment in a Transboundary Context is of great significance. This analyse briefly introduces the contents of the Convention, takes the Bystroye Canal Project in Ukraine as the starting point, analyzes its unique institutional highlights of the Convention, including inquiry procedure, compliance review and public participation. Finally, it affirms the positive role of the Convention, and puts forward the challenges faced by the Convention in overlapping application, standard updating, participation procedures and implementation effectiveness.

Keywords: Transboundary environmental impact assessment; Espoo Convention; precautionary principle.

1. Introduction

The environmental degradation makes the precautionary principle more useful. As an effective preventive measure, transboundary environmental impact assessment (EIA) is being paid much attention. The Convention of Environmental Impact Assessment in a Transboundary Context (Espoo Convention), drawn up under the auspices of the United Nations Economic Commission for Europe (ECE), aims at preventing, reducing and controlling significant adverse transboundary environmental impact from proposed activities by institutionalizing a standardized process of transboundary EIA, marking the first time that the transboundary environmental impact assessment system formally entered the international legal scope.[1]

The Espoo Convention provides for specific obligations on transboundary EIA: The parties shall, either individually or jointly, take all appropriately and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities (Art.2(1)). The Convention is advanced in that it provides an innovative system for transboundary environmental impact assessment. The subject matter of the Espoo Convention is procedural in character. This aims at making proposed activities subject to standardized process of transboundary EIA rather than substantially regulating proposed activities. Thus, the convention is solely concerned with the procedural legitimacy, not the substance, of proposed activities.

In terms of object matter, the Convention defines proposed activities that may have a significant impact by way of listing, such as crude oil refineries and installations, large-diameter oil and gas pipelines, large dams and reservoirs, groundwater abstraction activities, pulp and paper manufacturing of 200 air-dried metric tonnes or more per day. For those activities that are not on the proposed list, the Convention has a detailed discussion mechanism whereby the Parties can determine criteria based on the general guidelines set out in Annex III. In terms of specific content, Espoo Convention defines the obligations that parties need to comply with, such as the obligation to carry out transboundary EIA, the obligation to provide information, and the obligation to consult. In terms of organizational structure, Espoo Convention provides for the

Meeting of the Parties (MOP) to be the main decision-making body, which is open to all Parties, non-Parties and international governmental organizations. Does the convention, as an instrument for procedural regulation, work effectively as expected? If so, how, to what extent, and under what conditions? By focusing on a case study, this article will identify some distinctive features of Espoo Convention, discover its positive role and challenges.

The case study concerns the Ukrainian project of opening the Danube-Black Sea navigation route in the Danube Delta (Bystroye Canal project, BCP). BCP is one of the many sub-projects of the Danube-Black Sea Route project opened by Ukraine in the Danube Delta, which was officially launched on 11 May 2004. The Ukrainian government hopes that through Bystroye Canal, to rebuild the delta ports closed in the 1980s on the one hand, and on the other hand to reduce the huge shipping costs of the former Surina Canal via Romania. The Danube Delta, which is surrounded by Moldova, Romania and Ukraine, is the second largest delta, largest water purification system and one of the largest wetlands and reed fields in Europe. The Danube Delta is of great ecological value as it is a critical habitat for many migratory birds and an important area for many fish stocks. Romania believes that the construction of BCP will inevitably have a negative impact on the ecological environment of the Danube Delta. Therefore, Romania raised a question to Ukraine in August 2004 according to Espoo Convention. Subsequently, the two sides launched a series of processes around the convention system, and this paper will focus on analyzing the procedures with characteristics.

2. Inquiry Procedure

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 discussions on whether there is likely to be a significant adverse transboundary impact (Art.3(7)). An inquiry mechanism is extremely useful for environmental issues of

which effective management is often impeded by conflicting views on scientific or technological matters between the parties concerned.[2]

In September 2004, when Ukraine and Romania established Inquiry Commission according to Espoo Convention, it has held five meetings and conducted one site visit. During its visit, the Committee actively exchanged views with various stakeholders, such as representatives of the two sides, local governments, independent experts, the public and non-governmental organizations. In July 2006, the Commission adopted a resolution of its findings, which agreed that BCP has the potential to have significant transboundary impacts, such as reducing the flow dynamics of the Danube tributaries, reducing the area of the downstream alluvial plain and affecting bird habitat; concentration of suspended sand in the river increases and endangers the living environment of fish.[3] Ultimately, the Commission concluded that the BCP had transboundary adverse effects under the Convention and that subsequent construction of the project in Ukraine must comply with the Convention.

The Committee of Inquiry has played an important role in the application of the Convention. The following aspects highlight the effectiveness and flexibility of inquiry Commission's implementation methods: (1) Ukraine and Romania have joined the inquiry Commission's cooperative work, cooperated in the submission of information, attended the Committee's meetings, and facilitated the Committee's field visits; (2) Non-governmental organizations also participated in the investigation process and actively exchanged views with the Committee during field visits; (3) the inquiry Commission actively listened to external experts from different countries; (4) In addition to the investigation, the Commission conducted mediation between the two States. [2] In addition, the Committee adopted some reasonable proposals, such as that the parties concerned should designate joint research programmes, that Ukraine should take corresponding mitigation measures for transboundary impacts, and that the Secretariat should arrange financial assistance for bilateral cooperation, which were not limited to scientific and technical aspects but also included policy-oriented aspects. It is worth noting that these proposals were not challenged by any contracting party, which means that this procedure is widely accepted by them

The BCP is the first case of the application of the inquiry procedure under the Convention, which also shows that the inquiry procedure plays a significant role in the issue of transboundary environmental protection. This is because there will always be differences between the parties concerned in science, technology and policy guidelines due to different national conditions, and improper handling of differences will often hinder the management and solution of problems. Appendix I clearly states that the Commission of Inquiry shall adopt its own rules of procedure. This also means that the Inquiry Commission has autonomy, which to some extent helps the Commission to overcome some procedural disputes and administrative deadlock. To sum up, the inquiry procedure established by the Convention has played an effective role, and its flexible and diverse handling methods have played a very positive role in the solution of problems, which is a very dynamic and innovative element of the Convention.

3. Review of Compliance

The second MOP in 2004 introduced a non-adversarial and assistance-oriented procedure- Review of compliance, and established the Implementation Committee as the permanent body of the Convention to review the implementation of the Convention. The review of compliance consists of two procedures: periodical review of implementation by contracting parties on the basis of completed questionnaires sent in by parties and consideration of submissions made by a party or other parties that have concerns about another party's compliance or a party that considers itself unable to comply fully with its obligations or of any other possible non-compliance by a party on the initiative of the Implementation Committee, with a view to securing a constructive solution.

In 2007, Romania submitted a submission under Espoo Convention requesting a compliance review of Ukraine. Upon receipt of the submission, Implementation Committee began its review in May 2008. In this process, Ukraine and Romania were actively involved: both sides successfully completed the procedures for the submission of additional comments, oral presentations, comments on the draft findings of the review and the date for the preparation of recommendations. In final, the MOP adopted a decision on Ukraine's failure to comply with articles 2 to 6 of the Convention.[4] In particular, Implementation Committee investigated the general status of implementation of the Convention in Ukraine and whether the necessary measures for transboundary environmental impact assessment of the BCP have been taken. With regard to the general situation, the Committee considers that Ukraine did not fulfil its notification obligation to Romania immediately after the final observations of the Inquiry Commission, and that, taking into account the object and purpose of the Convention, Ukraine should have suspended the BCP project as soon as Romania requested the inquiry procedure and should have continued to suspend the project until the procedure under the Convention had been completed, But Ukraine has done none of this. With regard to the necessary measures required by the Convention, for example, Ukraine should have prepared an EIA document in accordance with Annex II, giving Romania an appropriate opportunity to submit proposals on the EIA document, and in particular, Ukraine should have given the Romanian public the right to express their views, as well as consultations with Romania on the reduction and elimination of potential transboundary environmental impacts of the proposed activities, Ukraine has not performed well.[5] In this regard, the MOP urged Ukraine to implement the final decision of the Inquiry Commission without delay, to act in full accordance with the provisions of the Convention in its subsequent construction, and to ensure that it had taken certain domestic measures to implement the Convention.

It is also the first case of a compliance review under Espoo Convention on the recommendation Inquiry Committee, in which it is not difficult to see an attempt by a parties to progressively use the system to ensure that the Convention multilateralizes the bilateral structure of transboundary EIA. Under normal circumstances, the main body of transboundary EIA under the framework of the Convention is the initiator and the affected party, but the Convention closely links the process of interest reconciliation between the two parties and other parties through the implementation review of the Implementation Committee Conference. As a multilateral body, the Conference needs to provide solutions to parties in

compliance reviews, share EIA information and provide technical assistance where necessary. It can be seen that the purpose of the Convention's creation of this regime is not only to achieve the bilateral interests of the parties directly concerned with the proposed activities, but also to achieve the common interests of all parties, which is also linked to the purpose of the Convention: to promote international cooperation, particularly in the area of transboundary environmental impact assessment.

4. Public Participation

The right of the public in one country to participate in the administrative or judicial proceedings of another country is based on the principle of non-discrimination. This principle provides that the public of another State, that is, natural and legal persons, shall be ensured an equal opportunity to act as the public of that State before the courts and the Government of the State in which the act is performed.[6] In Espoo Convention, 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.(Art.2(6)). This means that the Convention recognizes that transboundary EIA cannot rely solely on States, but must also include the public, that is, non-State actors. In BCP, NGOs have become an important part of public participation, including but not limited to: initiating or participating in field surveys, collecting daily information and analyzing reports, providing technical advice, proposing management plans for the Danube Delta, and facilitating communications among various interested party. In dispute resolution of transboundary EIA projects, the public also expressed the need for information exchange and cooperation. It can be said that such public participation has further promoted the exchanges and cooperation between the two countries.

The active participation of citizens is increasingly seen as a powerful means of implementing environmental policies. The Rio Declaration states that environmental issues are best addressed by involving all concerned citizens at the relevant levels, and that States should promote and encourage public awareness and participation by making information widely available and providing effective judicial and administrative avenues of action, including redress and remedies. For the purposes of Espoo Convention, public participation is considered an obligation. It can therefore be said that public participation not only enhances the Convention in terms of effective protection of the environment, it also promotes the legitimacy of environmental decision-making.

5. Conclusion

The Espoo Convention promotes the use of the EIA and also provides a more specific procedure for transboundary EIA. The Convention has laid the foundation for the transboundary EIA system in Europe and the world. Compared with most international treaties on environmental protection, the inquiry procedure, compliance review and public participation system of the Convention have achieved effective innovation. However, the Convention still faces certain challenges. First, the convention needs to address the problem of overlapping application with other environmental

conventions. In the aforementioned case, for example, Ukraine is also a party to the Aarhus Conventions and Bernier Conventions. Both conventions provide for public participation, but differ from Espoo Convention. A commitment by Ukraine to comply fully with the requirements of the Espoo Convention would inevitably have an impact on the procedural application of other conventions. Under certain conditions, there may be complementary interactions between conventions, but there may also be contradictory effects, which will lead to delays, deadlock and conflicts. How to balance the differences in overlapping conventions is also a difficult problem that States parties need to face. Second, the Convention was signed in the last century, and with the development of science and technology, the range of possible causes of environmental damage has been expanding, and the general criteria for defining the significance of the environmental impact of proposed activities in Annex III to the Convention need to be updated. In the context of the rapid development of construction technology, industrial level and biochemical technology, the parties should have more targeted, timely and scientific discussions on specific projects. Third, public participation, as an important system, needs to be both scientific and efficient.[7] Public participation is never an either-or relationship with government participation. Public participation can better coordinate the work of committees, countries, individuals and organizations, and its coordination effect will determine the future of the transboundary impact assessment Convention to a certain extent. Therefore, how to improve the enthusiasm of citizen participation and strengthen the scientific popularization of environmental protection for citizens is a problem that needs to be paid attention to in the future. The last point concerns the effectiveness of the Convention. Investigation procedures, compliance reviews and public participation all depend on effective implementation, so strengthening the legal basis and effectiveness of the implementation of the Convention is a key element. In addition, the successful implementation of transboundary environmental impact assessments under the Convention in multiple countries has become a new challenge. Currently, transboundary EIA tends to focus on two or three States, but with the increasing number of contracting parties, it is likely that the geographical scope of future proposed activities will be expanded to include four, five or even more States. Bilateral or trilateral transboundary EIA mechanisms alone are not enough to solve new environmental problems, and deeper exploration and reflection are still needed.

Notes

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