

Jerzy Jendrośka

Environmental assessments and public participation in the European Union and in the EECCA countries in the light of international standards

International Symposium on
Public Participation and Access to Justice in Environmental Matters

3-4 November 2016

Osaka

Content

- Origins and development of environmental assessments
- International legal framework
- The interplay between environmental assessments and public participation
- Key conceptual differences between UNECE standards and OVOS/expertiza systems
- Responsibility for public participation in EU
- Public participation in OVOS/expertiza systems
- Project proponents/developers in public participation – issues of concern
- Practical solutions
- Conclusions

Origins and development of environmental assessment

- US National Environmental Policy Act of 1969
 - covers: plans, programs, policies, legislative proposals, concrete projects
 - key role of discussing alternatives
 - concept of tiering
- Currently in all developed environmental national frameworks

Environmental assessment in international law - general principles

- General principles of international law
 - Trail Smelter case - arbitration tribunal
 - Nagymaros-Gabcikovo case – ICJ
 - Pulp Mill case - ICJ
- UNEP Goals and Principles of Environmental Impact Assessment of 1987
- Rio Declaration on Environment and Development 1992
 - Integration principle – Principle 4
 - Environmental Assessment – Principle 17
 - Responsibility for transboundary environmental damage - Principle 2
 - Transboundary procedure (Principles 18 and 19)

Environmental assessment in binding international law

- Global treaties
 - mostly agreements concerning use of natural resources
- 2 specific agreements in UNECE:
 - Convention on Transboundary EIA (Espoo) 1991
 - SEA Protocol of 2003
 - *Protocol under Teheran Convention*
- Role
 - harmonization of national procedures
 - transboundary procedure

Development of legal framework in Europe

- EU EIA Directive 1985 – impact of projects
- UNECE Espoo Convention 1991 – transboundary impact of projects
- UNECE Aarhus Convention 1998 – access to information, public participation in decision-making and access to justice in environmental matters
- EU SEA Directive 2001 – impact of plans and programs
- UNECE Kiev SEA Protocol 2003 - transboundary impact of plans and programs

Public participation in EIA/SEA

- Mandatory element in EIA/SEA
 - but
- apply much broader than EIA/SEA!
 - EIA or SEA not always required with public participation
- Synergy with Aarhus Convention
 - EIA and art. 6
 - SEA and art.7
- Public participation and access to justice

Concept of UNECE Espoo and Aarhus Conventions

- Based on Western EIA concept
 - designed for market economy
 - assuming well established development control
- Procedural and process oriented
- Obligations put on authorities

Concept of OVOS/expertiza in EECCA countries

- Traditions of OVOS/expertiza systems in Eastern Europe, the Caucasus and Central Asia
 - Designed for centrally planned economy
 - Substance oriented
- Two separate stages and legal regimes
 - OVOS - responsibility of developer
 - Expertiza - responsibility of environmental agencies

Key conceptual differences

- Legal character of environmental assessment
 - Procedural (international standard)
 - Substantive (OVOS/expertiza)
- Done by
 - Authority competent to make a decision
 - Technical experts
- Role of EIA/SEA report in the assessment
 - One of the elements of the assessment
 - Document summarising results of assessment

Definition of EIA in UNEP Goals and Principles

- EIA means an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development.

Definition of EIA in Espoo Convention

- Under Art.1 (v) of the Espoo Convention
- „environmental impact assessment” means:
 - *„national procedure*
 - *for evaluating the likely impact*
 - *of a proposed activity on the environment”*

Definition of EIA in EU EIA Directive

- “environmental impact assessment” means a process consisting of:
 - (i) the preparation of an environmental impact assessment report by the developer...
 - (ii) the carrying out of consultations
 - (iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer..., and any relevant information received through the consultations...;
 - (iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and
 - (v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a.

Definition of EIA in Belarus law on ecological expertiza of 2009

- "Environmental Impact Assessment" means identification of possible environmental impact of expected changes in the environment due to implementing proposed project decisions during the development of project documentation as well as prediction of its state in the future in order to take decisions concerning possibility or impossibility of project decision implementation;

Definition of EIA Report in Belarus law on ecological expertiza of 2009

- "Report on environmental impact assessment" means a component of project documentation on planned economic and other activity (hereinafter, unless otherwise specified, - project documentation), **containing information with respect to the findings of Environmental Impact Assessment** and measures required to mitigate and/or prevent predicted changes in the environment;

Responsibility for public participation in EU

- Competent authority
 - Authority competent to permit specific activity
 - Authority competent to prepare/adopt strategic document
- Local authorities – in case of activities with local impact but permitted by other authorities
- Foreign authorities – in case of transboundary impact
- Specialised bodies
- Role of private actors and developers
- Statutory division vs delegation of tasks

Role of private actors

- Private actors involved in public participation
 - EIA consultants
 - SEA consultants
 - NGOs
 - Specialised private firms (negotiators)
- Pros
 - Expert knowledge
 - Experience with public participation
- Cons
 - Approach often depends on who hires them

Public participation in OVOS/expertiza system

- OVOS stage
 - responsibility of the developer
 - in practice done by EIA consultants
 - no clear procedures for notification and hearings
 - limited availability of EIA documentation
 - in practice rather propaganda than participation
- Expertiza
 - only non-mandatory „public expertiza”
 - no public consultation in practice
 - no clear requirement to take into account outcomes of public participation

Project proponents/developers in public participation – issues of concern

- Role of art.6 para 5 of the Aarhus Convention vs mandatory public participation
- Interested in promoting the project – therefore by definition not objective!
- Experience
 - Manipulations with defining „the public concerned”
 - Inaccurate performance of procedural obligations
 - Biased approach towards public comments
- Special situation with public authorities
 - Being developers
 - Being promoters

Opinions of ACC and Espoo IC

- “it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2 (d) (iv) and (v), and article 6, paragraph 6)” and therefore “reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention” (Aarhus CC - ECE/MP.PP/2008/5/Add.6, para. 78; see also ECE/MP.PP/2011/11/Add.2, para. 77)
- “the organization of public participation under the Convention was the responsibility of the competent authority⁶ and not of the proponent” (Espo IC - (ECE/MP.EIA/IC/2010/4, para. 19 (b))

Practical solutions

- Criteria for delegating responsibility
 - Impartiality
 - Not representing any interests related to the decision
 - Specialisation or vast experience with public participation
 - Proximity to public concerned
- Role of developers
 - Paying for costs of public participation
 - Involvement into some activities under the control of competent authority

UNECE Maastricht Recommendations

- Delegating tasks in a public participation procedure - paragraphs 27–36
- Encouraging developers to engage with the public concerned before applying for a permit (article 6, paragraph 5) - paragraphs 82–84
- Annex - table

Conclusions

- Conceptual discrepancy between OVOS/expertiza systems and requirements of the UNECE Espoo Convention and Aarhus Convention
- Risk of repeated cases at the Espoo Implementation Committee and Aarhus Compliance Committee
- Need for systemic approach
- Lessons for other regions

General Guidance

- General Guidance on enhancing consistency between the Convention and environmental impact assessment within State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia, which was adopted by the Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context (ECE/MP.EIA/2014/2).

Approaches to risk assessment and public participation: lessons from Fukushima

- Science based vs precautionary approach
- Worst case scenario and „likely” vs „possible” (Hinkley Point NPP cases under Aarhus and Espoo Conventions)
- Approaches to risk and defining public concerned
- Notification
- Issues of public concern