determined of?

While one of the possible attractions of international law is, generally speaking, its indeterminate (some would say flexible) nature[129], the turning point is reached where indeterminacy lapses into "anything goes". Where the notion of object and purpose can be utilized to support or substantiate even diametrically opposed claims, surely its usefulness as "a normative element beyond the rules laid down in a treaty"[130] proper leaves a thing or two to be desired.

That is not to say, as alluded to above, that the notion of object and purpose can ever be substantively delimited *in abstracto*. The meaning of object and purpose in any given situation depends to a large extent on the characteristics of that situation; it depends not only on the treaty itself which may be at issue, but also, as argued above, on the particular treaty-problem concerned. As such, object and purpose is and will remain indeed an utterly flexible notion, able to cater to various needs and different circumstances.

It is also clear that determining a treaty's object and purpose, in whatever situation, is essentially a subjective act over which no impartial or objective control exists. This has generally been acknowledged to be the case with respect to reservations: whether or not a reservation is deemed to be compatible with the treaty's object and purpose depends, in the final analysis, on whether or not it meets with the acceptance of the other treaty partners. The situation is much the same in other contexts, whether it concerns modification, the interim obligation, interpretation, succession, or breach. Given this essentially subjective nature, it is all the more imperative that the notion of object and purpose be handled with care. And even then, it is likely to remain "so difficult to apply".[131]

[129] See Ulrich Fastenrath, *Lücken im Völkerrecht* (1990) or, more accessible perhaps, Fastenrath's "Relative Normativity in International Law", *European Journal of International Law* (1993) p. 305. In a different context, compare Ian Ward, "Identity and Difference: the European Union and postmodernism", in Jo Shaw & Gillian More, eds., *New Legal Dynamics of European Union*, (1995) p. 15.

[130] See Riphagen (note 25).

[131] *Reservations* case (note 9), joint dissenting opinion of Judges *Guerrero, McNair, Read & Hsu Mo*, p. 44.

THE TRANSNATIONAL EIA PROCEDURE OF THE ESPOO CONVENTION

by

Timo Koivurova*

On 10 September 1997, the Convention on Environmental Impact Assessment in a Transboundary Context (the "Espoo Convention") entered into force.[1] At present, the Espoo Convention obligates only those eighteen States which have ratified it, but because it has been signed by an additional sixteen states, its geographical range of operation is likely to expand in the near future.[2] The popularity of this regional convention is no wonder;[3] it reflects the present compromise between economic interests and environmental protection called sustainable development.

The Espoo Convention is a tool for implementing sustainable development in a transboundary context. By requiring the contracting States to establish national environmental impact assessment (EIA) procedures, the Convention is able to integrate the assessment of transboundary effects and the participation of foreign actors in the functioning of the national EIA procedure. Hence, the Convention provides a forum for the preventive management of environmental effects of a certain project on the basis of its whole area of likely impact.[4]

In this article, I attempt to provide a perspective on how the procedure of the Espoo Convention can be understood. First, I will review the scope of the Convention, i.e., the time and place defining where and when the relevant situations must occur in order to be

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[1] The Convention on Environmental Impact Assessment in a Transboundary Context was signed on 25 February 1991 in Espoo, Finland. It was prepared under the auspices of the United Nations Economic Commission for Europe (UN ECE). The text of the Convention is reproduced in 30 *ILM* (1991) p. 800 et seq. See the press release by the UN ECE about the entry into force of the Espoo Convention (*http://www.unicc.org/unece/press/97env14e.htm*).

[2] Information obtained from the Finnish Ministry for Foreign Affairs.

[3] The Convention is open to "States, Members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe ... regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe...", Article 16 of the Espoo Convention, *supra*, note 1. By and large, the Convention is open to States of Europe and North America.

[4] In recent years, EIA procedures have been increasingly used also in transboundary context, see Kuokkanen, T., "Ympäristövaikutusten arviointimenettely kansainvälisissä sopimuksissa", in E.J. Hollo, K. Takamaa, M. Kuoppala & K. Miettinen, eds., *Global Biodiversity, 3rd Finnish Conference on International Environmental Law* (1996) pp. 165-173.

covered by the Convention, and, of course, the characteristics of those situations. Secondly, the transnational EIA procedure of the Convention is reviewed in light of the substantive obligation it contains. It is important to clarify the content of the substantive obligation and its influence on deciding the future of a proposed activity before going into the steps of the transnational EIA procedure. Because the Convention deals more with procedure than substance, this article will concentrate on defining the steps of the transnational EIA procedure. Thirdly, I will take up Finland as one example of the implementation and application of the Convention. I have chosen to focus on Finland not only because it is my own Country, but also because it has implemented, and, in practice, has already applied, the Convention in an exemplary manner. Following this discussion, I conclude the essay with some remarks on the transnational EIA procedure of the Convention.

1. TERMINOLOGY

A national *EIA procedure* can be seen as a linear process in time, consisting of different phases controlled by State legislation and administration. EIA as an institution has manifested itself differently in different national legal systems. An EIA procedure must fulfill certain minimum requirements. At the very least, the procedure must ensure that the likely environmental impacts of a proposed activity are assessed with the participation of the interested parties. A national EIA procedure evaluates only the environmental effects within the territory of a State.

An EIA procedure is supposed to provide scientific information on the negative effects of a proposed activity and its alternatives on the surrounding environment. The procedure provides information for the permit authority whose task it is to decide whether the proposed activity, or some of its alternatives, is given a permit to operate at all, or only under certain conditions. Thus, the procedure evaluates not only the environmental impacts of a certain plan of activity, but also provides information for the permit authority on possible alternatives to the proposed activity, and, normally, on possible measures to mitigate the effects of the activity, as well. In this sense, the EIA procedure is also a planning procedure. The procedure involves not only the developer and the governmental authorities but also other interested parties who are given their say on the desirability and effects of the activity and on possible alternatives.[5]

A national *EIA system* refers not only to the national EIA procedure but also to the decision-making process determining the permissibility of the activity. The EIA procedure applies only to stationary large-scale activities.[6] The permissibility of the operation of such

[5] For general information about the EIA institutions in various countries, see, Gilpin, A., *Environmental Impact Assessment (EIA); Cutting Edge for the Twenty-First Century* (Cambridge University Press, Cambridge 1995).

[6] The contracting States may, of course, complement the list of activities in Appendix I with mobile activities through the amendment rules contained in Article 14 of the Convention, *supra,* note 1.

activities is generally decided by balancing norms in the majority of Western environmental legal systems, i.e., by comparing the costs and benefits of the activity. An EIA procedure does not dictate the outcome of the permit decision by the granting authority; it only provides information about the costs of the activity.

The Espoo Convention creates a system whereby the scope of application of a national EIA procedure is extended to foreign actors and foreign impacts. Almost every time that the Espoo Convention is applicable, the national EIA procedure is applicable, as well, because the Convention requires the contracting States to establish a national EIA procedure in regard to the activities listed in Appendix I.[7] Hence, it is the national EIA procedure of the contracting States which operates as a motor for the *transnational EIA procedure.* The Convention only makes sure that the entire area likely to be affected by the activity is the factor which determines the scope of the impact study and the scope of participation in the transnational EIA procedure. The national EIA legislation and national environmental administration of the origin state operate as elements of the transnational EIA procedure whenever the Espoo Convention is applied.

The national EIA system of the contracting States is applicable whenever the Espoo Convention is applicable, for the Convention requires the establishment of a national EIA procedure and national permit systems at least with respect to all those activities that trigger the application of the Convention (see Appendix I).[8] Thus, it is the national EIA system of the State of origin which transforms into the *transnational EIA system* whenever the Espoo Convention is applied. A transnational EIA system consists of a transnational EIA procedure and the transnational decision-making process whereby permits are granted.

2. SCOPE OF APPLICATION

Generally speaking, the Espoo Convention is applicable to all stationery activities likely to cause transboundary impacts. However, the scope of the Convention, upon closer scrutiny, has been refined to apply to certain activities having clearly defined, potentially transboundary impacts. Before elaborating upon the transboundary pollution events which are within the scope of the Convention, it will be appropriate to review the general scope of the Espoo Convention. As an international treaty, the Espoo Convention is covered by the Vienna Convention on the Law of Treaties (the "Vienna Convention")[9] and the rules

[7] If the concerned States agree upon assessing the transboundary effects of a non-listed activity, by virtue of Article 2 (5) of the Convention, it is possible that no national EIA procedure will take place. The Convention only obligates States to establish a national EIA procedure with respect to listed activities.

[8] The States concerned may agree to include a certain non-listed activity in the transnational EIA procedure. In these cases, it is possible that transnational EIA procedure is implemented without the operation of any national EIA procedure. See Article 2 (5) of the Espoo Convention, *supra,* note 1.

[9] The text of the Convention is reproduced in 8 *ILM* (1969).

of customary international law relating to international treaties.[10]

2.1. Geographical Scope of Application

The Espoo Convention is a multilateral international treaty which has been concluded among several States. It is the States Parties to a treaty which determine the geographical scope of a treaty and the rights of third States within the limits of general international law. As an international treaty, the presumption is that the Espoo Convention applies to the whole territory of each contracting State unless the contracting States decide otherwise:

> "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each Party in respect of its entire territory."[11]

"Territory" denotes only those physical areas over which the State exercises general exclusive physical sovereignty, i.e., land territory and territorial waters, as well as the air space above and subterranean areas below the above-mentioned areas. The contracting States of the Espoo Convention have extended the geographical scope of the treaty by determining the geographical scope through the concept of jurisdiction.

"Jurisdiction" denotes also those areas over which the state exercises particular exclusive physical sovereignty. Only two main physical areas are involved: maritime areas of the Exclusive Economic Zone and the Continental Shelf. In addition, other legitimate maritime zones established by the coastal states come within the scope of the concept.

2.2. Temporal Application of the Convention

If a treaty contains no provision on the retroactivity of treaty obligations, the following presumption applies:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that party".[12]

The Espoo Convention contains no provisions on the retroactivity of its obligations.

[10] In effect, a majority of the rules of the Vienna Convention can be regarded as part of customary international law; see Villiger, M., *Customary International Law and Treaties* (1985). And, if not yet clearly part of customary international law, they 'constitute presumptive evidence of emergent rules of general international law', Brownlie, I., *Principles of Public International Law*, 4th edition (Oxford 1990).

[11] Article 29 of the Vienna Convention, *supra,* note 9.

[12] Article 29 of the Vienna Convention, *supra,* note 9.

However, when signing the Convention, the contracting States adopted a resolution affirming their:

> "resolve to strive for the entry into force of the Convention as soon as possible and to seek to implement the Convention to the maximum extent possible pending its entry into force".[13]

Could this text be considered an agreement between the negotiating States for provisional application of a treaty as provided for in Article 25 of the Vienna Convention? It would seem that the answer is no, for the following reasons. First, the Espoo Convention itself does not provide for such a possibility. Secondly, if the negotiating States had agreed upon the provisional application of the Espoo Convention, they would have used more imperative language than "resolve to strive" or "seek to implement". It can be assumed that their intention was to try to implement the Convention and to apply it in practice on a voluntary basis before its formal entry into force. Finland, for instance, had already applied the Convention before its entry into force.[14]

An important question is whether an activity should be assessed in accordance with the Espoo Convention if the planning process has started before the entry into force of the Convention. This question has ongoing relevance because sixteen states are still to ratify the Convention in the future. The planning process of the activity can not be described as "act or fact" since the planning of an activity is a long-term process, not single event. Thus, in accordance with Article 29 of the Convention, an activity can be seen as a "situation"; the pivotal question becomes whether the situation has ceased to exist before the entry into force of the Convention in respect of that activity's State of location.

When does the planning process of an activity "cease to exist"? In my opinion, the planning process can be seen as terminated when the permit authority has made its decision as to the future of the activity, and under what conditions. After that decision, the plan for an activity ceases to be of interest to the Espoo Convention because the plan has already been given either governmental approval or refusal. Moreover, from a practical viewpoint, it would be rather difficult to initiate a transnational EIA procedure after the permit decision has already been made. Consequently, all those activities which have not yet been given permission to operate potentially come under the scope of the Convention, even though, the planning process was instituted before the entry into force of the Convention.

The entry into force of the Convention is regulated by the Convention itself:

> "This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or

[13] Paragraph 1 of the Resolution of the signatories of the Espoo Convention. ECE/ENVWA/19.

[14] See my forthcoming article in the *Nordic Journal of International Law* (1998). Of course, in accordance with Article 18 of the Vienna Convention, the contracting States were, and are, under an obligation not to defeat the object and purpose of the Convention prior to its entry into force.

accession."[15]

This date was 10 September 1997. Thereafter, all those States which had previously formally accepted the Convention became bound by its norms.[16] For those contracting States which formally accept the Convention after 10 September 1997, the Convention enters into force "on the ninetieth day after the date of deposit" of their formal acceptance.

The Vienna Convention regulates the general termination of treaty obligations. A treaty is in force until it is terminated by the provisions of that specific treaty, or "by consent of all the Parties after consultation with the other contracting States".[17] The Espoo Convention includes no provisions on general termination of the Convention; hence, it can be terminated by consent of all the contracting States. The Convention does stipulate that the contracting States are entitled to withdraw from the Convention four years after the "Convention has come into force with respect to a Party".[18] However, a withdrawal notice does not absolve a State from its obligations after the point when it has given written notification to the depositary; rather, this withdrawal shall "take effect on the ninetieth day after the date of its receipt by the depositary".[19]

2.3. Subject Matter

The substantive obligation of the Convention applies only to certain kinds of transboundary pollution events, i.e., "significant adverse transboundary environmental impact from proposed activities".[20] This definition can be divided into two parts, activity and consequence.

Activity is defined in Article 1(v):

> "'Proposed activity' means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure."

All the activities which come under any national permit system are included in the

[15] Article 18 of the Espoo Convention, *supra,* note 1.

[16] Article 17 regulates the formal acceptance of the Espoo Convention: "This Convention shall be subject to ratification, acceptance or approval by signatory states and regional economic integration organizations", *supra,* note 1.

[17] Article 54 (b) of the Vienna Convention, *supra,* note 9.

[18] Article 19 of the Espoo Convention, *supra,* note 1.

[19] Ibid.

[20] Article 2(1) of the Espoo Convention, *supra,* note 1.

scope of the Convention; "all" means both plans for new activities, and major changes to existing activities. It must be noted, however, that the national environmental administration systems of the contracting States define which activities come within the scope of the Convention, as evidenced by the phrase "in accordance with an applicable national procedure".[21] On the other hand, as will be shown, *infra*, the contracting States must establish a national permit system, at least in regard to the activities listed in Appendix I.[22]

Proposed activities include all activities which are subject to a national permit system; which means both mobile and stationary activities, because Article 2(1) contains no exclusions. In practice, however, only stationary activities come within the scope of the Convention because all national EIA procedures are based on stationary activities. This *de facto* situation is also apparent from the list in Appendix I.

The use of the term "activity" confines the scope of the Convention to individual activities only; it thus excludes plans or programmes. This qualification is specified in Article 2(7):

> "Environmental impact assessments as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes."

A proposed activity must be able to cause "significant adverse transboundary environmental impact".[23] There are two main sub-elements here, which specify the consequences an activity must have in order to be covered by the Convention.

The first sub-element involves the specific definition of the required consequences. The concept of impact defines on a general level the kind of consequences which the proposed project must have:

> "'Impact' means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors."[24]

The concept of impact is defined very broadly. First, it defines the concept of environment in a comprehensive manner. Secondly, it does not define what kind of effects

[21] Article 1 (v) of the Espoo Convention, *supra,* note 1.

[22] See Section 3.3.1. below.

[23] Article 3 (1) of the Espoo Convention, *supra,* note 1.

[24] Article 1 (vii) of the Espoo Convention, *supra,* note 1.

the activity must cause to the environment, and thus, it does not exclude any effects, for instance, alteration of the environment because of noise.

The concept of environment covers living beings: humans, flora and fauna; environmental media, i.e., soil, air and water; and the cultural environment, for instance, the landscape and historical monuments. The concept of environment provided here also includes interaction among living beings, environmental media and the cultural environment, i.e., ecosystems.[25] Moreover, human social relations, "cultural heritage or socio-economic conditions", are included, but only indirectly.

What kinds of effects on the environment must result from the proposed activities? Here, again, the broad definition of "impact" is apparent. "Impact" means "any effect" on the above mentioned environmental elements. Hence, an activity must only be able to cause some kind of alteration to the environment in order to be covered by the Convention. If an activity causes such effects as to alter, for instance, socio-economic conditions, it does not fall within the scope of the Convention. Such a situation might arise, for instance, if an activity did not have the capacity of altering physical factors but caused psychological effects on socio-economic life on other side of a national border.

This "impact" of an activity must be able to cause adverse effects. Finally, the "impact" must exceed a certain threshold of importance, called "significant" in the Convention.

The second sub-element involves the transboundary element of the impact of an activity. An activity must cause impacts on physical areas under the jurisdiction of another contracting State. Thus, impacts to international areas are excluded from the scope of the Convention.[26]

3. THE TRANSNATIONAL EIA PROCEDURE OF THE ESPOO CONVENTION

The Espoo Convention consists primarily of procedural norms obligating the origin State to establish certain kinds of national institutions and to arrange the transnational EIA procedure in such a manner that the participation of the affected State and the members its public is guaranteed. However, the Convention also contains a substantive norm obligating State of origin to ensure that the decision on the future of a proposed activity is made in accordance with this substantive obligation.

3.2. Substantive Obligation of the Espoo Convention

The national EIA procedure of a contracting State, as reviewed, *supra*, does not make any decision on the future of a proposed activity; it only collects information for the decision-making process. The situation becomes more complicated when the Espoo

[25] For a similar interpretation of the EIA directive of 1985, see H.-J., Peters, "The Significance of Environmental Precaution in the Environmental Impact Assessment Directive", *7 European Environmental Law Review* (1996) pp. 210-213.

[26] See Article 1 (viii) of the Espoo Convention, *supra,* note 1.

Convention is applicable, and the national EIA system transforms into a transnational EIA system. The Espoo Convention contains a substantive obligation on all the contracting States:

> "The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities."[27]

This provision might be interpreted as requiring preventive measures from the State of origin to be implemented in consultation with the affected state. It would mean that the transnational permit authority has no decision-making power with regard to measures reducing "likely transboundary" impact, but only with respect to "likely national" impacts of a proposed activity. Yet this this interpretation of the provision is false. The Espoo Convention only requires that the transnational permit authority take due account of the outcome of the consultations among States, not to decide in accordance with their agreement.[28] Of course, it is likely that the outcome of these consultations will be very influential in the decision-making process of the transnational permit authority.

The transnational EIA procedure only provides information on the costs of a proposed activity, both to the territory of the State of origin and to the territory of the affected State, and furnishes proposals for reducing or mitigating these likely effects. The transnational permit authority decides how the transnational costs of a proposed activity are to be compared to its transnational benefits. It is the transnational permit authorities, the permit authorities of the State of origin, which must enforce the substantive obligation of the Convention contained in Article 2(1).

3.2.1. Specific Content of the Substantive Obligation

What is the content of this substantive obligation directed at the transnational permit authority? The obligation to prevent and reduce the likely significant adverse transboundary environmental impact of proposed activities must operate within the balancing norm of calculating the transnational costs and benefits of the activity. Because it can be assumed that the likely impacts on the affected State's territory do not add any benefits to this calculation process, the transnational authority must decide whether the benefits to the State of origin of the proposed activity, e.g., employment opportunities, outweigh the costs resulting from the negative effects of the proposed activity to the environment of the State of origin and the affected State. The result of this balancing process may be that the proposed activity is not permitted at all, or is only permitted under certain conditions. It is very probable that the transnational permit authority will observe any agreement among the concerned States as to the measures for mitigating likely

[27] Article 2 (1) of the Espoo Convention, *supra,* note 1.

[28] See Article 6 of the Espoo Convention, *supra,* note 1.

transboundary impact.

The specific content of the substantive obligation must remain vague because the obligation deals with a situation where one may only speculate about possible transboundary impacts. Indeed, the entire machinery of the Espoo Convention tries to ensure that potential transboundary impacts are evaluated scientifically, thus increasing the knowledge of anticipated transboundary impacts. Yet, even after a transnational EIA procedure, many questions will remain; there are simply no means of obtaining absolute certainty.

According to the substantive obligation in Article 2(1), the, State of origin is obligated to take measures with respect to certain kinds of potential transboundary pollution events defined, *supra*. Although, this obligation is of a general nature, "to prevent, reduce and control", it does point out the general direction for a decision to be made. It is also written in binding language: "...shall...take all appropriate and effective measures", and thus, cannot be considered as reflecting a "soft" obligation. Hence, the Convention lays down a general substantive obligation on the transnational permit authority to take, at a minimum, those measures which could lower the significance of the adverse transboundary environmental impact resulting from the proposed activities.

The substantive obligation requires differing preventive measures with respect to two categories of activities: continuous pollution activities and accidental activities. The Convention applies generally to all proposed stationary activities. The preventive measures, however, must be different in regard to activities which have a strong likelihood of causing continuous pollution and activities which are unlikely to cause continuous pollution but which may cause major large-scale accidents.[29] The Convention requires that the transboundary impacts of continuous pollution activities must at least be reduced to a point below the threshold of significance. Since the pollution from these activities is known, and is known better after the transnational EIA procedure, the transnational permit authority must introduce measures which mitigate the potentially significant adverse transboundary impact.

On the other hand, if a proposed activity entails mainly the threat of accidental pollution, the transnational permit authority cannot govern the acceptable amount of transboundary pollution. Because it is the highly risky nature of these activities which increases the likelihood of pollution, accidents may happen even if all the possible precautionary measures have been taken. The transnational permit authority, or the concerned States, cannot eliminate the possibility of an accident altogether. Both the transnational permit authority and the concerned States can and should try to prevent these accidents by introducing strict safety measures or they should try to contain the effects of accidents by requiring joint contingency plans.[30]

[29] Both of these categories of activities are listed in Appendix I, points 2 and 13, of the Espoo Convention, *supra*, note 1.

[30] Handl in particular has advocated the view that there should be two sets of rules for these two categories of activities. For him, the principle of due diligence can be applied to continuous pollution activities in accordance with international tort principles, while a standard of strict liability can be applied to accidental activities. See, for instance G., Handl, "State Liability for Accidental Transnational Environmental Damage by Private Persons", 74 *American Journal of International Law* (1980) pp. 525-566.

The substantive obligation of the Convention leaves the transnational permit authority much discretion to include this general obligation as part of the balancing process of transnational costs and benefits. As a general obligation, it only gives a broad direction for the measures required to mitigate or prevent likely transboundary impacts. It must be remembered, however, that, in most cases, the obligation does require certain measures for mitigating potential transboundary impacts. Since the transnational EIA procedure commences only if the concerned States agree that "significant adverse transboundary environmental impact" is likely, the transnational permit authority, representing the State of origin in relation to the substantive obligation, must introduce certain measures to mitigate that likely transboundary impact, otherwise, that State will be in violation of the Espoo Convention. On the other hand, although through initiation of the transnational EIA procedure, the concerned States have agreed that certain kinds of transboundary impacts are likely to occur, the transnational impact study may well fail to offer such a finding. Everything depends on the circumstances of the case.

3.3. Enforcing the Substantive Obligation

In order to enforce the substantive obligation stipulated in Article 2(1) of the Espoo Convention, the transnational permit authority needs information on the likely transboundary impacts of a proposed activity and proposals indicating how these impacts can be mitigated or prevented. The main emphasis of the Convention is centered in the creation of two kinds of procedural rules: those rules which obligate the contracting States to reform their national EIA systems in order to provide a basis for the transnational EIA system and those rules which oblige the contracting States to ensure that the potentially affected State, and its population, can participate in the transnational EIA procedure.

3.3.1. Requirements of the National EIA System of the Contracting States

The Espoo Convention enforces its substantive obligation by concentrating on the activities listed in Appendix I of the Convention.[31] The aim is to make sure that the EIA systems of the contracting States are capable of providing the basis for an efficient transnational EIA system, at least with respect to these activities. The Convention requires a certain kind of EIA system to be established for these activities.

The Convention requires the contracting States to establish a national EIA procedure. Article 2(2) states:

> "Each party shall take the necessary legal, administrative or other measures to

[31] The seven appendices of the Espoo Convention "form an integral part of the Convention", Article 10 of the Espoo Convention, *supra*, note 1.

> implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II."

The Convention seeks to ensure that the national EIA procedures of the contracting States are capable of initiating the transnational EIA procedure in regard to the activities listed in Appendix I. Toward that end, it requires, at a minimum, the establishment of some form of national EIA procedure which is capable of initiating the transnational EIA procedure with regard to the listed activities that "are likely to cause significant adverse transboundary impact".

Thus, the contracting States are not obligated to establish an EIA procedure which always assesses the environmental impact of the activities listed in Appendix I of the Convention. Since both criteria for initiating a transnational EIA procedure must be fulfilled, the contracting States may choose other screening systems, that is, systems determining whether an EIA procedure is to be applied to a certain activity.[32]

Article 2(2) requires that the national EIA procedures of the contracting States must contain "public participation and preparation of the environmental impact assessment documentation described in Appendix II". The Convention does not require any specific type of EIA procedure to prepare the environmental impact statement (EIS), for instance, one operating through the developer or through an independent government panel. The Convention only contains minimum conditions for the EIS, a document describing the likely environmental effects of the activity, alternatives to this activity, and possible mitigation measures to be produced by the chosen system. These minimum conditions contained in Appendix II establish a minimum scope for the transnational EIS. No independent scoping procedure is required.[33]

The Espoo Convention organizes the participation of the public of the affected State through the non-discrimination principle: the public of the affected State enjoys the same participation rights as the public of the State of origin in the transnational EIA procedure.[34] Hence, the content of the national EIA procedure with regard to the participation of the public is very important, for it determines the participation rights of the public of the State of origin and the affected States. Unfortunately, public participation is only mentioned,

[32] A good overview of different national EIA systems is provided by Gilpin, Chapters 6, 7, 8, and 9, *supra,* note 5.

[33] Gilpin defines scoping as "a procedure carried out as early as possible, to help ensure that an [EIA] focuses on key environmental issues associated with a proposed activity or development; scoping involves meetings between the proponent and planning or governmental agencies, members of the public, and other interests likely to be affected. The result should determine the scope and depth of the significant issues to be examined in the forthcoming EIS", pp. 171-172, *supra,* note 5.

[34] Article 2(6) of the Espoo Convention, *supra,* note 1.

with no details provided on how the participation of the public should be arranged or at what stage of the EIA procedure this participation should occur.

Of much importance for the transnational EIA procedure is the time at which the public of the State of origin is informed of the pending national EIA procedure. The Espoo Convention connects two important events of a transnational EIA procedure to this moment. First, the transnational EIA procedure must be initiated no later than the date on which the State of origin's public is informed. Secondly, since the public of the affected state enjoys the same participation rights as the public of the State of origin, the initial information of the upcoming EIA procedure marks the moment when the public of the affected State must also be involved in the transnational EIA procedure.

The Convention does not require any specific type of national EIA procedure to be established in this respect. It only stipulates that the initiation of the transnational EIA procedure must occur, at the latest, when the public of the State of origin has been informed. If the national EIA legislation provides that the public need be informed only after the completion of the EIS, the efficiency of the transnational EIA procedure is considerably weakened. Since the transnational EIS is prepared in accordance with national EIA legislation by either a governmental agency or a developer, the agency or developer must also study the likely transboundary impacts of the proposed activity. But if the transnational EIA procedure starts only after the governmental agency or developer has already completed the EIS, the document will contain no evaluation of potential transboundary impacts. If it does contain such an evaluation, this data is based only upon a speculative knowledge of possible transboundary impacts since no input from the affected State is available before the initiation of a transboundary EIA procedure.

It is, possible, of course, that the State of origin will start a transnational EIA procedure independently of the functioning of its national EIA procedure. If this sequence of events occurs, *ad hoc*, without any legislative regulation, there is an insufficient basis for the initiation of the transnational EIA procedure. It is highly desirable, therefore, that if the national EIA procedure is able to initiate the transnational EIA procedure only after the completion of the EIS document, the early initiation of the transnational EIA procedure would be guaranteed through general legislation, or at least through administrative guidelines.

There also exists an obligation to establish permit systems for at least the activities listed in Appendix I of the Convention. This language is set forth in Article 2(3) of the Convention:

> "The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact".

The contracting States are obligated to adopt not only a minimum national EIA procedure but also permit systems in regard to the activities listed in Appendix I, if these

activities are "likely to cause a significant adverse transboundary impact".[35] As mentioned *supra*, the contracting States retain much discretion as to the kind of screening system they adopt since the Convention does not require any compulsory initiation of the transboundary EIA procedure in regard to the listed activities. The situation is different with respect to the establishment of national permit systems. Although, a contracting State does not have to provide a compulsory system of screening in regard to all the listed activities, it must establish permit systems for all these activities. If a certain category of the listed activities does not fall under a national permit system, the transnational EIA procedure of the Convention cannot work properly. Since the transnational EIA procedure is supposed to conclude with the decision by the permit authority of the State of origin, this part of the transnational EIA procedure would be missing if a permit system were not established. Thus, the contracting states are under an obligation to establish general control systems for all the listed activities if they have not yet done so.

The question arises whether a sectoral EIA procedure in general observes the obligations of the Espoo Convention. It is, of course, possible that even a sectoral system might be so arranged as to fulfill these obligations. In practice it is difficult to see how such an arrngement might work. If multiple laws regulate the EIA procedure in regard to the activities listed in Appendix I, and multiple authorities are in charge of implementing these laws, it is hard to imagine the obligations of the Espoo Convention could be efficiently observed. Problems could arise in connection with the co-ordination of the work of several authorities under the administrative structure of different branches of government, each of which having its own values and traditions.

3.3.2. Transnational EIA Procedure

Transnational EIA procedure is designed to enforce the substantive obligations of the Convention. The scope of the general subject matter detailed, *supra*, is clearly too broad for triggering the operation of the transnational EIA procedure. By privileging certain activities listed in Appendix I, the Convention puts pressure on the State of origin to initiate the transnational EIA procedure, at least with respect to these activities.

3.3.2.1. Initiation of the Transnational EIA Procedure

The Espoo Convention establishes two categories of activities for which different initiation procedures are available: those listed in Appendix I, and those which are not included in appendix I..

The Convention contains a presumption that a transnational EIA procedure must be initiated in regard to the activities listed in Appendix I of the Convention.[36] These activities

[35] Article 3(1) of the Espoo Convention, *supra*, note 1.

[36] Article 3 (1) of the Espoo Convention reads: "For a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact, the Party of origin shall, for the purposes of ensuring an adequate and effective consultations under Article 5, 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", *supra*, note 1.

are not, however, automatically included in the scope of the Convention, but it is presumed that under normal circumstances, they are "likely to cause a significant adverse transboundary impact".[37] This presumption can be rebutted, for instance, by showing that substantial distance from an international border constitutes special circumstances, and thus, excludes the listed activity from the scope of the Convention.

The general subjectmatter scope in Article 2(1) is specified with respect to both activities and consequences. First, the Convention specifies what "activity" means a listing the categories of activities in the Appendix I of the Convention.[38] Some of these activities are defined in great detail, e.g.,:

> "1. Crude oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day."

Others are described in very general terms, e.g.,:

> "Major installations for the initial smelting of cast-iron and steel and for the production of non-ferrous metals."

[37] Article 3 (1) of the Espoo Convention, *supra*, note 1.

[38] The categories of activities listed in Appendix I are the following: "1. Crude oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.
2. Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load). 3. Installations solely designed for the production or enrichment of nuclear fuels, for the reprocessing of irradiated nuclear fuels or for the storage, disposal and processing of radioactive waste. 4. Major installations for the initial smelting of cast-iron and steel and for the production of non-ferrous metals. 5. Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos: for asbestos-cement products, with an annual production of more than 20,000 tonnes finished product; for friction material, with an annual production of more than 50 tonnes finished product; and for other asbestos utilization of more than 200 tonnes per year. 6. Integrated chemical installations. 7. Construction of motorways, express roads and lines for long-distance railway traffic and of airports with a basic runway length of 2,100 metres or more. 8. Large-diameter oil and gas pipelines. 9.. Trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tonnes. 10. Waste-disposal installations for the incineration, chemical treatment or land-fill of toxic and dangerous wastes. 11. Large dams and reservoirs. 12. Groundwater abstraction activities in cases where the annual volume of water to be abstracted amounts to 10 million cubic metres of more. 13. Pulp and paper manufacturing of 200 air-dried metric tonnes or more per day. 14. Major mining, on-site extraction and processing of metal ores or coal. 15. Offshore hydrocarbon production. 16. Major storage facilities for petroleum, petrochemical and chemical products. 17. Deforestation of large areas.

The Convention specifies what "consequence" means by stating that the activity must be "likely" adverse significant transboundary impact.[39]

In order to enforce this presumption in regard to the listed activities, the Convention contains a special mechanism for evaluating whether or not the criteria provided in Article 3(1) of the Convention has been fulfilled. If the State of origin decides not to initiate a procedure in regard to an activity listed in Appendix I, the concerned States are under an obligation to discuss whether the transnational EIA procedure should be applied. If the discussions between the States have failed, either party, though normally the affected State, has the right to initiate an inquiry commission procedure whereby an expert panel gives its opinion of whether the activity "is likely to cause a significant adverse transboundary impact".[40] Crucially, the affected State is entitled to initiate the inquiry commission procedure without the consent of the State of origin, and may even obtain the opinion from the Commission without the participation of the State of origin.[41] As the decision of the Inquiry Commission is only an opinion, it is not directly legally binding. From a practical point of view, the Inquiry Commission procedure puts pressure on the decision of the State of origin whether or not to initiate the transnational EIA procedure.

The Convention contains a reverse presumption with regard to those activities not listed in Appendix I. It is presumed that they do not fulfill the criteria laid down in Article 3(1) in normal circumstances. This presumption can also be rebutted by showing that exceptional circumstances are applicable, for instance, because the activity is located very near an international border. The criteria for these exceptional circumstances are enumerated in Appendix III of the Convention.[42]

In normal circumstances, activities not listed in Appendix I are generally seen as falling outside the scope of the Convention. However, a mechanism is provided for unlisted activities whereby the affected State is entitled to "enter into discussions" with the State of origin, but no more.[43] However, if exceptional circumstances exist, for instance, the activity is located very near an international border, the Convention will apply.

[39] Article 3 (1) of the Espoo Convention, *supra,* note 1.

[40] Ibid.

[41] See Appendix IV of the Espoo Convention, *supra,* note 1.

[42] The following criteria are listed in Appendix III of the Espoo Convention: "(a) Size: proposed activities which are large for the type of the activity; (b) Location: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention, national parks, nature reserves, sites of special scientific interest, or sites of archeological, cultural or historical importance); also, proposed activities in locations where the characteristics of proposed development would be likely to have significant effects on the population; (c) Effects: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment", *supra,* note 1.

[43] Article 2 (5) of the Espoo Convention, *supra,* note 1.

The transnational EIA procedure applies only if both of the States concerned so agree. This provision pertains to both listed and non-listed activities. Consent to apply the procedure is expressed in accordance with the provisions of the Convention, the State of origin providing notification and the affected State furnishing a response that it will participate in the procedure.[44] Even if the affected State resorts to the Inquiry Commission procedure, and the Commission opines that the procedure of the Convention should be applied, it is the task of the State of origin to initiate the procedure through notification.

It is a separate determination whether the refusal of the State of origin to initiate a transnational EIA procedure amounts to a breach of its treaty obligation. As shown, *supra,* the State of origin is obligated to initiate the procedure if a significant adverse transboundary impact is likely to follow from a proposed activity taking place in its territory. With regard to the activities listed in Appendix I, there is a strong presumption that, in normal circumstances, the procedure must be initiated if the State of origin cannot show the existence of special circumstances. Hence, the legality of its non-initiation of the transnational EIA procedure in these cases relates to its burden of proof in showing the existence of special circumstances. If the State of origin declines to initiate the procedure after the affirmative finding of the Inquiry Commission, it clearly violates its treaty obligations under the Espoo Convention.

This same logic does not apply to proposed activities that are not listed in Appendix I of the Convention. Here it is the affected State that has to show the existence of special circumstances. Breach of treaty by the State of origin due to the failure to initiate the procedure is much more difficult to show in these cases. However, if, for instance, the non-listed activity is planned in a location very near the border and is likely to pollute a natural park on the other side of the border, the non-initiation of the State of origin would amount to a breach of treaty.

The timing of the initiation of the transnational EIA procedure is specified in Article 3(1):

> "...the Party of origin shall, for the purposes of ensuring adequate and effective consultations under Article 5, 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 provision sets a minimum obligation, and a desired one. The deadline for notification is the time at which the public of the State of origin is informed and the desired initiation is "as early as possible".

[44] The consent of the State of origin is expressed through the notification stipulated in Article 3 (1) and the affected State's consent through the participation response provided for in Article 3 (3-4) of the Convention, *supra,* note 1.

3.3.2.2. Preparation of the Transnational EIS document

The Espoo Convention lays down the minimum requirements for the transnational EIS document. The main components of the transnational EIS can be divided in accordance with Appendix II as follows:

> 1. The transnational EIS must contain reasonable alternatives to the proposed activity, including a no-action alternative. If the proposed activity is site-specific, meaning that it can operate only in a certain location, the alternatives are technological solutions, different size-alternatives, and a no-action alternative. If the proposed activity is not site-specific, the alternative plans for location are important.
>
> 2. The transnational EIS shall include the "potential environmental impact of the proposed activity and its alternatives and an estimation of its significance". Thus, not only the transboundary impact of the main proposed idea of an activity and its possible alternatives must be assessed but also the estimation of the significance of all these plans. The determination of the objects of an environmental study are defined in Article 1(vii) as reviewed above.[45]
>
> 3. The transnational EIS must contain proposals for measures to mitigate the effects of the proposed activity and of each of its alternatives.[46]

The concerned States may exclude certain information from the transnational EIS document. Article 2(8) states as follows:

> "[t]he provisions of this Convention shall not affect the right of Parties to implement national laws, regulations, administrative provisions or accepted legal practices protecting information the supply of which would be prejudicial to industrial and commercial secrecy or national security."

[45] See Section 2.3 above.

[46] The minimum content stipulated in Appendix II of the Convention includes the following elements: "(a) a description of the proposed activity and its purpose; (b) a description, where appropriate, of reasonable alternatives (for example locational or technological) to the proposed activity and also the no-action alternative; (c) a description of the environment likely to be significantly affected by the proposed activity and its alternatives; (d) a description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance; (e) a description of mitigation measures to keep adverse environmental impact to a minimum; (f) an explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used; (g) an identification of gaps in knowledge and uncertainties encountered in compiling the required information; (h) where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and (i) a non-technical summary including a visual presentation as appropriate (maps, graphs, etc.)".

This *ordre public* rule gives rather broad discretion to the State of origin to exclude information from the transnational EIS. However, like all rules of exception, this rule must be interpreted narrowly.

In order to guarantee that the minimum requirements for a transnational EIS are met, the Convention contains the following procedure:

> "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, *where such information is necessary* for the preparation of the environmental impact assessment documentation. The information shall be furnished promptly and, as appropriate, through a joint body where one exists."[47] (Emphasis mine)

The condition for the delivery of information from the affected State to the State of origin is that the information be "necessary for the preparation of the environmental impact assessment documentation". In normal circumstances, there would always seem to exist a need for information about the environmental conditions of the area likely to be affected. Since the initiation of a transnational EIA procedure means that both States have agreed that a significant adverse transboundary environmental impact is likely, the States must also observe the minimum requirements for the transnational EIS set out in Appendix II. In order to fulfill those requirements, the affected State clearly has to participate in the preparation of the transnational EIS; otherwise, the transnational EIS would be executed on the basis of speculation on the conditions in the State of origin by the person or body who is responsible for preparing the EIS under the State's national EIA legislation. Without details of environmental conditions in the area likely to be affected, the transnational EIS would definitely remain inadequate.

If and when a need exists to obtain information from the affected State, the affected State must provide that information to the State of origin. This communication may come about through a request being made by the State of origin. If no such request is forthcoming, and the need does exist, the affected State may provide this information. This alternative may, of course, have an injurious effect upon the consultations between the States since the basis of the consultation would not be one jointly prepared transnational EIS document, but rather, competing documents from each side.

The Convention does not require that the public of the affected State be given an opportunity to participate in the preparation of a transnational EIS document. However, if the national EIA procedure of the State of origin provides this opportunity to the public of the State of origin, Article 2(6) accords the same right to the public of the affected State. In such cases, the States concerned must ensure that the public of the affected State is given the same opportunity to influence the scope of the transnational EIS as is the public

[47] Article 3 (6) of the Espoo Convention, *supra*, note 1.

of the State of origin.

The Convention contains a provision for situations when the public of both the affected State and the State of origin are entitled to participate in the preparation of a transnational EIS document. Article 3(8) provides general guidelines for the practical organization of the participation of the public of the affected State in the preparation of a transnational EIS. The States concerned must inform the public which is "likely to be affected"[48] and provide the public with an opportunity to submit comments either directly, to the competent authority - depending on the EIA procedure of the origin state - or indirectly, via the contact authority of the State of orgin. In accordance with the non-discrimination principle, the manner and form of participation depends on the EIA legislation of the State of origin.

3.3.2.3. Reaction to the Completed Transnational EIS document by the Affected State and its Public

After the completion of the transnational EIS document, the States concerned are obliged to agree upon the time-frame for consultations. They are to enter into consultations "without undue delay"[49] concerning, e.g., the potential transboundary impact and measures to reduce or eliminate its impact. The Convention provides certain guidelines for the possible objects of discussion.

By agreeing to start the procedure set out in the Convention, the States concerned accept the likelihood of significant adverse environmental impact from the proposed activity and its relevant alternatives. And as the States have agreed to "take all appropriate and effective measures to prevent, reduce and control" such impacts, they should, under normal circumstances, come up with plans to reduce the likely transboundary impact of the proposed project. It is, however, possible that the transnational EIS will show that no "significant adverse transboundary environmental impact from the proposed activity" is likely, thus removing the binding force of the substantive obligation from the State of origin.

The substantive obligation may be fulfilled, for instance, by selecting certain less polluting alternatives to the main proposed idea or by executing measures mitigating the impact of the main proposed activity. Since the alternatives, their environmental impacts, and possible mitigation measures will already have been studied in the transnational EIS, the States have a good basis for finding measures to reduce the likelihood of significant adverse transboundary impact.

The Espoo Convention requires that, at a minimum, the national EIA procedures of the contracting States should provide for the participation of the public after the completion of the EIS document. Hence, after the completion of the transnational EIS document, both the public of the affected and the State of origin are entitled to participate in the transnational EIA procedure. The specific manner and form of this participation is

[48] Article 3 (8) of the Espoo Convention, *supra,* note 1.

[49] Article 5(1) of the Espoo Convention, *supra,* note 1.

determined by the EIA legislation of the State of origin.

Suggestions regarding the practical organization of the participation of the members of the public of the affected State are offered in Article 4(2). The concerned parties together should agree how to inform the public of the affected State. The active participation of the members of the public of the affected State should take place either directly, through comments and objections delivered to the competent authority, or indirectly, via the contact authority of the State of origin. Since the participation rights of the members of the public of the affected State are the same as those of the members of the public of the State of origin, it may always try to participate directly without the mediation of by the concerned states if the public of the State of origin enjoys such rights.

3.3.2.4. Transnational permit decision

The Espoo Convention requires permit systems to be established for the activities listed in Appendix I of the Convention. These national permit systems, operating as transnational permit systems when the Espoo Convention is applicable, produce the final decision on the permissibility of an activity, and, if such an activity is permitted, then under what conditions. These national permit systems, operating as transnational permit systems when the Espoo Convention is applicable, produce the final decision on the permissibility of an activity, and if such an activity is permitted, then, under what conditions. In this sense, the Convention implements the "Polluter Pays" principle of international environmental law, because economic enterprise internalizes the costs of pollution when implementing permit conditions.[50]

The transnational permit authority is under an obligation to reduce the significant adverse transboundary environmental impact of a proposed activity. However, if, for instance, the transnational EIS has shown that no such effects are anticipated, the substantive obligation of Article 2(1) loses its binding force on the transnational permit authority.

The transnational EIA procedure provides the transnational permit authority with information on likely transboundary impacts, as well as with proposals for their mitigation. Neither the outcome of the consultations between the States concerned, nor the comments of the members of the public of the affected State dictate the decision of the transnational permit authority. Noelkamper is of opinion that transnational EIA procedures: "...inevitably do not guarantee that the State of origin should follow a particular decision...".[51] In my opinion, the transnational permit authority has to follow a certain direction in its decision-making, *viz.*, that which is outlined by the substantive obligation of the Convention.

[50] See for instance A. Kiss & D. Shelton, *Manual of European Environmental Law* (1993) pp. 39-40.

[51] A. Noelkamper, "EEC Directive 85/337 in an International Context", in *The Implementation of the EEC Directive 85/337/EEC on Environmental Impact Assessments* (1992) pp. 168-169.

The balancing norms found in national material environmental laws provide the general criteria for the transnational balancing process. The transnational EIA procedure informs this decision-making process about the costs that the activity will have on the environment of the State of origin and the affected States. Because the benefits of the activity normally accrue only to the State of origin, these benefits must then be compared to the costs outlined by the transnational EIA procedure. The substantive obligation of the Convention merges into this transnational balancing process, as evidenced in Article 6(1):

> "The Parties shall ensure that, in the final decision on the proposed activity, due account is taken of the outcome of the environmental impact assessment, including the environmental impact assessment documentation, as well as the comments received pursuant to Article 3, paragraph 8 and Article 4, paragraph 2, and the outcome of the consultations as referred to in Article 5."

In order to ensure that the results of the transnational EIA procedure are taken into account in the transnational permit decision, the Convention requires the explication of the decision-making process which takes places on to the transnational EIA procedure:

> "The Party of origin shall provide to the affected Party the final decision on the proposed activity along with the reasons and considerations on which it was based."[52]

If one of the States concerned acquires additional information after the final decision has been made, but before the commencement of the activity, either of the States concerned has the right to initiate consultations "as to whether the decision needs to be revised". Additional requirements for the use of this right are that this information "was not available at the time a decision was made" and that it could have materially affected the decision.[53]

The final decision must also take into account the comments and objections of the members of the public of the affected State.[54] Curiously enough, according to the wording of Article 6 (2), the final decision must only be delivered to the affected State, not to the members of the public of that State. The right to non-discrimination belonging to the public of the affected State pertains only to the transnational EIA procedure because it this is the only procedure where the Convention regulates public participation. Thus, there exists no clear-cut obligation to inform the public of the affected State of the final decision. If the members of the public of the affected State have participated in the transnational EIA procedure, it is, of course, highly desirable that the affected State should also disseminate

[52] Article 6(2) of the Espoo Convention, *supra,* note 1.

[53] Article 6(3) of the Espoo Convention, *supra,* note 1.

[54] See Article 6(1) of the Espoo Convention, *supra,* note 1.

to its own public the decision it receives from the State of origin.

3.3.2.5. Post-Project Analysis

Only few national EIA procedures contain compulsory post-project analysis.[55] Similarly, although the Convention contains provisions on such analyses, these only obligate States to discuss such measures.

The Convention suggests that the transnational EIS could already contain a plan for a post-project analysis:

> "(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis;"[56]

Transnational post-project analysis is voluntary for the States concerned, and so the transnational EIS may contain such a component.

If either of the States concerned so requests, which is most likely the case in the consultation phase, the States must together determine whether a post-project analysis is to be carried out. Where the States agree on such an analysis, they are advised by Appendix V of the Convention. If either State concludes, via the post-project analysis, that a significant adverse transboundary impact has occurred, it must inform the other State. The states are then obligated to "consult on necessary measures to reduce or eliminate the impact".[57]

3.4. Criticism

One problematic aspect of the Espoo Convention is that it does not do much to harmonize the national EIA procedures of the contracting States. It should have been essential to require an independent scoping procedure with the participation of the public as part of the national EIA procedure. This type of action would have ensured both early initiation of the transnational EIA procedure and early involvement of the public of the affected State. Both elements would have been key in guaranteeing the quality of the transnational EIS. Participation by the public is only mentioned as part of the required national EIA procedure, leaving it for the national EIA legislation of the State of origin to determine the form and timing of the participation in the transnational EIA procedure.[58]

[55] See for instance Gilpin, *supra,* note 5, pp. 26-28.

[56] Appendix II (h) of the Espoo Convention, *supra,* note 1.

[57] Article 7 of the Espoo Convention, *supra,* note 1.

[58] Ebbesson is disappointed with the generality of the rules regulating the participation rights of the public of the affected State: "Nothing is prescribed, however, about the form nor intensity of public participation. Would it, for instance, suffice if a state limits the public participation to a possibility to send written opinions to the examining agency? To what extent should hearings be

A second problem caused by the relatively modest degree of harmonization by the States parties to the Espoo Convention is the potential situation where States accuse lack other of non-reciprocity of treaty obligations. There may be a fear that when the national EIA procedure of the affected State is much stricter than the one in force in the State of origin, problems of reciprocity will indeed appear. If, for instance, the EIA procedure of the State of origin informs the public only after the completion of the EIS document, and the affected State's EIA procedure would have provided for earlier involvement of the public, the affected State may very well complain of a lack of reciprocity. It can only be hoped that greater harmonization of the contracting States' national EIA procedures will be achieved under the regime of the Espoo Convention.[59]

4. FINLAND AS THE STATE OF ORIGIN OF THE ESPOO CONVENTION

Finland had no general EIA legislation in force prior to its signing the Espoo Convention. The need arose for a national EIA procedure to fulfill the requirements of the Convention, at least with respect to the activities listed in Appendix I of the Convention. This need derives not only from Finland having signed the Espoo Convention but also from the Finnish membership in the European Economic Area (EEA) treaty.[60] The Finnish Parliament adopted the Act on Environmental Impact Assessment Procedure on 10 June 1994, which entered into force on 1 September 1994.[61] Finland ratified the Espoo Convention on 10 August 1995.

The obligations of the Espoo Convention were incorporated into the Finnish legal system through two procedures.[62] First, because the Convention lays down the minimum requirements for a national EIA system, the Finnish Act and Decree on EIA implement these requirements. In addition, these national legal sources determine:

held and how is the outcome of such hearings to be considered by the decision-makers". J. Ebbesson, *Compatibility of International and National Environmental Law* (1996) p. 189. Fortunately, the Economic Commission for Europe is currently preparing a new convention on public participation and environmental information, see *http://www.unicc.org/unece/press/env4e.htm*.

[59] The first meeting of the State parties will take place in January 1998. Information obtained from the Finnish Ministry of the Environment.

[60] Since the EIA Directive of 1985 had to be implemented by the European Free Trade Area (EFTA) States in accordance with the EEA agreement, it created pressure for adopting national EIA legislation.

[61] Act on Environmental Impact Assessment Procedure, No. 468 (1994).

[62] The term "incorporation" pertains to a constitutional system in which the rules of an international treaty are included in the national legal system as they stand in the treaty. The term "transformation" denotes a procedure in a constitutional system which requires that the rules of an international treaty be incorporated via the legal forms of a national legal system. The method of incorporation is used primarily in the case of the Finnish constitution.

1. the means by which the transnational EIA procedure is initiated when Finland is the State of origin;
2. the government agencies which are competent to fulfill the obligations of the Espoo Convention.

The Espoo Convention was incorporated into the Finnish legal system by a decree.[63] Finnish officials will resort to the incorporated Espoo Convention as a basis for their action in phases of the transnational EIA procedure other than the initiation phase regulated by the Act. The criteria for permit decisions when Finland is the State of origin are provided by the national material laws and the substantive obligation of the Convention. As a member state of the European Community, Finland is also bound by Community EIA directives. For the most part, however, these directives do not require any additional action from Finland in regard to its national EIA procedure or its capability to handle a transnational EIA procedure.[64]

I will use the term "Finnish EIA system" to refer to all these incorporated or national rules by which Finland organizes the transnational EIA system required by the Espoo Convention.

[63] SopS 67/1997. The Finnish Constitution provides for a dualist system in relation to international treaties. If Finnish private legal subjects or officials are to be obligated, an international treaty must be incorporated by the Finnish legal system in accordance with constitutional provisions. There are four main procedures for incorporating international treaties into the Finnish legal system. First, if the treaty conflicts with a legal rule having the status of a Parliamentary Act, a three-stage parliamentary procedure is applicable. Secondly, when an international treaty must be approved by the Parliament, only one procedural stage is necessary. Thirdly, if the treaty does not involve any issues over which the Parliament is competent, the President of Finland adopts an incorporation Decree. And, finally, if the rules of an international treaty are not of such significance as to require approval by the President, the Council of State can incorporate the treaty by a decree. M. Hiden & I. Saraviita, *Valtionsääntöoikeuden pääpiirteet* [On The Main Features of Constitutional Law] (1994) pp. 209-222. Since the Espoo Convention was deemed not to require parliamentary enactment, it was the President of Finland who passed the incorporation decree.

[64] The original directive of 1985 contains broad principles on transnational EIA procedure and on national EIA procedures, but the Finnish EIA procedure sets stricter requirements that the Directive, see Council Directive of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, Official Journal No. L 175/40. Because European Community environmental law allows Member States to adopt stricter measures than the Directive stipulates within the limits of the functioning of the internal market, Finland is entitled to retain its stricter standards. Article 130 (t) of the EC treaty reads: "The protective measures adopted in common pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty". The original directive has, however, been amended, and the amended directive must be implemented by March 1999, see Council Directive 97/11/EC of 3 March 1997, amending Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, Official Journal No. L 073, 14/03/1997 p. 0005. This amendment signifies no major changes for the Finnish EIA system; because the European Community also signed the Espoo Convention, the amendment Directive implements the obligations of the Espoo Convention. Thus, in all the relevant parts, the amendment Directive requires only minor changes in the Finnish EIA system.

4.1. The Finnish National EIA System in Light of the Requirements of the Espoo Convention

Before the Convention was signed, the Finnish legal system did not contain any separate EIA procedure in regard to the activities listed in the Espoo Convention. There were, however, certain sectoral laws which provided for public participation and impact assessment prior to a permit decision. Finland opted for an integrative national EIA procedure as best implementing its obligations under the Convention. There existed no problem in regard to the permit system since the Finnish legal system required a permit for all of the listed activities even prior to the signing of the Espoo Convention.[65]

The Act on EIA determines the basic national EIA procedure. It is applicable compulsorily to all the activities listed in Section 5 of the Decree. This list was drawn up on the basis of the list in Appendix I of the Convention as well as the original EU directive; it contains all the categories of activities enumerated in Appendix I, but in greater detail, and defines two additional categories.[66] Moreover, there is a special

[65] See government bill 319/1993.

[66] Section 5 of the EIA decree includes all the categories of activities mentioned in Appendix I of the Convention, but in greater detail. In addition, it establishes the categories "sewage treatment plants dimensioned for over 100 000 people and "400 KW power lines". Section 5 lists the following activities: "1) crude oil refineries and installations for the gasification and liquefaction of bituminous shale, coal or peat, of at least 500 tonnes per day; 2) boiler and power plants with a gross output in excess of 300 MW; 3) foundries or smelting plants with an output of at least 5000 tonnes per annum, and iron and steel works, sintering plants and iron alloy manufacturing plants, and metal works or calcining plants processing metals other than iron; 4) asbestos extraction and installations for the processing and transformation of asbestos or products containing asbestos; 5) factories manufacturing artificial fibres, mineral wool and cement, and plants using solvents or substances containing solvents and using at least 1000 tonnes of solvent per annum, and plants manufacturing on a large scale the chemicals dangerous to health and the environment ...; 6) incineration plants for the disposal of hazardous waste, physio-chemical treatment plants and landfills, household waste incineration plants, and landfills dimensioned for a waste volume of at least 20 000 tonnes per annum; 7) pulp, paper or board mills; 8) large-scale extraction, dressing and processing of metal ores and other mined minerals; 9) stores for oil, petrochemical products and chemical products when the total volume of the storage tanks for these substances is over 50 000 m^3; 10) the construction of motorways, semimotorways, long-distance railway tracks, and airports if the main runway is at least 2100 m long; 11) main pipelines intended for the long-distance transport of oil and liquids other than water or waste water, main pipelines with a diameter of at least 1000 DN intended for long-distance transport of gas, large raw water or wastewater tunnels, and at least 400 KW power lines; 12) maritime channels with a draft of at least 8 metres, inland water channels with a draft of at least 4 metres, and ports with an access channel of at least the above depths, and significant canals; 13) sewage treatment plants dimensioned for over 100 000 people; 14) dams ..., reservoirs over 10 km^2 in size and water body regulation projects, if the mean flow in the water body is over 20 m^3/s and the flow and water level conditions will change materially compared with the initial situation; 15) groundwater abstraction, if the annual volume is at least 3 million m^3; 16) production of hydrocarbon at sea; 17) permanent alteration of natural forest, peatland or wetland over what can be considered a unified area above 200 hectares in size, by carrying out new ditching or by draining unditched peatland and wetland areas, by removing the tree stock permanently or by replanting the area with species of tree not indigenous to Finland; and 18) nuclear power plants and other nuclear reactors with the exception of research reactors with a maximum continuous heat output below one megawatt, and plants

procedure whereby certain non-listed activities are included in the EIA procedure.[67] The amended EU directive will obligate Finland to expand the list of activities.[68]

The Finnish EIA procedure is administered by the environmental administration. The regional environment centres (regional centre) are primarily responsible for executing the national EIA procedure as coordination authorities. The regional centre receives the assessment programme, a plan for an EIS, from the developer, and gives its opinion on the adequacy of the assessment programme after informing the relevant interested parties of its content. The regional centre delivers its opinion to the developer, who is then responsible for drawing up the EIS document, called an assessment report in the Finnish system. The regional centre has the same duties when the developer has completed the actual assessment report. The Ministry of the Environment, the head of environmental administration in Finland, has only subsidiary duties with respect to the standard national EIA procedure.[69] All in all, the national EIA procedure is very much integrated in Finland. All the listed activities are subject to the national EIA procedure administered by the environmental administration.

Significantly, the Finnish EIA procedure contains an independent scoping procedure. As reviewed above, the Espoo Convention intends that the transnational EIA procedure should be initiated "as soon as possible".[70] It is more likely, however, that the contracting states will observe the minimum obligation of the Convention, i.e., "no later than when informing its own public about that proposed activity".[71] The Finnish EIA Act provides that the public should be informed at a very early stage of the EIA procedure, that is, at the stage when the assessment programme, a plan for an EIS, is submitted by the developer to the coordination authority, i.e., the regional centre. Hence, the transnational EIA procedure must also be initiated by Finland at this early stage.

The Finnish EIA legislation also fulfills the requirements regarding the scope of the EIS. In effect, the requirements for the Finnish EIS, the assessment report, exceed the

designed mainly to produce or enrich nuclear fuels, to reprocess irradiated nuclear fuels, or process, permanently store and dispose of radioactive waste derived from the production of nuclear energy". This list was formed on the basis of the requirements of the Espoo Convention and the original European Community Directive. Compare these items to the requirements of the Espoo Convention listed in footnote 38.

[67] The Ministry of the Environment decides whether a non-listed activity "will probably have significant adverse environmental impact comparable in type and extent to that of the projects referred to in paragraph 1, also taking into account the combined impact of different projects". Section 4(2) of the EIA Act, *supra*, note 61.

[68] See Annex I of the amendment Directive, *supra*, note 64.

[69] The Ministry of the Environment decides on the applicability of the EIA procedure to those projects not listed in Section 5 of the Decree.

[70] Article 3(1) of the Espoo Convention, *supra*, note 1.

[71] Ibid.

requirements set forth in Appendix II of the Convention.[72]

4.2. The Finnish National EIA System as a Transnational EIA System

The Espoo Convention endeavors to construct an efficient transnational system by requiring that the contracting States establish national EIA systems. The national EIA system is supposed to operate as the transnational EIA system when the State concerned is the State of origin.

4.2.1. Initiation of the Transnational EIA Procedure within the Operation of the Finnish EIA Procedure

The developer is obligated to initiate the national EIA procedure. Since the assessment report is a prerequisite for a prior permit to operate, it is the developer who must first prepare the assessment programme according to the Act. The developer must submit the plan for an assessment report, the assessment programme, to the coordinating authority for inspection. The coordinating authority studies the assessment programme and gives its opinion on the quality of the programme after making it known to the public and the

[72] According to Section 11 of the EIA Decree, the following information must be included in the assessment report: "1) the information referred to in section 10, subparagraphs 1-3, after verification [the information required from the assessment programme includes: 1) information on the project, its purpose, site, land-use needs and connections with other projects, and on the developer; 2) alternatives for implementing the project, one of which shall be non-implementation, unless for specific reasons the last-mentioned alternative is unnecessary; 3) information about the plans, permits and comparable decisions required for implementation of the project, information about investigations into environmental impact carried out and planned, and a proposal for a definition of the area of impact to be studied...]; 2) an explanation of how the project and its alternatives relate to land-use plans and such pls and programmes for use of natural resources and nature conservation which are relevant with reagard to the project; 3) the main characteristics and technical solutions of the project, a description of operations, such as products, outputs, raw materials, traffic, other materials, and an estimate of the types and amounts of waste, discharges and emissions; 4) the main information used in the assessment, and the methods used in the assessment and in obtaining the information, and their basic assumptions; 5) an account of the environment, and an estimate of the environmental impact of the project and its alternatives, any deficiencies in the data used, and the main uncertainty factors, including an assessment of the possibility of environmental accidents and their consequences; 6) an account of the viability of the project and the alternatives; 7) a proposal for action to prevent and mitigate adverse environmental impact; 8) a proposal for a monitoring programme, and; 9) a non-technical, clearly presented summary of the information in sub-paragraphs 1-8". It is also of importance that the concept of "environmental impact" has been defined more brodly than in the Espoo Convention, in Section 2 of the Act: " 1) environmental impact means the direct and indirect effects inside and outside Finnish territory of a project or operations on a) human health, living conditions and amenity; b) soil, water, air, climate, organisms, interaction between them, and biological diversity; c) the community structure, buildings, landscape, townscape and the cultural heritage and; d) utilization of natural resources". Compare these enumerated items to the requirements in Appendix II of the Convention listed in footnote 46.

relevant government agencies.[73]

Important obligations of the Espoo Convention are linked to the moment when the public is informed of a proposed activity. First, the transnational EIA procedure must be initiated by notification to the affected State no later than when the members of the public of the State of origin is informed. Also, because the public of the affected State enjoys the same participation rights as the public of the State of origin, the moment at which the public of the State of origin is informed triggers the obligation of the State of origin to inform and involve the public of the affected State. The Finnish EIA procedure contains early public participation in a separate scoping phase.[74]

Section 14 of the Act determines how the initiation of the transnational EIA procedure is to occur. If the coordinating authority determines that the project "is likely to have significant environmental impact in territory under the jurisdiction of another state",[75] it must submit the assessment programme to the Ministry of the Environment.[76] Before notifying the potential affected State, the Ministry of the Environment "shall request a Ministry for Foreign Affairs opinion on the matter".[77] In this way, the transnational EIA procedure is initiated in accordance with the Espoo Convention by notifying the potentially affected State. But how is the public of the affected State informed of its possibility to participate in the Finnish scoping procedure?

The EIA Decree specifies the content of the notification made to the potentially affected State. This notification must include information on the project, its transboundary impact,

[73] See section 8 and 9 of the Act, *supra,* note 61.

[74] See Section 8 of the EIA Act. The Act lays down two conditions, however, for informing the public at this early stage of the procedure. The public is informed only if "the project may have substantial impact over a wide area or on the circumstances of several people, the coordination authority shall inform the quarters whose circumstances or interests may be affected about the pendency of the assessment procedure..." The project must have either "substantial impact over a wide area" or "on the circumstances of several people" in order to trigger the duty of the coordination authority to inform the public. It might seem rather strange that these two conditions have been laid down for informing the public. When the assessment programme comes to the coordination authority, the applicability of the EIA procedure has already been clarified. And, since the condition for the applicability of the EIA to a certain project is that the project may entail "significant adverse environmental impact", at least one of the conditions of "substantial impact over a wide area" or "on the circumstances of several people" is always fulfilled. Thus, the Finnish public has to be informed in all cases in which the EIA procedure is applicable. Consequently, the minimum requirement of the Espoo Convention in the case of Finland is that the initiation of the transnational EIA procedure with the potential affected State and the involvement of the public of the affected State in the Finnish scoping procedure must occur when the coordinating authority informs the Finnish public, *supra,* note 61.

[75] Section 14, paragraph 3 of the Act, *supra* note 61.

[76] Since the Ministry of the Environment has the general competence to fulfill the obligations of the Espoo Convention, the decision to apply the Espoo Convention is ultimately under its competence, not under the competence of the coordinating authority, see Section 14(3) of the EIA Act, *supra,* note 61.

[77] Section 14(3) of the EIA Act, *supra,* note 61.

the assessment procedure, and the time limit for participation in the transnational EIA procedure.[78] This content observes the guidelines set out in the Espoo Convention.[79] Information on the project, its likely transboundary impacts, and the assessment procedure are contained in the assessment programme which is translated and forwarded to the contact authority of the affected State.

Interestingly, the notification is to contain "a reasonable time period within which any notification by authorities, citizens and associations concerning participation in the assessment procedure shall be sent to the Ministry of the Environment".[80] Hence, the notification is delivered to the contact authority representing the potentially affected State, which then informs the members of its own public who are likely to be affected. The affected State and its public are then obligated to announce within certain a time limit their willingness to participate in the transnational EIA procedure.

It would seem obligatory in most cases to link the notification procedure to the active participation of the public of the affected State, and not merely its participation response. The public of the affected State has a right to give its comments on the scoping procedure. The notification of the Ministry of the Environment should require the public of the affected State to inform the State of origin not only of its willingness to participate in, but also its intent to comment on the assessment programme on an equal footing with the Finnish public. Otherwise, a separate procedure would be needed, very soon after the notification procedure, for delivering the comments of the public of the affected State to the Ministry of the Environment. In fact, although the EIA Decree mentions only a participation response, in practice, Finland has included foreign actors in this participation response phase.[81]

4.2.2. Preparation of the Transnational EIS Document in the Finnish EIA System

After the coordination authority has given its opinion on the assessment programme to the developer in the form of a statement, the developer may start making the actual EIS, known in the Finnish system as the assessment report.

In the Finnish EIA procedure, it is the developer who is obligated to prepare the assessment report. There are two main control mechanisms by which the developer is prevented from producing a self-serving EIS. First, the minimum requirements for the EIS have been set forth in the EIA decree.[82] These go beyond the requirements of Appendix II of the Convention. Secondly, after the developer has completed the assessment report, he

[78] Section 16 of the Decree, No 792.

[79] Article 3(2) of the Espoo Convention, *supra,* note 1.

[80] Section 16 of the Decree, *supra,* note 78.

[81] See below Section 4.4.

[82] Section 11 of the Decree, *supra,* note 78.

or she must submit the documents to the coordination authority for review. The coordination authority also informs the public and relevant government agencies of the documents and requests them to submit the necessary statements. Hence, the developer's preparation of the EIS is scrutinized not only by the coordination authority, which must provide "its own statement of its adequacy",[83] but also, by relevant government agencies and the public.

An additional concern is, ascertaining that the developer has complied with the Scope of the requirements of the Espoo Convention in the preparation of his or her assessment report. As mentioned above, the Finnish list of requirements for the scope of the EIS exceed those requirements specified in Appendix II. It is the task of the coordination authority to ensure that the developer complies with the minimum requirements of the transnational EIS. The authority should include such an appraisal as part of the opinion it submits to the developer on the adequacy of the assessment programme. But the Finnish EIA procedure also provides that the public of the affected State and the affected State's contact authority must be given the opportunity to submit their comments on the assessment programme; indeed, these comments greatly assist the coordination authority in directing the preparation of the assessment report by the developer. Without these comments, which provide initial information on the main points of emphasis in the transnational EIS, the coordination authority could give only general guidance to the developer as to what should be studied.

The affected State must provide information for the preparation of the transnational EIS if such information is considered necessary. As indicated above, this situation is almost always the case. Since the Ministry of the Environment has the general competence to comply with the obligations of the Espoo Convention, it is the responsibility of this agency to request the information from the potential affected State.[84]

4.2.3. Reaction to the Transnational EIS by the Public of the Affected State, and its State of Nationality

The Espoo Convention defines different ways for the public of the affected State and for the State itself to respond to the findings of the transnational EIS. The public of the affected State has the right to submit its comments in the same way as does the Finnish public. The affected State is entitled to consult with the Finnish government. The national EIA Act and Decree do not contain any specific rules on how consultations are to be arranged when the incorporated Espoo Convention is applicable. The EIA Act provides that it is the Ministry of the Environment which represents Finland in these consultations.[85]

The Convention provides that the public of the affected State may deliver its comments

[83] Section 12 of the Act, *supra,* note 61.

[84] See section 14(2) and Section 15 of the Act, *supra,* note 61.

[85] Section 14(2) of the Act, *supra,* note 61.

either directly to the competent authority or through the Party of origin. The Finnish EIA procedure operates through the environmental administration. A developer must submit the completed assessment report to the coordination authority for its opinion. Hence, the integration of the Finnish and the transnational EIA procedure is similar to the procedure by which the transnational EIA procedure is initiated.

First, the coordination authority delivers the completed assessment report to the Ministry of the Environment after receiving it from the developer. The Ministry of the Environment then forwards a translation to the contact authority of the affected State, which informs its own public of the content of the assessment report and of its opportunity to submit its comments on the transnational EIA procedure. The affected State collects the comments and objections of its own public and delivers is material to the Finnish Ministry of the Environment which, then in turn, sends the responses on to the coordination authority. After the coordination authority has given its own statement of the adequacy of the assessment report, it delivers this opinion and "opinions and views expressed concerning the report"[86] to the developer; the comments of the public of the affected State are thus included in this statement by the coordination authority. Since the permit authority may not grant a permit without the assessment report and the coordination authority's opinion of it, the comments of the public of the affected State will have reached the permit authority prior to its making any decision.[87]

The consultations between the States concerned occur after the completion of the assessment report. As mentioned above, the assessment report is delivered to the contact authority of the likely affected State by the Ministry of the Environment after receiving it from the coordination authority. The Party of origin is responsible for initiating the consultations 'without undue delay'.[88] Since the Ministry of the Environment is given general competence to execute the obligations of the Espoo Convention, it is also the agency which initiates the consultations with the competent authority of the affected State.

The initiation of the transnational EIA procedure means that both of the States concerned agree that "significant adverse transboundary impact"[89] is likely, and if not persuaded otherwise by the assessment report, both States are obligated to discuss the possible measures to mitigate such effects. If the States reach an agreement on this issue, or the affected State wants to submit a comment, the outcome of the consultations is delivered by the Ministry of the Environment to the coordination authority for inclusion in the latter's opinion. Again, the outcome of the consultations is delivered to the permit authority on the basis of the requirement that the coordination authority's opinion must be included in the developer's permit application.

[86] Section 12 of the Act, *supra,* note 61.

[87] See Section 13 of the Act, *supra,* note 61.

[88] Article 5(1) of the Espoo Convention, *supra,* note 1.

[89] Article 3(1) of the Espoo Convention, *supra,* note 1.

4.2.4. Final decision

There was no need to amend the material environmental laws when the Act on EIA was adopted and the Espoo Convention incorporated. The national and transnational EIA procedures are seen as only providing information for the operation of the balancing norms found in the material legislation in force in Finland. As primarily balancing norms, these material laws leave much discretion to the permit authority to decide on the permissibility of the activity, and, if permissible, the conditions under which it must operate.

4.2.5. Post-Project Analysis

Finnish EIA procedure does not contain any compulsory post-project analysis. Monitoring of the observance of the permit conditions occurs through the sectoral laws, which make the arrangement of transnational post-project analysis more difficult. If the Finnish EIA procedure had included a separate compulsory post-project analysis phase, it would have been much easier to integrate the transnational post-project analysis into that procedure merely by extending the monitoring the ratio of national impacts from the activity engaged in to the transboundary impacts. Since this kind of procedure does not exist in the Finnish EIA procedure, Finland and the affected State must always discuss the possibility of post-project analysis *ad hoc*. The Ministry of the Environment is the competent agency in Finland for deciding whether such a procedure should be arranged with the potentially affected State.

4.3. Conclusions on Finland's Ability to Arrange the Transnational EIA Procedure

The Finnish EIA system is well able to accommodate the transnational EIA procedure as a State of origin. Finland has opted for an integrative EIA procedure which functions well from the viewpoint of the efficiency of the transnational EIA procedure. All activities which in normal circumstances trigger the transnational EIA procedure, i.e., Appendix I activities, automatically trigger the Finnish national EIA procedure, as well. At least, this approach ensures that the likelihood of significant adverse transboundary impacts are always studied with respect to the listed activities.

It is worthy of note that in Finland a single branch of government, viz., the environmental administration, is primarily responsible for organizing the EIA procedure.[90] It can be presumed that the exchange of information among national authorities occurs smoothly. If different branches of government had varying duties in the national EIA procedure, it would be likely too that the duties towards other States and their nationals could not be handled as efficiently. Even more important from the viewpoint of the transnational EIA procedure is that only one agency, the Ministry of the Environment, is primarily responsible for discharging the duties of the Espoo Convention. It can again be

[90] However, the Ministry of Trade and Industry decides of the applicability of EIA procedure to non-listed activities. Section 6(3) of the Act on EIA, *supra,* note 61.

assumed that an agency specialized in environmental protection has more knowledge of transboundary impacts and has a greater awareness of their importance than do other government branches.

Significantly, the Finnish system contains a separate scoping phase with public involvement. This separate phase guarantees that the public of the affected State and that State itself are entitled to participate at a very early stage in the transnational EIA procedure and that the transnational EIA procedure is initiated at an early stage in the planning process of the proposed activity.

On the other hand, a system based on the assessment report prepared by the developer is always suspect. Although, as shown above, there are various ways of guaranteeing that the quality of the assessment report is adequate, doubts remain as to whether the person preparing the impact assessment, who is hired by the developer, is neutral in his or her assessment.

The situation is worse with respect to the transnational EIS. It is, in the end, the developer who also prepares the transnational EIS when Finland is the State of origin. Although, the developer is guided in the preparation process by the comments of the public of the affected State and by the opinion of the coordination authority, it seems unlikely that he or she can obtain an adequate account of the potential impacts of the activity and its alternatives on the territory of the affected State. Even when the affected state provides basic information about the environmental conditions in its territory, it is precisely these transboundary impacts which may be beyond the comprehension of the developer.

It is totally different to speculate about the possible alternatives to one's own activity, likely impacts, and mitigation schemes in the national and transnational contexts. The examination of alternatives in the national context may mean placing the activity, alternatively, in an industrial area. In the transnational context, it might mean transferring it as far away from an international border as possible. The question of likely impacts on the territory near the location of the activity is clearly different than speculating about the long-range transfer of pollution or the impact of the activity as part of cumulative impacts on another State. All these considerations mean that persons trained in evaluating national impacts, which normally affect the areas near the site of the proposed activity, are not fit to evaluate transboundary issues. In this respect, a system in which the governmental inspection authority draws up the transnational EIS would work better because the governmental authority usually has better contacts at the governmental authority of the affected State and can even conduct the transnational EIS in cooperation with these contacts.

4.4. Application of the Espoo Convention by Finland

Finland had already applied the Espoo Convention before its entry into force in the cases of Vuotos, Vattenfall and Outokumpu. Since I have examined the Vuotos case in another article, I will concentrate here on the Vattenfall and Outokumpu cases.[91]

Outokumpu Chrome Ltd. and Outokumpu Polarit Ltd. (the Outokumpu Group) planned to enlarge their ferrochrome and stainless steel works in Tornio by constructing a new mill.[92] Since the distance to the Swedish border is only 2 kilometers, and the activity belonged to one of the categories listed in Appendix I,[93] the Espoo Convention was applied. However, the activity did not belong to the mandatory screening list of Section 5 of the decree on EIA. It was the Ministry of the Environment which decided that national EIA procedure was to be applied by virtue of Section 4(2) and Section 6 of the EIA Act and also that the Espoo Convention should be applied. The transnational EIA procedure occurred as follows:

> 1. The Ministry of the Environment sent notification to Sweden on 13 June 1996 together with the translated assessment programme after requesting the opinion of the Finnish Ministry for Foreign Affairs on the matter. The contact authority for Sweden, the Environmental Protection Agency, announced its willingness to participate and distributed the documents for comments to various authorities and institutions.[94] In addition, Regional Environment Centre of Lapland directly requested comments from the Province of Norrbotten and the Municipality of Haparanda.
>
> 2. Sweden participated in the scoping procedure, the assessment programme, by delivering a statement on 30 August 1996. In this statement, the Environmental Protection Agency, as well as other relevant quarters, commented on the likelihood of transboundary impacts. The Ministry of the Environment sent this statement to the coordination authority for inclusion in the latter's opinion to guide the preparation of the assessment report by the developer. The coordination authority arranged public meetings on the Finnish side of the border. These meetings were also announced in Sweden, and citizens of Sweden participated in these meetings. In this way, both the Swedish authorities and the Swedish public were able to participate in the transnational scoping procedure.
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> 3. The completed assessment report was transmitted to the Swedish point of

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[91] See *supra*, note 14.

[92] The case presentation of *Outokumpu* is based on the draft version of S. Korhonen, *Experience on the Transboundary EIA* (1997). See also *Outokumpu's* own version from "http://www.outokumpu.fi/newinfo/press/290496.htm".

[93] Appendix I (4) of the Espoo Convention reads: "Major installations for the initial smelting of cast-iron and steel and for the production of non-ferrous metals", *supra*, note 1.

[94] The following institutions participated: Fiskeriverket, Boverket, Umeå Universität (Umeå Marina Forskningscentrum), Länstyrelsen i Västerbottens Län, Haparanda Kommun, Naturskyddsförening i Norrbottens Län.

contact on 10 December 1997, which distributed it to other relevant quarters in Sweden. Sweden, the Swedish Environmental Protection Agency and other institutions, delivered a statement on the adequacy of the assessment report on 26 March 1997. The Ministry of the Environment forwarded this statement to be included in the opinion of the coordination authority. Swedish citizens were entitled to participate directly in the public meetings in Finland, and thus, could comment on the adequacy of the assessment report. At present, on 19 December 1997, no permit application has yet been made by the Outokumpu Group.[95]

Vattenfall Ltd. planned to construct a gas power station in Imatra, which is located very near the Russian border. Since the heat output of the planned gas power station exceeded 300 MW, the project was an activity listed in Appendix I(2).[96] After receiving the assessment programme from the coordination authority, the Ministry of the Environment translated it into the Russian language and sent it on November 21, 1996 to the contact authority of Russia, the State Committee for Environmental Protection.[97] The Ministry of the Environment requested the following in its notification:

1. Russia's opinion as to whether significant adverse transboundary impacts would be likely to follow from the activity of Vattenfall Ltd.
2. Russia's interest in participating in the Finnish EIA procedure.
3. A statement on the quality of the assessment programme.
4. A statement of the issues to be considered in the assessment report.

The notification also contained information about the Finnish EIA procedure and the permit required from Vattenfall Ltd. In addition, Russia was requested, in accordance with Article 3 (3)-(4) of the Convention, to respond before December 15, 1996, and also to notify the relevant government agencies and citizens who are likely to be affected. Russia responded on December 27 by fax. The Ministry of the Environment forwarded this response to the coordination authority.

After Vattenfall Ltd. completed the assessment report, the Ministry of the Environment translated this document and asked for Russia's comments on whether the environmental studies made were adequate and whether Russia was of the opinion that a significant adverse transboundary impact was likely. The Ministry also requested that the State Committee inform the relevant quarters of the content of the assessment programme and that the response to the assessment report be returned to Finland by May 15, 1997. The response came on May 29, 1997, and the Ministry of the Environment again translated it and forwarded it to the coordination authority. The final permit decision was delivered to

[95] Information obtained from the Regional Environment Centre of Lapland.

[96] Appendix I (2) reads: "Thermal power stations and other combustion installations with a heat output of 300 megawatts or more ...", *supra*, note 1.

[97] The notification was sent on October 21, 1996.

Russia with the opinion of the coordination authority.[98]

There are two upcoming cases in which Finland is involved, the first entailing the disposal of nuclear waste in Finland and the second concerning the construction of a gas pipeline from Russia to Germany. In the first, a company called Posiva Ltd. has presented four alternative sites for the disposal of nuclear waste: Kuhmo, Äänekoski, Olkiluoto and Loviisa. For three of these sites, Finland would have to apply the transnational EIA procedure of the Convention: pollution from Kuhmo, Loviisa and Olkiluoto could affect Russia, Estonia and Sweden, respectively. The developer, Posiva Ltd., will submit its assessment programme at the beginning of 1998. It is possible that an informal consultation will be arranged with the participation of all the concerned States.[99]

A company called North Transgas Ltd. is planning a gas pipeline from Russia to Germany. At the moment, a feasibility study is under way, and three main alternatives have been identified: a pipeline through Finland and Sweden and then along the bottom of the Baltic Sea; a pipeline through southern Finland, and then across the Baltic Sea; a pipeline directly from Russia to Germany across the Baltic Sea. It is estimated that the company will complete its assessment programme in February 1998.

Since this project may influence the environment of all the Baltic sea littoral states, the Ministry of the Environment is planning to arrange a meeting among all the contact authorities of the Espoo Convention of the littoral states of the Baltic Sea, and also with relevant staff from the Baltic Marine Environment Protection Commission (Helsinki Commission).[100] The aim of the meeting is to inform the participants about the project and its possible alternatives and consider the roles of various participants in the process.[101]

[98] Surprisingly, the Boundary Waters Commission of Russia and Finland expressed its annoyance that it had not been involved in the transnational EIA procedure. This notification occurred on September 18, 1997 after the finding in the assessment report that no permit from the Water Court was needed, only prior notification was needed to start the activity. The officer from the Ministry of the Environment said that the Finnish members of the Border Commission were notified of the procedure. See *Helsingin Sanomat* 4.10.1997, page A 13. Information from this procedure was obtained from the Finnish Ministry of the Environment.

[99] Information obtained from the Finnish Ministry of the Environment.

[100] This institution was already established in the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area. Article 12 (1) reads: "The Baltic Marine Environment Protection Commission, hereinafter referred to as 'the Commission' is hereby established for the purposes of the present Convention". The 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area operates through the same Commission. Article 19 (1-2) reads: "1. The Baltic Marine Environment Protection Commission, referred to as 'the Commission', is established for the purposes of this Convention. 2. The Baltic Marine Environment Protection Commission, established pursuant to the Convention on the Protection of Marine Environment of the Baltic Sea Area of 1974, shall be the Commission. Since the Commission is located in Helsinki Finland, it is called the Helsinki Commission (HELCOM)".

[101] Information obtained from the Finnish Ministry of the Environment.

5. CONCLUDING REMARKS

The management of transboundary pollution seems somehow outdated in the face of multiple global agreements on protecting our common environment. International management of environmental problems can seem hierarchical, as if laying down rules for the nation-States to implement nationally. But potential or concretized transboundary damage activates the horizontal structure of international law in accordance with the equality of States principle. What becomes important is not only determining the means for combatting the pollution itself, but also handling the conflicting interests of States in situations of transboundary pollution. Here, we confront the resistance of States to give away any substantive decision-making power to other States when the future of large-scale economic activity is at stake.

This unwillingness of States to subscribe to any far-reaching norms is reflected in the Espoo Convention. Although, the Convention contains a substantive norm, it is of a very general character, leaving the State of origin with much of the discretion as to the content of the permit decision. The Convention focuses more on procedure than on substance. But here, we begin to see the real contribution of this Convention to the management of these situations: it shifts decision-making from central governments to the transnational EIA system. Central governments act only as facilitators of the procedure and as participants in it, not as decision-makers determining the future of the activity. Hence, management of these situations is implemented by means of functional criteria: those entities likely to be affected by the impact of an activity, whether inside or outside the border, have a right to participate, whether or not they represent a governmental agency or an environmental organization. In this sense, the image of clashing sovereigns disappears, and is replaced by one of transnational political procedure.

This shift in imagery corresponds to the recent changes in political interest formation. Especially in the field of environmental protection, political forces increasingly form their strategies on a transnational level. This global strategizing is no wonder. Because the polluting activities are by-products of economic enterprise which increasingly operates in global markets, there is no reason to accept the practice that political activity should be channeled only through national political structures in the enforcement of social responsibility. The same effect can be seen in the growing awareness of global environmental problems among people throughout the world.

The Espoo Convention can be seen as establishing new structures for transnational political forces to voice their concern. It can be assumed that when the Convention is applicable, the central question is not the clash of two alienated political identities, nation-States, but rather the value perspective of multiple interest groups and various governmental authorities of the States concerned with regard to the effects and the acceptability of the activity in question. Indeed, the alignment of interests on the governmental level too might very well adhere to a value perspective rather than a national interest perspective in a transnational EIA procedure. In my opinion, this situation is what

happened in the *Vuotos* case, for instance.[102]

On the other hand, the final decision on the future of an activity is made by the permit authority of the State of origin. Transnational political forces, operating more on the basis of value perspective than on the basis of nationality, may exert an influence on the decision of the permit authority; it will in fact precisely be the governmental authorities, which hinder the real effect of the transnational EIA procedure. In other words, although national agencies have been given the task of acting as transnational permit authorities, they still presumably defend the interests of the local population of the State of origin, according a priority to employment opportunities and financial gain from the proposed activity over the environmental problems of a transnational nature. If anyone has a problem in accepting the value of protecting another State's environment, it will be the national governmental agencies, with their institutionalized way of looking at things.

[102] The Finnish Ministry of the Environment opposes the construction of the Vuotos reservoir, while the Ministry of the Trade and Industry advocates it. Both Ministries have been very vocal in the media as to their opinion of the project. In fact, it can be argued that the Ministry of the Environment started the procedure with Sweden, with its Statens Naturvårdsvarket, in order to have another strategy against the construction of the Vuotos reservoir. Since the treaty in force between the the States, the Nordic Environmental Protection Convention, accorded the competence to decide on the initiation of the international procedure to the permit authority, in this case, the Water Court of northern Finland, the Ministry of the Environment resorted to the Espoo Convention as the basis of its competence to notify Sweden. This action was an efficient move because without this activity from the part of the Ministry of the Environment, the Water Court, in all likelihood, would not have notified Swedish authorities. See *supra*, note 14.