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The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)

TIMO KOIVUROVA

The 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention)¹ was negotiated under the auspices of the United Nations Economic Commission for Europe (ECE) and was signed in Espoo, Finland, in 1991.² Following six meetings of the signatories, the Convention entered into force in 1997 and the first Meeting of the Parties (MoP) took place in Oslo in 1998. The Strategic Environmental Assessment (SEA) Protocol to the Convention was adopted in 2003, and has been signed by thirty-six States as well as by the EC.³

The institutional development within the Espoo regime has progressed over time. The Meeting of the Parties, representing the voice of States parties, has taken place three times, and has adopted many important decisions pertaining to the institutional structure of the Espoo Convention. The Bureau of the Convention was established as an organ to co-ordinate the work pertaining to the development of the system of the Convention between the Meetings of the Parties. Secretariat tasks are handled by the ECE. The MoP is now assisted by the Working Group on Environmental Impact Assessment (EIA) and the Implementation Committee. The Working Group on EIA assists the MoP in the implementation of the Convention and the management of the work-plan, and the Implementation Committee has the dual

¹ The Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991, in force 10 September 1997, Doc. E.ECE.1250. The Convention text can be accessed via the website of the Convention at www.unece.org/env/eia/documents/conventiontextenglish.pdf.

² For an overview of the negotiations, see R. Connelly, 'The UN Convention on EIA in a Transboundary Context: A Historical Perspective' (1999) 19 *Environmental Impact Assessment Review* 37–46.

³ Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, Kiev, 21 May 2003, Doc. ECE/MP.EIA/2003/2. The Protocol can be accessed via the website of the Convention at www.unece.org/env/eia/documents/protocolenglish.pdf.

task of developing the reporting system and considering individual cases of non-compliance.

Before taking up the main focus of this chapter – namely, the dispute resolution, compliance control and enforcement procedures of the Espoo regime – it will be useful to examine the substantive rules of the Espoo Convention. The Convention regulates situations where a proposed activity in one contracting State (the origin State) is likely to cause a significant adverse transboundary impact on another State's environment. The Convention tries to manage these situations by requiring the parties to co-operate with each other before the activity is undertaken. In order for this procedure to function effectively, the Convention requires the States parties to establish national EIA procedures as well as licensing procedures, with foreign impacts and foreign actors integrated into both.⁴

The origin State is first required to notify the potentially affected State of the likely significant adverse transboundary impact and to provide basic information regarding the proposed activity. The affected State must next confirm that it wants to participate in the procedure.⁵ The origin State is then obligated to study the transboundary impacts together with the affected State and allow the public of that State to participate in the process on the same terms as its own public would be entitled to.⁶ After the impact assessment, the affected State has an opportunity to comment on the proposed activity and its likely impacts, through consultations with the origin State. The public of the affected State is entitled to provide its comments on the proposed activity on the same terms as apply to the public of the origin State.⁷ The final decision taken on the proposed activity in the origin State must take due account of the comments from the potentially affected State and its public, and must be delivered to the affected State.⁸ The States parties are not required to determine whether the impacts studied ultimately materialize, as post-project analysis is optional.⁹

The SEA Protocol requires the contracting States to establish a national SEA procedure – a procedure by which the likely environmental effects of a plan, programme or policy are examined with the help of all relevant parties – rather than on establishing a transboundary procedure between States; only one provision in the Protocol, article 10, addresses the latter procedure. The Protocol requires the contracting States to create an SEA

⁴ Art. 2(2), (3) and (7) of the Espoo Convention. ⁵ *Ibid.*, art. 3(1), (2) and (3).

⁶ *Ibid.*; see art. 3(4)–(8) and art. 2(6) on non-discrimination. ⁷ *Ibid.*, arts. 4 and 5.

⁸ *Ibid.*, art. 6. ⁹ *Ibid.*, art. 7 and Appendix V.

procedure that evaluates, with the involvement of the environmental and health authorities and the general public, the likely environmental and health impacts of plans and programmes.¹⁰ Evaluation of the environmental and health impacts of policies and legislation is optional for the parties.¹¹ In the case of likely significant transboundary environmental and/or health impacts, the origin State must notify the potentially affected State, after which consultations may take place.¹²

The substantive rules of the Espoo Convention and the SEA Protocol set out clear obligations and rights for the States parties. This approach stands in direct contrast to that found in many other international environmental treaties, for example the Convention on Biological Diversity, whose primary rules are so loose and open-ended that their legal status can be questioned.¹³ The nature of a treaty's substantive rules has an impact on how the compliance control and enforcement systems are organized in the treaty regime. If the parties and the treaty bodies fail to agree on what is required in a treaty, and perhaps even disagree over whether some of the rules in the convention are binding or not (or are soft rules), it becomes much more difficult to establish a compliance control system, as the object of what is controlled and reviewed is uncertain. In the case of the Espoo Convention, substantial consensus exists on the content and scope of the primary rules, which greatly facilitates the creation of a compliance control system.

9.1 Dispute resolution

9.1.1 *The basic dispute resolution mechanism under the Convention*

The need to have a separate provision for dispute resolution arose in the first (of six) meetings of the *ad hoc* Working Group that was entrusted by the Senior Advisers of the ECE¹⁴ to draw up an international agreement on the matter.¹⁵ The Espoo Convention thus came to include a provision on

¹⁰ Arts. 5–9 of the SEA Protocol. ¹¹ *Ibid.*, art. 13. ¹² *Ibid.*, art. 10.

¹³ The Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 31 ILM 818 (1992). The Convention can be accessed via the Convention's website at www.biodiv.org/convention/articles.asp.

¹⁴ The body known as the Senior Advisers to the ECE governments was transformed in 1994 to become the Committee on Environmental Protection. For the terms of reference of both bodies, see the ECE website at www.unece.org/env/cep/tor.htm.

¹⁵ Connelly, *EIA in a transboundary perspective*, 1999, p. 40.

dispute settlement which also applies to the SEA Protocol.¹⁶ The provision is set out in article 15:

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.
2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
 - (a) Submission of the dispute to the International Court of Justice;
 - (b) Arbitration in accordance with the procedure set out in Appendix VII.
3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this Article, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

This article is very much in line with the basic premise of dispute settlement provisions in international environmental treaties: the parties remain fully free to resolve their dispute by any means they deem appropriate, although the article does give them the option of making declarations accepting compulsory third-party settlement.

Article 15 sets out two main channels for resolving disputes between contracting States about the interpretation or application of the Convention. First, if a party has declared in writing to the Depositary that it accepts a compulsory dispute settlement – either the procedure in the International Court of Justice (ICJ) or arbitration as set out in Appendix VII, or both – the disputes it has with other contracting States may be decided by compulsory dispute settlement. However, even when both disputants have made such a declaration, they always have the possibility – if they so agree – to have the dispute decided using political dispute settlement methods ('for a dispute not resolved in accordance with paragraph 1 of this Article ...'¹⁷). The declarations become important in cases where no political solution can be

¹⁶ Art. 20 of the SEA Protocol.

¹⁷ Art. 15(2) of the Espoo Convention. In other words, the declarations give the parties the option of submitting the dispute to compulsory dispute settlement; the provision does not force them to do so.

found since, depending on the content of the declarations the parties have given, the potentially affected State may take the origin State to the ICJ or initiate arbitration.¹⁸ To date, Austria, Bulgaria, Liechtenstein and the Netherlands have declared that they accept both means of compulsory dispute settlement identified in article 15(2) of the Convention, meaning that, if a dispute between the parties cannot be handled through the political mechanism, the ICJ will have jurisdiction over it.¹⁹

There is one pending dispute between the parties to the Espoo Convention. The Polish Minister of the Environment has sent a letter to the German Federal Minister of Environment, Nature Conservation and Nuclear Safety with a request to start negotiations. The dispute relates to the management of the River Oder, and focuses on whether Germany has adequately taken into account the comments from the public and the outcome of the consultation in its final decision, as required by article 6(1) of the Convention. The first meeting between the parties took place in Wroclaw on 12 February 2003.²⁰

9.1.2 Special dispute resolution: the inquiry commission procedure

If a dispute centres on whether the origin State is required to initiate a transboundary EIA procedure of the Espoo Convention, then the

¹⁸ If both have accepted only arbitration, then it is arbitration according to Appendix VII (similarly, if both have accepted only the ICJ, then the ICJ will be the forum used). If both parties have accepted both means of dispute settlement, then the ICJ will be used provided that the parties do not agree otherwise, in which case Appendix VII arbitration will be applied. However, if one party has accepted only arbitration and the other only the ICJ, the provision leaves open the question whether both parties are bound to have the dispute resolved by compulsory dispute settlement since the provision speaks of the 'same obligation', which can be interpreted as referring to the compulsory dispute settlement in general or a means of compulsory dispute settlement.

¹⁹ For the declarations, see the Espoo Convention website at www.unece.org/env/eia/convratif.html. If the parties, or one of the parties, have not given such a declaration to the Depositary, then para. 1 applies and the parties are free to resolve their dispute via any method of political dispute settlement they deem necessary. If the dispute cannot be resolved by these mechanisms, art. 15 cannot be resorted to, because the compulsory dispute settlement becomes possible only through the declarations. Where these declarations have not been made, the parties may seek remedies under the regime of the Vienna Convention on the Law of Treaties and/or general international law.

²⁰ See the Review of Implementation, p. 198, which is available from the Implementation Committee website at www.unece.org/env/eia/implementation.htm. According to the German official in charge, Germany commenced this procedure even before the Convention became binding on it; it thus does not regard the procedure in which the Polish state and its nationals were parties as a regular transboundary EIA procedure or consider art. 15 to be applicable. There is currently a bilateral working group studying the issue (e-mail communication on 28 January 2005).

Convention provides a special dispute settlement mechanism known as the inquiry commission procedure.²¹ This concept came in quite late in the negotiations leading up to the adoption of the Convention, in the fourth meeting of the *ad hoc* Working Group.²² The particulars of the inquiry commission procedure were then negotiated in the Working Group's fifth and, especially, sixth and final meeting.²³ This particular method of resolving disputes is actually quite rare in international environmental treaties. The only treaty before the Espoo Convention to have had such a procedure is the 1974 Nordic Environment Protection Convention, but this procedure has never, to the author's knowledge, been invoked.²⁴

The basic provision establishing an obligation on the part of the origin State to commence a transboundary EIA procedure is article 3(1), which 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 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.

If the origin State does not notify the potentially affected State concerning a proposed activity listed in Appendix I (list of activities known to be environmentally harmful), and the affected State is of the opinion that the activity is likely to cause a significant adverse transboundary impact, the affected State has a right to request information from the origin State for 'the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact'.²⁵ If the concerned States cannot agree in their discussions on whether there is likely to be a significant adverse transboundary impact, or if the origin State refuses to discuss the issue, the affected State 'may submit that question to an inquiry commission in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact, unless they agree

²¹ The SEA Protocol does not contain an inquiry commission procedure, even though it does have a provision on a transboundary procedure. See art. 10 of the Protocol.

²² Connelly, 'The UN Convention on EIA in a Transboundary Context', p. 42.

²³ *Ibid.*, pp. 43–4.

²⁴ Art. 12 of the Nordic Environment Protection Convention, Stockholm, 19 February 1974, in force 5 October 1976, 13 ILM 352 (1974). ²⁵ Art. 3(7) of the Espoo Convention.

on another method of settling this question'.²⁶ The affected State can thus initiate an inquiry commission procedure even against the origin State's will.

Although many of the relevant terms are defined in the Convention,²⁷ determining whether a significant adverse transboundary impact is likely to result from a proposed activity listed in Appendix I is bound to be a difficult and relative task, and for this reason both States may opt to seek advice through an inquiry commission procedure. Then again, if the origin State has persistently rejected any discussion of the applicability of the Espoo Convention to the case, it is unlikely to take part in the inquiry commission procedure either. The Convention contains rules for both situations, i.e. when both States initiate an inquiry commission procedure and when only the affected State does so. In both instances, the procedure starts by the parties (or party) notifying the Secretariat of the Convention of their (its) intention to commence it. This notification must also state the subject-matter of the inquiry. The Secretariat then notifies all parties to the Convention of this submission, a measure which broadens the awareness of the dispute to the whole treaty community.

If both parties seek advice through an inquiry commission procedure, each proceeds, in accordance with paragraph 2 of Appendix IV, to appoint a scientific or technical expert as its representative to the commission. The two experts then appoint by common agreement a third expert, who serves as president of the commission and whose impartiality must be ensured.²⁸ After adopting its own rules of procedure, the inquiry commission may take all appropriate measures to carry out its functions, a task in which it clearly needs assistance from the concerned States.²⁹ Paragraph 7 of Appendix IV requires the parties to an inquiry commission procedure to facilitate the work of the commission using all means at their disposal.³⁰ The decision by the inquiry commission as to whether the proposed activity listed in Appendix I is likely to cause a significant adverse transboundary impact is only advisory in nature but, where negative for the origin State,

²⁶ *Ibid.* ²⁷ *Ibid.*, art. 1.

²⁸ *Ibid.*, Appendix IV, para. 2, which states that he or she 'shall not be a national of one of the Parties nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the matter in any other capacity'. Para. 3 then provides: 'If the president of the inquiry commission has not been designated within two months of the appointment of the second expert, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party, designate the president within a further two-month period.'

²⁹ *Ibid.*, Appendix IV, para. 6. ³⁰ *Ibid.*, Appendix IV, para. 7.

certainly puts pressure on that State to initiate the transboundary EIA procedure.³¹

There are special rules for cases where the affected State invokes the inquiry commission procedure against the origin State without the participation of the latter. The procedure commences as described above, with the affected State making a submission to the Secretariat, which then informs the other parties to the Convention. After the affected State has appointed its expert to the commission, if the origin State does not appoint its expert within one month of its being notified by the Secretariat, the affected State may inform the Executive Secretary of the ECE accordingly.³² The Executive Secretary is empowered by paragraph 4 of Appendix IV to designate the president of the inquiry commission, who will then require the origin State to appoint its expert. If the origin State remains passive and fails to appoint its expert within one month of the president's request, the president must inform the Executive Secretary of the ECE, who then has to make the appointment within the next two months. The affected State can thus invoke the inquiry commission procedure even without any participation by the origin State. According to paragraph 9 of Appendix IV, if the origin State does not appear before the commission or fails to present its case, the affected State may request that the commission continue the proceedings and complete its work, which it must do since 'absence of a party or failure of a party to present its case shall not constitute a bar to the continuation and completion of the work of the inquiry commission'.³³ It should be borne in mind that, if the origin State does not participate at all in the inquiry commission procedure, it becomes very hard for the commission to do its work, given that the origin State has most of the relevant information about the proposed activity.

The inquiry commission procedure has been invoked in one recent case. On 19 August 2004, the Secretariat of the Espoo Convention notified all the parties to the Convention, as required by paragraph 1 of Appendix IV, that Romania had made a submission requesting the establishment of an inquiry commission to advise on the likelihood of a significant adverse transboundary impact arising from the Ukrainian project 'Danube-Black Sea Deep Water Navigation Canal in the Ukrainian Sector of the Danubian Delta'. The concerned States, Romania and Ukraine, were not able to agree

³¹ *Ibid.*, Appendix IV, paras. 12-14.

³² *Ibid.*, Appendix IV, para. 3.

³³ *Ibid.*, Appendix IV, para. 9.

whether a significant adverse transboundary impact from the project would be likely, and both nominated their experts to the commission. However, the two experts were not able to agree on a third expert – the president of the commission – within two months of the appointment of the second expert, whereupon, on 17 December 2004, Romania asked the Executive Secretary of the ECE to make the appointment of the president pursuant to paragraph 3 of Appendix IV. The Executive Secretary did so, and the first meeting of the inquiry commission was held on 26 January 2005 in Geneva. Further meetings are scheduled for 24 February and 13 May, with site visits from 10 to 16 April 2005.³⁴ In principle, according to paragraph 13 of Appendix IV, the inquiry commission is to present its final opinion within two months of the date on which it was established, which did not take place in this case. However, paragraph 13 also provides that the inquiry commission can extend the time limit for an additional two months, a timeframe that may prove to be challenging in this case, given that parties have already scheduled a meeting for 13 May 2005.

The Espoo Convention provides three mechanisms by which parties can resolve their disputes: the Implementation Committee, to be discussed below, the inquiry commission procedure, and the general dispute settlement procedures. This range of alternatives seems like a sound approach in principle, since it enables parties to avoid resorting to third-party dispute settlement, which is a measure to be used only when all others have been exhausted. Thus far, four parties have filed a declaration to have their disputes with other parties decided through compulsory third-party dispute settlement. With the Convention having been in force for seven years, there are two disputes pending between States parties: one is being dealt with in an inquiry commission procedure, the other through general dispute settlement, as discussed above.

9.2 Compliance control

Compliance control is the mechanism whereby the treaty community monitors and reviews whether the States parties have observed their

³⁴ The information about inquiry procedures can be accessed through the Espoo Convention website at www.unece.org/env/eia/inquiry.htm. See also the responses by States parties as to whether they have made use of the inquiry procedure, presented in the full Review of Implementation (Advance Copy, 30 August 2004), p. 197, which can also be accessed through the Espoo Convention's website at www.unece.org/env/eia/implementation.htm.

obligations as set out in the Convention. The principal need here is for an institutional structure by which such compliance can be monitored in general. There is also a need to establish basic rules and procedures by which compliance information flows to the treaty bodies from the States parties, procedures as to how the treaty bodies may ensure that this subjective information corresponds to the reality (the reporting procedure) and procedures by which potential cases of non-compliance are examined by the treaty bodies (the non-compliance procedure).

The Espoo Convention did not originally provide much in the area of compliance control. It did establish the basis for institutional development in article 11 by creating the Meeting of the Parties and defining its terms of reference; otherwise, all legal changes to the Convention are to be made through formal amendments, as set out in article 14. Curiously, article 11 does not explicitly mandate that the MoP create any sub-organs, frequently so relevant in the management of international environmental treaties.³⁵

9.2.1 The system for reviewing treaty compliance

In contrast to its SEA Protocol,³⁶ the Espoo Convention does not impose any reporting obligation on the parties. Unlike some international environmental treaties, the Convention did not require the parties to provide an initial submission of information, nor does it require them to submit regular reports. The farthest the Convention has gone in this respect is article 11(2) setting out the terms of reference of the MoP, essentially requiring the parties to continuously review implementation of the Convention in numerous ways.

The second MoP, held in Sofia in 2001, decided to develop a reporting system 'on how the obligations of the Convention have been complied with, both at the general level and by particular Parties'.³⁷ A task force³⁸ was established at the Sofia meeting to handle the review procedure until the system proper under the Implementation Committee became operational. The ensuing review was published at the third MoP, in Croatia in 2004, and

³⁵ Art. 11(2) of the Espoo Convention.

³⁶ Art. 14(7) of the Protocol stipulates as follows: 'Each Party shall, at intervals to be determined by the Meeting of the Parties to the Convention serving as the Meeting of the Parties to this Protocol, report to the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol on measures that it has taken to implement the Protocol.'

³⁷ Decision II/11, Adoption of the Work-plan (ECE/MP.EIA/4, 7 August 2001).

³⁸ The delegation of the United Kingdom led the task force, assisted by the Secretariat.

it focused on how the parties had applied the obligations of the Convention with regard to the transboundary EIA procedure.³⁹ In keeping with the mandate of the task force, the review did not analyze whether the parties had complied with their obligations; it only examined the experiences of the parties with a view to improving the regime, basically summarizing what the parties had experienced in implementing and applying the Convention. This task clearly differed from the regular analysis of State reports with a view to detecting non-compliance.

The first review of implementation was carried out by the task force, not the Implementation Committee. The decision establishing the Implementation Committee in the 2001 Sofia MoP gave the Committee the responsibility of developing a reporting procedure, and it is expected to prepare a revised and simplified questionnaire and draft a review of implementation for the fourth MoP.⁴⁰ The third MoP adopted an amendment formalizing the regular reporting requirement for the parties, which when it enters into force will provide a formal basis for the reporting of compliance information to the Implementation Committee and the MoP. The amendment inserted a new article, article 14*bis*, into the Convention. Article 14*bis* provides as follows:

1. The Parties shall review compliance with the provisions of this Convention on the basis of the compliance procedure, as a non-adversarial and assistance-oriented procedure adopted by the Meeting of the Parties. The review shall be based on, but not limited to, regular reporting by the Parties. The Meeting of Parties shall decide on the frequency of regular reporting required by the Parties and the information to be included in those regular reports.
2. The compliance procedure shall be available for application to any protocol adopted under this Convention.⁴¹

The role of the Implementation Committee in examining State reports is still taking shape and it seems that its role in the near future will be largely to do what the task force did, namely, to conduct an evaluation of State behaviour in terms of the future development of the regime rather than to carry out a review focused on detecting non-compliance. The reason for this is that there will be no legal obligation to report until the second amendment

³⁹ Full Review of Implementation (Advance Copy, 30 August 2004).

⁴⁰ Decision III/9 of the third MoP (ECE/MP.EIA/6, 13 September 2004).

⁴¹ *Ibid.*, Decision III/7, Second Amendment to the Espoo Convention, para. f.

to the Convention enters into force. Yet, if and when the formal amendment quoted above enters into force, the Implementation Committee will be empowered to develop a regular system of State reporting.

9.2.2 The non-compliance mechanism: the Implementation Committee

The Espoo Convention has no provisions on non-compliance, but the work-plan for the years 1998 to 2000, formulated in 1998 at the first MoP in Oslo, included work on non-compliance guidelines.⁴² The delegation of the United Kingdom, which was assigned to lead a task force in this area, produced a background paper entitled 'Compliance with Multilateral Environmental Agreements', in which it outlined the existing non-compliance mechanisms and identified certain trends in these mechanisms for the Working Group on EIA to consider.⁴³ Decision II/4 by the MoP – setting out the structure and functions of the Implementation Committee – drew heavily from the Implementation Committee which supervised the Convention on Long-Range Transboundary Air Pollution and its protocols, which had been established by that Convention's Executive Body in its Decision 1997/2.⁴⁴

The third MoP, held in Croatia in 2004, changed the structure and functions of the Implementation Committee, but only very slightly. The principal change, seen throughout Decision III/2, is its emphasis on openness and transparency, a development much influenced by the other ECE convention, the Aarhus Convention. The third MoP introduced another change, prompted by the adoption of the SEA Protocol in May 2003 and the concomitant need to determine whether the Implementation Committee is empowered to supervise observance of the Protocol. In its Decision III/2, the MoP 'encourag[ed] the application of the procedure for the review of compliance to the Protocol on Strategic Environmental Assessment and to any future protocols to the Convention, in accordance with their relevant provisions'.⁴⁵ Furthermore, as noted above, the MoP adopted an amendment which, when it enters into force, will make it clear that the Implementation Committee procedure also applies to supervision of the

⁴² Decision I/6, chapter 5 (ECE/MP.EIA/2, 10 November 1998).

⁴³ MP.EIA/WG.1/1999/7, 28 July 1999.

⁴⁴ The first draft, MP.EIA/WG.1/2000/9, 27 March 2000. The Executive Body Decision 1997/2, ECE/EB.AIR/53.

⁴⁵ Decision III/2, Review of Compliance, para. 4, ECE/MP.EIA/6, 13 September 2004.

SEA Protocol. What is more, the SEA Protocol itself contains an explicit provision on the applicability of the Implementation Committee procedure to the Protocol.⁴⁶ A possible challenge for the Implementation Committee in this respect is how it can adjust its work to include not only inter-State situations and disputes, as set out in the Espoo Convention, but also situations regulated by the SEA Protocol, which focuses primarily on requiring the contracting States to create and implement national SEA procedures.

Where non-compliance is suspected, the contracting States may notify the Secretariat of the Convention with corroborating information.⁴⁷ The Secretariat will then inform the State alleged to be in non-compliance and allow it to supply information of its own. Thereafter, the Secretariat will transmit these bodies of information to the Implementation Committee.⁴⁸ It is also possible that the origin State will notify the Secretariat that it is unable to comply with the obligations of the Convention, either after the notification by the affected State or on its own initiative. In such cases, the State is obligated to inform the Secretariat of its reasons for non-compliance, and this information is delivered to the Implementation Committee.⁴⁹ The Committee may also commence the procedure on its own initiative with the party that has failed to comply with its obligations.⁵⁰

The Implementation Committee has two options in proceeding with a case of suspected non-compliance: it may request further information on the case through the Secretariat or it may even gather information in the territory of the concerned States, but only at its invitation.⁵¹ The Committee must ensure the confidentiality of the information delivered to it.⁵² The concerned States and the public are entitled to participate in the proceedings if the Committee does not decide otherwise, but not in the preparation and adoption of any report or recommendations of the Committee.⁵³ The Implementation Committee Procedure is without prejudice to the general dispute settlement clause, meaning that, even when a procedure is pending, the parties can try to resolve the dispute on their own.⁵⁴ When a matter is being considered under the inquiry commission procedure, however, it may not be submitted to any other dispute settlement mechanism under the Convention.⁵⁵

⁴⁶ Art. 14(6) of the SEA Protocol.

⁴⁷ Decision III/2, Annex II, Review of Compliance, Appendix, para. 5(a), ECE/MPEIA/6, 13 September 2004. ⁴⁸ *Ibid.* ⁴⁹ *Ibid.*, para. 5(b). ⁵⁰ *Ibid.*, para. 6. ⁵¹ *Ibid.*, para. 7.

⁵² *Ibid.*, para. 8. ⁵³ *Ibid.*, paras. 9 and 10. ⁵⁴ *Ibid.*, para. 14. ⁵⁵ *Ibid.*, para. 15.

As noted above, the Convention did not originally contain any provisions on non-compliance. In the third MoP, in Croatia in 2004, the parties adopted the above-quoted second amendment to the Convention, which, if and when it enters into force, will formalize the status of the Implementation Committee.

To date, while the Implementation Committee has not been called upon to resolve any disputes, it has received a communication from an NGO. This presented a difficult problem for the Committee since, in contrast to the Compliance Committee of the Aarhus Convention, it may not receive direct submissions from other than States parties. The Committee discussed this challenge extensively in its third meeting, outlining various alternatives for the role of the public.⁵⁶ In the fourth meeting, the President of the Committee drew the Committee's attention to a letter from an NGO addressed both to the Committee and to the Secretariat; the Secretariat had forwarded the letter to the Committee on 26 August 2003. The Committee did not address the fundamental question of how to deal with such communications but only agreed that the information that had been provided thus far was insufficient for the case to be considered.⁵⁷

However, in the fifth meeting of the Committee, the case came back to the Committee. The Secretariat had received a copy of a letter sent by the same NGO to a party regarding a potential non-compliance issue and then made this letter available to the Committee.⁵⁸ It is worth noting here that the rules of the Committee permit it to initiate the procedure when it becomes aware of possible non-compliance. The Committee's conclusion in this respect is worth quoting:

The Committee agreed that it should acknowledge the latest communication and that its response should reflect the views of all its members. The majority agreed not to consider the information, because considering unsolicited information from NGOs and the public relating to specific cases of non-compliance was not within the Committee's existing mandate. A minority disagreed, interpreting the present mandate (decision II/4, app., para. 5) to mean that there

⁵⁶ Paras. 5–15 of the minutes of the third meeting of the Implementation Committee, MPEIA/WG.1/2003/8, 10 July 2003.

⁵⁷ Para. 10 of the minutes of the fourth meeting of the Implementation Committee, MPEIA/WG.1/2004/3, 17 December 2003.

⁵⁸ Para. 5 of the minutes of the fifth meeting of the Implementation Committee, MPEIA/WG.1/2004/4, 8 April 2004.

were no restrictions on how the Committee became aware of a case of possible non-compliance, preferring to examine the information further.⁵⁹

In the present author's view, it seems hard to defend the position of the majority except in terms of political realism. The Committee certainly had become aware of a case of possible non-compliance that was not a direct submission from an NGO but a copy of a letter by an NGO that a State party had sent to the Secretariat, which it had then forwarded to the Committee. If the case had been a direct submission from an NGO, there would have been better grounds for refusing to examine it. This decision by the Implementation Committee will most likely serve as a precedent: it is hard to see how after this decision the non-compliance mechanism could be triggered by parties other than the States parties. The Espoo Convention's non-compliance review cannot be started even by the Secretariat, as it is only the Committee that can 'open' a case and contact the State party alleged to be in non-compliance. In the case of, for example, the Convention on Long-Range Transboundary Air Pollution non-compliance mechanism, the Secretariat of that Convention can initiate a procedure with the State alleged to be in non-compliance on the basis of information provided by, for instance, an environmental NGO.⁶⁰

As noted above, the Implementation Committee has neither received any submissions from States parties nor 'become aware' of any non-compliance by a party. With no formal submission from the States parties, a case has to be opened by the Implementation Committee itself, a course of action it has been reluctant to take. The Committee's conclusions quoted above clearly indicate that it will not easily start the non-compliance procedure without formal submissions from States parties, a policy also seen in the MoP's increased emphasis on requiring parties to make self-submissions.⁶¹ When the reporting system becomes obligatory, the Committee will have a good basis for starting a non-compliance procedure on the basis of the information obtained from the State reports.

⁵⁹ *Ibid.*, para. 7.

⁶⁰ Statement of the secretary to the Executive Body of the LRTAP Convention in the third meeting of the Compliance Committee of the Aarhus Convention, para. 7 of the minutes of the third meeting (MPP/C.1/2004/2, 2 March 2004).

⁶¹ See para. 1 of Decision III/2, ECE/MP.EIA/6, 13 September 2004.

9.2.3 Enforcement

According to the rules that govern the work of the Implementation Committee, the Committee cannot take decisions of its own, a mandate differing, for example, from that of the Compliance Committee of the Aarhus Convention.⁶² The Implementation Committee can only draft a recommendation on a compliance case to the MoP, which makes the final decision.⁶³ If consensus cannot be reached in the MoP, the recommendation by the Implementation Committee will be accepted if a three-quarters majority of the parties present and voting favours it.⁶⁴ The party suspected of non-compliance cannot block the decision, since consensus is not required. Yet, not even such a decision is binding on the non-compliant State, since it is a decision of the MoP, which, arguably, is non-binding, although arguments to the contrary have been put forth in the legal literature.⁶⁵

Decision III/2, Review of Compliance, of the MoP does not specify the measures that can be taken in the case of non-compliance. It is only stipulated that the MoP may decide 'upon appropriate general measures to bring about compliance with the Convention and measures to assist an individual party's compliance'.⁶⁶ This would seem to refer to two basic approaches, enforcement and management. The former entails implementation of negative measures against the party in non-compliance and the latter assistance for parties in complying with the obligations of the Convention. However, it is still very unclear what form these measures might take, as the

⁶² Para. XI of the Annex to Decision I/7 of the first MoP, ECE/MP.PP/2/Add.8. The Compliance Committee is empowered by its founding document to provide advice and facilitate assistance to individual parties concerning their implementation situation pending consideration by the meeting of the parties. The Committee may also make recommendations and request an implementation strategy pending the decision by the meeting of the parties but only when an agreement has been reached with the non-compliant state.

⁶³ Para. 13 of the Appendix to Decision III/2 of the MoP, ECE/MP.EIA/6, 13 September 2004.

⁶⁴ *Ibid.*

⁶⁵ It is of course possible that decisions by the MoP can be seen as 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions', as stated in Art. 31(3)(a) of the Vienna Convention on the Law of Treaties. Or, as has been suggested by Churchill and Ulfstein, the regime of the Espoo Convention may qualify as an Autonomous Institutional Arrangement (AIA), an entity comparable to an intergovernmental organization, with the concomitant possibility that the decisions of its plenary organ are binding on the States parties. See Robin R. Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623–59.

⁶⁶ Para. 13 of the Appendix to the Decision III/2 of the MoP, ECE/MP.EIA/6, 13 September 2004.

Implementation Committee has not had to decide any actual cases of non-compliance nor has it addressed the issue in its meetings. Given the recent amendment to the Convention providing that the 'Parties shall review compliance with the provisions of this Convention on the basis of the compliance procedure, as a non-adversarial and assistance-oriented procedure',⁶⁷ it seems likely that the procedure is very much tilted towards using a managerial rather than an enforcement approach.

One problem that the Implementation Committee has been well aware of since its third meeting is that, with MoPs taking place only every three years, a considerable amount of time may elapse before the MoP can take a decision on an issue decided by the Committee and a response to non-compliance made.⁶⁸ The trend in this issue might very well be that the Implementation Committee will follow the lead of the Aarhus Compliance Committee and become empowered to take certain decisions by itself, with more severe consequences for the parties being decided by the MoP.⁶⁹

It is hard to evaluate the direction which the collective decisions to counter non-compliance might take, as no case has proceeded that far. To date, the Implementation Committee, which must draw up the particulars of reactions to non-compliance since it recommends them to the MoP, has not started elaborating guidelines as to the kinds of measures the MoP could take if the Committee should discover a case of non-compliance. While this is no doubt due in part to the fact that the Committee has not dealt with any cases, such guidelines are precisely the kinds of measures that should be elaborated before any case even comes before the Implementation Committee and the MoP.

9.2.4 *Evaluation*

A number of general trends can be identified with respect to reporting, non-compliance mechanisms and enforcement rules and procedures in the

⁶⁷ Decision III/7, Second Amendment to the Espoo Convention in the third MoP, para. f, ECE/MP.EIA/6, 13 September 2004.

⁶⁸ Para. 21 of the minutes of the third meeting of the Implementation Committee, MP.EIA/WG.1/2003/8, 10 July 2003. The same issue was taken up in the fourth (para. 13 of the minutes of the fourth meeting of the Implementation Committee, MP.EIA/WG.1/2004/3, 17 December 2003) and fifth meetings of the Implementation Committee (para. 15 of the minutes of the fifth meeting of the Implementation Committee, MP.EIA/WG.1/2004/4, 8 April 2004).

⁶⁹ See Parts XI and XII of the founding document of the Compliance Committee of the Aarhus Convention, Annex, 'Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance', Decision I/7, Review of Compliance, ECE/MP.PP/2/Add.8.

Espoo regime. First, the Convention itself provides no guidance in these matters; the MoPs have developed the compliance system as it presently stands. Secondly, in the third MoP, the second amendment to the Convention was adopted which, if and when it enters into force, will provide a formal basis for a compliance system. Finally, the SEA Protocol has seemingly learned the lesson lost on its parent Convention and provided for a compliance system in its article 14.

Yet, there will be many questions to be answered in the near future where development of a compliance system is concerned. The second amendment to the Espoo Convention, which formalizes the compliance system, was adopted on 4 June 2004 and has not yet⁷⁰ been ratified by any State. Even when the amendment enters into force someday – as will happen in all likelihood – it will probably apply to only some parties, making it hard to operate a collective compliance system on an equal basis. Another interesting question is whether the SEA Protocol will formalize the status of the Implementation Committee, for it contains an explicit provision to this effect; then again, the Protocol has yet to be ratified by States. Many questions thus remain to be resolved by not only the entry into force of the relevant instruments but also the number of States that ultimately ratify those instruments.

9.3 Overall evaluation

International environmental treaties – the Espoo Convention among these – exhibit a clear trend towards having similar provisions for dispute resolution: they keep dispute settlement in the hands of the States parties but provide the parties with the possibility of making a declaration that they will have their disputes resolved by a third-party procedure.⁷¹ Significantly, the general dispute settlement clause of the Espoo Convention seems to have established a ‘precedent’ for other ECE environmental protection conventions. In contrast to the first environmental protection convention of the ECE, the 1979 Convention on Long-Range

⁷⁰ November 2005.

⁷¹ See, for instance, the Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, UNEP Doc. IG.53/5 (art. 11), the 1992 Convention on Biological Diversity (art. 27), the 1992 United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, UN Doc. A/A.C.237/18 (Part II) (Add.1). (art. 14).

Transboundary Air Pollution, article 13 of which only provided the parties with a possibility to settle their disputes through political means,⁷² the Espoo Convention's dispute settlement provision allows parties to declare in writing that they accept compulsory third-party settlement as binding. This 'precedent' was embraced in the protocols to the Convention on Long-Range Transboundary Air Pollution, as the protocols adopted from 1994 onwards all contain the option of making a declaration. It was also followed by both of the ECE conventions adopted in Helsinki in 1992, i.e. the Convention on the Transboundary Effects of Industrial Accidents⁷³ and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes,⁷⁴ and the 1998 Aarhus Convention in its article 16.

The inquiry commission procedure was quite unique when it was adopted as a special dispute settlement procedure in the Espoo Convention, there being only one other treaty in the field of international environmental law that contained such a procedure previously.⁷⁵ The only other international negotiation process apart from the Espoo Convention that tried to create a transboundary EIA procedure – the outcome of which was the draft Transboundary Environmental Impact Assessment Agreement negotiated under the auspices of the North American Commission for Environmental Co-operation (NACEC) – did not contain an inquiry commission procedure but only a general dispute settlement clause.⁷⁶

⁷² Art. 13 of the Convention on Long-Range Transboundary Air Pollution, Geneva, 13 November 1979, Doc. E-ECE (XXXIV)-L-18: 'If a dispute arises between two or more Contracting Parties to the present Convention as to the interpretation or application of the Convention, they shall seek a solution by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.'

⁷³ Art. 21 of the Convention on the Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, in force 19 April 2000, 31 ILM 1330 (1992). The Convention can be accessed via its website at www.unece.org/env/teia/text.htm. See also the Convention's Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, Kiev, Ukraine, 21 May 2003. The Protocol has not yet entered into force (art. 26).

⁷⁴ Art. 22 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, in force 6 October 1996, Doc. ENVWA-R.53 and Add.1. The Convention can be accessed via the Convention's website at www.unece.org/env/water/text/text.htm. See also the Convention's Protocol on Water and Health, London, 17 June 1999, in force 4 August 2005, ECOSOC Doc. MP.WAT/A.C.1/1999/1, 24 March 1999 (art. 20).

⁷⁵ The 1974 Nordic Environment Protection Convention, Stockholm, 19 February 1974, in force 5 October 1976, 13 ILM 352 (1974). The Protocol provides for a commission procedure in its art. 12.

⁷⁶ See Timo Koivuvuori, *Environmental Impact Assessment in the Arctic: A Study of International Legal Norms* (Aldershot: Ashgate Publishing, 2002), pp. 293–5.

The inquiry commission procedure has inspired the use of similar procedures, within the UN and the ECE in particular, in situations where it must be decided whether a proposed major development activity is likely to cause a significant adverse transboundary impact. The 1992 Convention on the Transboundary Effects of Industrial Accidents followed the lead of the Espoo Convention and contains an inquiry commission procedure in its article 4(2) and Annex II that is almost identical to that found in the Espoo Convention. Two International Law Commission (ILC)-sponsored projects – the draft preventative rules produced by the ILC project on International Liability⁷⁷ and the 1997 Convention on the Non-Navigational Uses of International Watercourses⁷⁸ – both contain fact-finding commissions that are clearly modelled after the inquiry commission in the Espoo Convention.

Another distinct and quite recent trend in the drafting and managing of international environmental treaties has been the creation of compliance control systems that have separate bodies for examining suspected cases of non-compliance and allow the plenary organ the option of taking collective enforcement measures. It is quite interesting that a collective compliance system was also developed in the regime of the Espoo Convention, given that the situations it regulates are far more bilateral in nature than those in the regulative field of other international environmental treaties, which seek to protect a common concern of the treaty community. With this background, the treaty community is more likely to be able to exert greater influence in situations that are often seen as disputes between two parties only. Through the compliance system, the treaty community can prod the

⁷⁷ In 2001, at its fifty-third session, the International Law Commission recommended to the UN General Assembly an elaboration of an international convention on the basis of the Draft Articles on Prevention of Transboundary Harm from Transboundary Activities that it had approved. The Draft Articles were clearly inspired by the Espoo Convention: they provide for a fact-finding commission as a method of settling disputes in art. 19, one very much modelled after the inquiry commission procedure. See art. 19 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Report of the International Law Commission on the Work of Its 53rd Session, A/56/10 (Supp.), pp. 370–436. The Draft Articles are available from the ILC website at www.un.org/law/ilc/texts/prevention/preventionfra.htm. Since the General Assembly decided to include liability in the project again, it is not very likely that negotiations will be taking place in the project in the near future. See paras. 165–74 of the Report of the ILC (56th Session) in 2004, A/59/10 (Supp.), 16 September 2004. The report is available from the ILC website at www.un.org/law/ilc/reports/2004/2004report.htm.

⁷⁸ The Convention on the Law of Non-Navigation Uses of International Watercourses, New York, 21 May 1997, not yet in force, Doc. A/51/869. This Convention contains not only an identical fact-finding commission but also a general dispute settlement provision: see art. 33.

States parties to improve their capability in organizing a transboundary EIA procedure, to participate in it as an affected State, and to educate their civil societies to take part in it. This role of the compliance system will become more apparent when the SEA Protocol enters into force.

The Implementation Committee of the Espoo Convention is most clearly based on the non-compliance mechanisms of the two ECE conventions, the Convention on Long-Range Transboundary Air Pollution and the Aarhus Convention. At first, it was extensively based on the Convention on Long-Range Transboundary Air Pollution Implementation Committee model, which itself drew heavily on the first non-compliance mechanism developed under the Montreal Protocol.⁷⁹ The work of the Compliance Committee of the Aarhus Convention has become increasingly influential, especially as regards the openness and transparency of the Implementation Committee procedure. All in all, however, it is the Convention on Long-Range Transboundary Air Pollution model that has figured most prominently in the present structure and function of the Implementation Committee of the Espoo Convention.

The institutional environmental protection work within the ECE – ministerial-level meetings in the Environment for Europe process, work among senior officials in the Committee on Environmental Protection, and the environment secretariat of the ECE – has a clear bearing on the capacity of each ECE environmental protection convention and provides a firm platform for incorporating a collective dimension even in treaties that deal primarily with bilateral issues between States.⁸⁰ The ECE in general has been very active in advocating non-compliance mechanisms, and it is no wonder that the five treaties have drawn inspiration from each other and prompted the Committee on Environmental Protection to draw up

⁷⁹ See Annexes IV and V to the fourth meeting of the parties to the Montreal Protocol establishing the Implementation Committee and its terms of reference, UNEP/OzL.Pro.4/15, p. 52. The document is available from the ozone regime website at www.unep.org/ozone/Meeting_Documents/mop/index.asp. For an analysis, see Tuomas Kuokkanen, 'Putting Gentle Pressure on Parties: Recent Trends in the Practice of the Implementation Committee under the Convention on Long-Range Transboundary Air Pollution', in Jarna Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Leiden and Boston: Martinus Nijhoff Publishers, 2003), pp. 315–26, at p. 320.

⁸⁰ The ECE environmental protection is organized very efficiently: it has an international organization of its own, the environment department in the ECE; senior-level officials of the ECE Member States provide policy direction via the Committee on Environmental Policy; and higher-level guidance is provided by the Environment for Europe process, which convenes the environment ministers in the ECE region.

guidelines on how to make sound non-compliance mechanisms. These guidelines were recently adopted as the Kiev Guidelines in the last ministerial meeting in the Environment for Europe process.⁸¹ Seen from the ECE perspective, a collective dimension is always present in the transboundary EIA procedures, which otherwise are often handled privately, as it were, by States parties. It is this collective dimension, upheld by the Espoo Convention being connected to the general environmental protection structure of the ECE, which provides an important underpinning for its dispute settlement and compliance control system.

On this basis, it seems fairly clear that the experiences gained in applying the regime of the Espoo Convention cannot easily be transferred to the regulation of similar situations in other parts of the world, which often lack a comparably strong institutional backing. Within the ECE, the various international environmental treaties regularly draw inspiration from each other, and the Espoo regime has also inspired developments in other ECE regimes.⁸² Yet, as was argued above, it is also possible to use particular elements of the Espoo regime outside of the ECE context, as has been done in the work of the International Law Commission in two instances.

⁸¹ The Kiev Guidelines, ECE/CEP/107, 20 March 2003. The Guidelines are available from the Espoo Convention website at www.unece.org/env/eia/implementation.htm.

⁸² The Implementation Committee of the Espoo Convention has been used as a model at least in designing a compliance mechanism for the Protocol on Water and Health to the ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes. See the second draft prepared by the Legal Bureau, MP.WAT/A.C.4/2004/8, 23 July 2004.