The Relationship Between the Convention on Environmental Impact Assessment in a Transboundary Context and the Convention on the Transboundary Effects of Industrial Accidents

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A/ SUMMARY OF THE REPORT

This report is concerned with the relationship between the Espoo Convention on Environmental Impact Assessment in a Transboundary Context and the Convention on the Transboundary effects of Industrial Accidents, both of which were elaborated under the auspices of the United Nations Economic Commission for Europe. The field of application of the two conventions overlap, and the report indicates that most of the activities that are within the scope of the Industrial Accidents Convention, as hazardous activities that are capable of causing transboundary effects, may also fall within the activities likely to cause significant adverse transboundary impacts for which an EIA is required under the Espoo Convention.

The Industrial Accidents Convention includes a procedure for assessing the risks of transboundary effects in the event of an industrial accident at the hazardous activity. This risk assessment procedure is similar, but not identical to, the EIA procedure of the Espoo Convention. Because of the overlap in scope of the two conventions, there is a possibility that a state that is a Party to both conventions would have to carry out an EIA and a risk assessment for the same activity. To avoid such duplication the Industrial Accidents Convention a provision was included in the Industrial Accidents Convention that would allow a Party, where it has already performed an EIA of the proposed hazardous activity in accordance with the Espoo Convention, to waive the requirement to perform the risk assessment procedure pursuant to the Industrial Accidents Convention. One of the conditions for the waiving of the risk assessment procedure is that the EIA includes an evaluation of the transboundary effects of industrial accidents which is performed in conformity with the Industrial Accidents Convention. This requirement that the EIA must comply with the procedures of both conventions creates a problem as there are several differences between the EIA procedure of the Espoo Convention and the risk assessment procedure of the Industrial Accidents Convention. For example the information to be included in the assessment documentation is more detailed under the Industrial Accidents Convention.

This report compares in depth the assessment procedures of the two conventions in order identify areas where the risk assessment procedure of the IA Convention differs from the Espoo Convention EIA procedure. It concludes with the recommendation that a harmonised EIA procedure, which took account of the differences between the two conventions, could be elaborated for use when a Party wished to take advantage of Article 4.4.

B/ INTRODUCTION

1. Summary of the Espoo Convention and the Industrial Accidents Convention

During the last twenty-five years environmental impact assessments have emerged as an essential tool for incorporating environmental considerations into decision-making processes. Originally environmental impact assessments (EIAs) were developed in the context of national legal systems, however international environmental treaties now frequently include an EIA requirement. The Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) is the first multilateral environmental treaty devoted to the question of EIAs in a transboundary context. It specifies the procedural rights and duties of Parties with regard to transboundary effects of proposed activities, and seeks to ensure that concerns over the adverse effects of projects on the environment, not only of the national territory where the project is being considered but also of neighbouring countries, are incorporated into the decision-making process. The Convention requires Parties to "take all appropriate measures to prevent, reduce and control significant adverse transboundary impacts from proposed activities".[1] Parties must ensure that prior to authorizing an activity that is likely to cause a significant adverse transboundary impact an environmental impact assessment is undertaken.[2]

The assessment procedure is a process mainly consisting of four pre-consent phases, the notification phase, the information phase, the consultation phase and the decision phase, and a monitoring obligation after consent is given. The first phase consists of the notification by the Party of origin[3] of any Parties it considers may be affected by the activity. The information phase involves an initial transmittal to the affected Party by the Party of origin of information concerning the proposed activity and possible transboundary effects, and then after allowing for public participation, the detailed environmental impact assessment documentation must be prepared and submitted to the authorities and public of the Party of origin. The public in areas likely to be affected by the proposed activity are to be allowed the opportunity to make comments on the EIA. After completion of the EIA documentation the Parties are to enter into consultations concerning possible transboundary effects of the prosed activity. In the decision phase, Parties are to ensure that the final decision takes due account of the EIA documentation, the consultations, and the comments received from the public. Finally, where the activity proceeds, the parties may carry out a post-project analysis to determine whether there have been any adverse transboundary impacts.

[1]Article 2.1

[2]Article 3.2

[3] "Party of origin" means the Contracting Party or Parties to the Convention under whose jurisdiction a proposed activity is envisaged to take place. espoo Convention Article 1(ii).

The Espoo Convention, which was adopted on 25 February 1991,is expected to enter into force in the near future. Of the sixteen instruments of ratification required by Article 18 of the Convention for its entry into force eleven have already been deposited and a further five states are expected to ratify the Convention before the end of 1995.[4] Thus the Convention may enter into force in early 1996 with the first Meeting of the Parties being held in autumn 1996.

The Convention on the Transboundary Effects of Industrial Accidents (the IA Convention) which was adopted 17 March 1992 is not yet in force. Similarly to the Espoo Convention sixteen ratifications are required for the convention to enter into force.[5] As of 14 September 1995, twenty-seven states had signed and seven had ratified the Convention.[6] The objective of the Convention is to protect human beings and the environment against industrial accidents by preventing such accidents as far as possible by reducing their frequency and severity and by mitigating their effects. The IA Convention seeks to enhance cooperation concerning transboundary effects of industrial accidents in the ECE region in several contexts - before, during and after an industrial accident. Firstly, when planning new hazardous activities Parties can cooperate through a risk assessment procedure which is very similar to the EIA procedure of the Espoo Convention. Secondly, there is to be cooperation between Parties when concerning prevention measures, and preparedness measures such as contingency plans. Thirdly, in the event of an industrial accident capable of causing transboundary effects potentially affected Parties must be notified through industrial accident notification systems. Parties are required to take appropriate legislative regulatory administrative and financial measures for the prevention of, preparedness for and response to industrial accidents.[7]

2. The Relationship Between the Espoo Convention and the Industrial Accidents Conventions

The Espoo Convention and the Industrial Accidents Convention were both elaborated under the auspices of the 55 member United Nations Economic Commission for Europe (UNECE). Furthermore the UNECE serves as the secretariat for both conventions. The relationship between the two Conventions is not confined to institutional matters, but extends to similarities of subject matter, approach and procedures. Both Conventions are concerned with the responsibility of states not to cause damage to the environment of other states. This principle is enshrined in the Declaration of the Stockholm Conference on the Human

[4]Status of UNECE Environmental Conventions 14 September 1995; Report of the Fourth Meeting of the Signatories to the Convention on Environmental Impact Assessment in a Transboundary Context, UN Doc. CEP/WG.3/2

[5]Article 30

[6]Status of ECE Environmental Conventions 14 September 1995

[7]Article 3

Environment and is recognised as reflecting a rule of customary international law.[8] Both Conventions adopt a preventative approach seeking to prevent or minimise environmental damage before it occurs. Both conventions codify the procedural duties of international law of notification and consultation which, where the activities of one state are likely to affect the environment of rights and interests of another state, are widely recognised as obligations of customary law.[9] The detailed impact assessment procedures of the Conventions clarify these general principles of international environmental law.

The Industrial Accidents Convention establishes a procedure for assessing the risk of transboundary effects from industrial accidents. This risk assessment procedure includes the core elements of the EIA procedure. The Industrial Accidents Convention, in Article 4 and the related Annexes, establishes a detailed procedures for the identification of hazardous activities, notification of affected Parties and consultations between the Party of Origin and the notified Party concerning the transboundary effects of the hazardous activity in the event of an industrial accident and measures to reduce or eliminate its effects.

In the negotiations to elaborate the Industrial Accidents Convention it was decided to apply the procedures for the evaluation of the risks of transboundary effects of industrial accidents within an EIA framework. Some delegations saw an advantage in borrowing parts of the already agreed text of the Espoo Convention for the risk assessment procedure of the Industrial Accidents Convention. Therefore when the second draft of the Convention was being prepared the EIA procedure in Articles 3-6 of the Espoo Convention, was incorporated with some amendments, into the Industrial Accidents Convention as the risk assessment procedure now found in Article 4 and Appendix III.[10]

As we shall see later on, certain industrial activities may fall within the scope of both Conventions. For these activities it would be necessary to perform an EIA twice - once when applying the Espoo Convention and again when applying the IA Convention. To avoid such duplication, and, to assist in the implementation of the Industrial Accidents Convention, Article 4.4 of the Industrial Accidents Convention creates a mechanism which would permit certain commitments under the Industrial Accidents Convention to be fulfilled by an EIA of the hazardous activity carried out under the Espoo Convention. Article 4.4 provides:

"When a hazardous activity is subject to an environmental impact assessment in

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[8]Principle 21.The Stockholm Declaration is referred to in the preamble of both the Espoo and the Industrial Accidents Conventions. On the customary law status of Principle 21 see P. Sands, Principles of International Environmental Law, 195 p190-4.

[9]See P. Sands, Principles of International Law (1995) Chs 6 & 16.

[10] The IA Convention was negotiated by a working group of Senior Advisors to ECE Governments on Environment and Water Problems. The working group met five times between 5 June 1990 and 8 November 1991. The negotiations to elaborate the Espoo Convention had been completed by 28 September 1990, prior to the second meeting of the IA Convention working group.

accordance with the Convention on Environmental Impact Assessment in a Transboundary Context and that assessment includes an evaluation of the transboundary effects of industrial accidents from the hazardous activity which is performed in conformity with the terms of this Convention, the final decision taken for the purposes of the Convention on Environmental Impact Assessment in a Transboundary Context shall fulfil the relevant requirements of this Convention."

This innovative mechanism would appear to offer a straightforward solution to the problem of duplication, by allowing the performance of an EIA pursuant of the Espoo Convention to waive the requirement to perform the risk assessment procedure. However when the Convention enters into force Parties who wish to take advantage of Article 4.4 may encounter a number of legal and procedural difficulties. There are two sources of these problems - the complex clauses and vague language used in Article 4.4, and the differences between the EIA procedure of the Espoo Convention and the risk assessment procedure of the IA Convention.

The wording and structure of Article 4.4 raise many questions. These can best be considered after breaking down Article 4.4 into its constituent elements.

-Before Article 4.4 can be applied there must be a "hazardous activity" which is subject to an EIA under the Espoo Convention. Thus the activity must fall within the scope of both Conventions.

-Furthermore the EIA must be "in accordance with" the Espoo Convention AND include "an evaluation of the transboundary effects of industrial accidents from the hazardous activity which is performed in conformity with the terms of" the IA Convention. This requirement, that the EIA should comply with both convention creates a fundamental problem. When the text of the Espoo Convention was incorporated into the IA Convention many alterations were made.The effect of these changes is that parts of the risk assessment procedure of the IA Convention differ from the Espoo EIA procedure. For example, the information to be included in the EIA is much more detailed under the IA Convention than under the Espoo Convention.[11] The aim of Article 4.4 is to allow a single EIA to fulfil the requirements of both conventions, but how can this be done where the procedures of the conventions differ?

-If both of the above are satisfied then final decision under the Espoo Convention shall fulfil the "relevant requirements" of the IA Convention. What are these "relevant requirements"?

To try and resolve these questions and clarify how Article 4.4 could operate this report will consider in depth the relationship between the two conventions. The scope of application of the two conventions will be compared to ascertain when they overlap. The EIA procedures of the conventions will then be compared in order to identify any differences between the

[11] See h) below.

procedures of the two conventions that could pose problems to the operation of Article 4.4. Finally legal and procedural aspects will be considered.

C/ COMPARISON OF THE SCOPE OF THE ESPOO CONVENTION AND THE INDUSTRIAL ACCIDENTS CONVENTION

Before a Party can take advantage of Article 4.4 the relevant activity must fall within the scope of both Conventions.

1. Scope of the Espoo Convention

Parties must ensure that an EIA 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.[12] Also, Parties may voluntarily extend the application of the Convention to activities not listed in Appendix I.[13]

The Convention applies to proposed activities, and not to existing activities. However proposed activity is defined broadly in Article 1(v) to include any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure. Therefore existing activities which are to be decommissioned or expanded may be within the scope of the Convention.

a) Listed activities

Appendix I contains a list of proposed activities which are to be subject to an EIA when it is considered that the activity is likely to cause a significant adverse transboundary impact. These include crude oil refineries and large coal gasification installations; thermal power stations; nuclear power stations and other nuclear reactors; nuclear fuel processing; nuclear waste storage or disposal installations; iron and steel smelting installations; asbestos processing installations; integrated chemical installations; construction of motorways, express roads and railway lines and airports; oil and gas pipelines; trading ports and inland waterways; large dams and reservoirs; groundwater abstraction activities; pulp and paper manufacturing; metals and coal mining; offshore hydrocarbon production; major storage facilities for petroleum and chemical products; and, deforestation of large areas. For certain of these activities the Appendix clearly specifies a threshold size for the activity such as thermal power stations with a heat output of 300 megawatts or more, however in other cases very vague classifying words are used such as "large dams" or "major storage facilities for petroleum".

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[12] Article 2.3.

[13] Article 2.5

The decision to require an EIA in accordance with the Espoo Convention for an activity listed in Appendix I depends on whether the Party of origin considers that the activity is likely to cause a significant adverse transboundary impact. The Convention gives definitions for "impact"[14] and "transboundary impact"[15] but does not define "significance" leaving the determination to the discretion of the Parties. Such an element of flexibility is unavoidable because the level of any transboundary effects can be dependent not only on the size of the proposed activity, other factors, such as the distance between from the frontier, may be equally important.[16]

In practice, it would be desirable that, whenever there is a possibility of transboundary impact, the Party of origin notifies the affected Party. The affected Party can then indicate whether it wishes to participate in the EIA. Where the affected Party does not respond to the notification, or responds declining to participate in the EIA, the Party of origin need not proceed further with the transboundary EIA.[17] Conversely, where the Party of origin does not notify affected Parties then a Party that considers that it would be affected by the activity may require the Party of origin to enter into discussions on whether there is likely to be a significant adverse transboundary impact and, failing agreement, submit the question to an inquiry commission.[18]

b) Activities not listed in Appendix I

In addition to the activities specified in Appendix I, which are subject to an EIA when considered to pose a risk of significant transboundary adverse environmental effects, Article 2.5 requires concerned Parties at the request of one such Party to enter into discussions on whether a proposed activity not listed by Appendix I is likely to cause a significant adverse transboundary impact. If the Parties so agree, the activity will be treated as if it were listed in Appendix I.

Appendix III sets forth guidance on general criteria to assist in determination of

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[14] Article 1(vii) defines "impact" as:

"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 amongst these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from the alteration of those factors".

[15] Article 1(viii) defines "transboundary impact" as "any impact not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party".

[16] The issue of significance is considered in ENVWA/WG.3/R.13.

[17] See Article 2.4. However the national law of the Party of origin may still require that an EIA is performed.

[18] Article 2.7. See section (b) below.

environmental significance of activities not listed in Appendix I. These include (a) the size of the proposed activity, (b) whether the proposed activity is to be located close to areas of special environmental sensitivity or importance; and (c) proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species, 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; and finally, to consider both activities which are located close to an international frontier as well as more remote proposed activities which could give rise to significant transboundary effects far removed from the sites of development. Although the stated purpose of the Appendix III criteria is to assist in the determination of the environmental significance of activities not listed in Appendix I there is no reason why the criteria could not also be used to help settle the question of the significance of the impacts of Appendix I activities.

c) bilateral and multilateral agreements

The Convention allows Parties to continue existing or enter into new bilateral or multilateral agreements or other arrangements in order to implement their obligations under the Convention. Such agreements may contain more precise threshold levels or criteria for determining the significance of transboundary impacts of Appendix I activities, and may agree to treat activities not listed in Appendix I as if they were so listed.[19]

2. The Scope of The Industrial Accidents Convention

Article 2.1 of the IA Convention provides that it shall apply to the prevention of, preparedness for and response to industrial accidents capable of causing transboundary effects, including the effects of such accidents caused by natural disasters. "Industrial accident" is defined as an event resulting from an uncontrolled development in the course of any activity involving hazardous substances either in an installation or during transportation.[20] The Convention does not apply only to industrial accidents themselves, but also to the prevention of and preparedness for such accidents by regulating the hazardous activities at which accidents capable of producing transboundary effects may occur. Therefore most provisions of the Convention apply to "hazardous activities". The Convention applies to both existing and proposed hazardous activities.

a) Hazardous Activities

The Industrial Accidents Convention adopts a different approach from the Espoo Convention

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[19] See Bilateral and Multilateral Cooperation on Environmental Impact Assessment in a Transboundary Context, Report to the fourth Meeting of the Signatories, 11 January 1995, CEP/WG.3/R.4 at pages 7-8.

[20] Article 1(a). The Convention does not apply to transport accidents, except for emergency response to such accidents or to transportation on the site of the hazardous activity (Article 2(d)).

in determining the range of activities to which it applies. Rather than listing a set of specific categories of activities the Industrial Accidents Convention uses a threshold level of hazardous substances present at an activity to determine whether the activity is within the scope of the Convention. "Hazardous activity" is defined as any activity in which one or more hazardous substances are present or may be present in quantities at or in excess of the threshold quantities listed by Annex I, and which is capable of causing transboundary effects.[21] Thus there are two elements to the test of whether an activity is a hazardous activity under the terms of the Convention:

1) - presence of hazardous substances at/above Annex I levels
2) - the activity must be capable of causing transboundary effects.

Certain categories of activities are expressly excluded from the scope of the Convention as they are already subject to safety regulations under other regimes. Thus the Convention does not apply to nuclear accidents; accidents at military installations; dam failures; certain land-based transport accidents; accidental release of genetically modified organisms; accidents caused by activities in the marine environment; and spills of oil or other harmful substances at sea.[22]

b) Hazardous substances

Annex I sets threshold quantities in Part I for categories of substances (eg 200 tonnes flammable gases; 20 tonnes very toxic substances; 500 tonnes oxidising substances) and in Part II for particular named substances (eg 500 tonnes ammonia; 20 tonnes hydrogen cyanide). Where a substance named in Part II also falls within a category named in Part I then the Part II threshold quantity is to be used. The Annex provides that when identifying hazardous activities Parties are to take into consideration the foreseeable possibility of aggravation of the hazards involved and the quantities of the hazardous substances and their proximity, whether under the charge of one or more operators.

c) *Capable of causing transboundary effects*

As mentioned above the definition of hazardous activities in Article 1(b) includes not only threshold quantities of hazardous substances but also the requirement that the activity "is capable of causing transboundary effects". The IA Convention is concerned not with normal operational emissions from hazardous activities, which may cause transboundary effects, but with the potential transboundary effects that could result from emissions in the event of an industrial accident.

"Effects" are defined broadly as any direct or indirect,immediate or delayed adverse

[21] Article 1(b)

[22]Article 2.2

consequences caused by an industrial accident on, inter alia, human beings, flora and fauna; soil, water, air and landscape; the interaction between the above factors; and material assets and cultural heritage, including historical monuments".[23] "Transboundary effects" means serious effects within the jurisdiction of a Party as a result of an industrial accident occurring within the jurisdiction of another Party.[24] The Convention does not offer further guidance on how to interpret capable of causing transboundary effects.

Concerned Parties may voluntarily extend the application of the Convention by agreeing to treat an activity not covered by Annex I as a hazardous activity.[25]

3. Overlap in scope of the Espoo Convention and the Industrial Accidents Convention

From comparing the scope of the two conventions some conclusions can be drawn concerning the situations in which Article 4.4 may be used.

a) Proposed/existing activities

The Industrial Accidents Convention applies to both existing and proposed activities, whereas the Espoo Convention applies only to proposed activities

b) Transboundary effects

Both Conventions require there to be potential transboundary effects. There are two aspects to be considered here. Firstly, which boundaries are relevant. Secondly, what is the degree of transboundary effects that makes application of the conventions mandatory. As regards the first question, both conventions are concerned only with transboundary effects occurring within the jurisdiction of a Party resulting from activities carried out under the jurisdiction of another Party. Therefore effects on the environment of non-parties or on areas beyond national jurisdiction, such as the high seas, are outwith the scope of the Convention.[26] As regards the latter issue, the definition of transboundary impacts under the Espoo Convention and transboundary effects under the Industrial Accidents Convention are very similar. They both

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[23] Article 1(a)(c)

[24] Article 1(d)

[25] Article 5

26 Another question to be considered is the definition of the jurisdiction of the Party of origin. Do the conventions only apply to activities occurring within the territorial jurisdiction of the Party of origin, or extend to activities that are carried out under the jurisdiction of, but outwith the territory of the Party of origin. For example, activities carried out on the global commons affecting the environment of other Parties. See the Espoo Convention Article 1(vii) (refers to the "area" under the jurisdiction of the Party of origin - implies restriction to territorial jurisdiction) and the IA Convention Article 1(d) (IA "occurring within the jurisdiction" of party of origin). NB IA Convention excludes certain marine activities.

refer to effects on almost identical sets of environmental media (air water etc). However there are some differences in relation to the degree of effect. The criteria under the Espoo Convention is "likely to cause significant adverse transboundary impacts". The Industrial Accidents Convention requires that the hazardous activity be capable of "causing transboundary effects"and defines effects broadly as "any direct or indirect, immediate or delayed adverse consequences", but defines transboundary effects as "serious effects".

c) Types of activities

The Conventions follow opposite approaches to determining the range of activities to which they apply. The Espoo Convention contains a list in Appendix I of specific types of activities to which it applies and allows Parties to extend the scope of the Convention by treating other activities which they consider likely to cause a significant adverse transboundary impact as though they were listed. Conversely the Industrial Accidents Convention lists activities to which it does not apply. It sets a quantative standard, based on the presence of quantities of hazardous substances at threshold levels set in Annex I to determine the hazardous activities to which it applies. These different approaches make it difficult to establish when a particular activity falls within the scope of both Conventions. The very wide category "Integrated chemical installations" may cover most hazardous activities. At the 1992 workshop on methodological aspects of EIAs held in Stockholm it was suggested that six different types of chemical installations could be identified under this activity.[27] These were:

-chemical installations for the manufacture of organic chemicals intermediates or products
-all installations for the manufacture of basic inorganic chemicals
all installations for the manufacture of pharmaceuticals which include biological and chemical production
-installations for the manufacture of chemical fertilizers except for formulation or amalgamation
installations for the manufacture of chemical pesticides except for formulation or amalgamation
-installations for the manufacture of gun powder or explosives.

Guidance can also be found in the United nations International Standard Industrial Classification of All Economic Activities which lists nine classes of activities under "Manufacture of chemicals and chemical products":

-manufacture of basic chemicals, except fertilizers and nitrogen compounds;
-manufacture of fertilizers and nitrogen compounds;
-manufacture of plastics in primary forms and of synthetic rubber;
-manufacture of pesticides and other agrochemical products;
-manufacture of paints, varnishes and similar coatings, printing ink and mastics;

[27] ENVWA/WG.3/R.7, annex I.

-manufacture of pharmaceuticals, medicinal chemicals and botanical products;
-manufacture of soap and detergents, cleaning and polishing preparations, perfumes and toilet preparations;
-manufacture of other chemical products not elsewhere classified; and
-manufacture of man-made fibres.[28]

In addition to considering the various classes of activity that may be considered as chemical activities, and the question of threshold levels at which these activities may be likely to cause significant impacts, the word "integrated" must also be considered. In some ECE countries, an integrated installation is understood to be an installation or a group of installations in the same geographical location, where two or more linked chemical or physical processes are employed on an industrial scale.[29]

The Industrial Accidents Convention is intended to regulate particularly dangerous activities whereas the Espoo Convention is concerned with a much broader range of activities, and as a result a large percentage of the activities which require an EIA under the Espoo Convention will not be within the scope of the IA Convention:

-Many of the activities listed in Appendix I to the Espoo Convention do not involve hazardous substances, for example, deforestation or the construction of hazardous activities;

-Certain industrial activities within the scope of the Espoo Convention may involve the use of hazardous substances, but will not reach the thresholds levels set in Annex I of the IA Convention. For example soap production, which could be considered an integrated chemical installation would not be covered by Annex I of the IA convention as there are no hazardous substances involved in the production process; and

-Also the IA Convention specifically excludes certain activities, such as nuclear installations and dams, which are listed under the Espoo Convention.[30]

Conversely, when a proposed activity qualifies as a hazardous activity under the Industrial Accidents Convention it is most likely that it will also fall within the scope of the Espoo Convention either through being one of the types of activities listed by Appendix I or potentially through being likely to cause a significant adverse transboundary impact. The broad range of activities listed in Appendix I, including integrated chemical installations, power stations, oil refineries and storage facilities for chemicals, should result in most

[28] ENVWA/WG.3/R.13, page 2.

[29] Id at page 3.

[30] see IA Convention Article 2.

proposed hazardous activities falling within the scope of the Espoo Convention. [31]

More precise clarification of the overlap in scope of the two conventions will be possible when Parties to the Industrial Accidents Convention identify which processes qualify as hazardous activities under Annex I[32] and when Parties to the Espoo Convention define more precisely the activities which require an EIA. Depending on how broadly the Parties to the Espoo Convention define "integrated chemical installations" it is possible that virtually all proposed hazardous activities within the scope of the IA Convention would fall within the field of application of the Espoo Convention.

D/ COMPARISON OF THE EIA PROCEDURE OF THE ESPOO CONVECTION AND THE RISK ASSESSMENT PROCEDURE OF THE INDUSTRIAL ACCIDENTS CONVENTION

1. Introduction

The aim of this analysis is to identify and compare the EIA procedures of the two conventions. It is important for the operation of Article 4.4 to determine which are the relevant requirements of the IA Convention which could be fulfilled by a satisfactory EIA. To achieve this the procedures, commitments and rights which are found in both Conventions will be compared. The main aim of this analysis will be to establish whether the common elements of the two conventions are identical/ similar/ different. Such an approach may appear to be excessively legalistic/technical however it has been adopted in order to identify all possible inconsistencies between the two conventions so that the insignificant differences discarded as trivial and the more significant differences can be focused upon. It is the differences between the two conventions that could be a source of dispute between two Parties when one Party wishes to apply Article 4.4 and argues that the EIA performed pursuant to the Espoo Convention fulfilled all risk assessment requirements of the IA Convention.

When sections of the Espoo Convention were incorporated into the Industrial Accidents Convention many alterations were made to the text. Some of these alterations were made to ensure consistency with the terminology used in the rest of the Industrial Accidents Convention, and do not affect the substance of the procedures. For example rather than referring to environmental impact assessment documentation the Industrial Accidents

[31] One area where a HA may be excluded from Espoo is activities with zero normal operating emissions and a small risk of an IA capable of causing transboundary effects - could such an activity be said to be likely to cause significant adverse transboundary impacts?

[32] This will occur when the Convention enters into force and Parties are required to identify hazardous activities within their jurisdiction. In the interim the workshop on identification of hazardous activities to be held in ? , 18 - 20 september 1995 may provide some guidance.

Convention uses the term "analysis and evaluation documentation". Another example is that the Espoo Convention uses the term "affected Party" where the Industrial Accidents Convention refers to the "notified Party". However in addition to changes made to terminology changes were also made affecting the substance of the Convention. The substantive amendments made to the text during the negotiations will result in the IA Convention having provisions that are either more stringent or weaker than those of the Espoo Convention. How would this affect Article 4.4? [33]

Article 24(2) of the IA Convention states "The provisions of this Convention shall not affect the right of Parties to take, by bilateral or multilateral agreement, more stringent measures than those required by the Convention". Thus where the Espoo Convention contains more stringent commitments than the IA Convention, the performance of the Espoo Convention could fulfil the relevant requirements of the IA Convention. Conversely, where the Espoo Convention contained commitments that were narrower in scope, or less stringent than those of the IA Convention problems may arise if a Party were to perform an EIA under the Espoo Convention and then rely on Article 4.4 to waive the requirement to perform the more stringent procedures of the IA Convention.

The EIA processes of the two conventions are composed of the same procedural steps. There are thirteen separate stages of the process:

-notification
-discussions to determine whether convention applies
-content of initial notification
-response to notification
-failure to respond accepting participation in EIA
-provision of further information
-provision of information by the affected Party
-preparation and submission of the EIA documentation
-public information and participation
-consultations
-decision
-notification of decision
-subsequent additional information

2. Analysis of the elements of the EIA procedures

a) notification

Relevant provisions: Espoo Articles 2.4 and 3.1; IA Article 4.1, Annex 111.2

[33] see section D, Operation of Article 4.4 - Legal and Procedural Aspects, below.

There are four different situations in which the IA Convention requires the Party of Origin to notify Affected Parties:

> i) the Party of Origin must notify the affected Party of any proposed hazardous activities within its jurisdiction;
>
> ii) within two years of the entry into force of the Convention, the Party of Origin must notify affected Parties of existing hazardous activities within its jurisdiction;
>
> iii) Parties are required to establish industrial accident notification systems, and in the event of an industrial accident, or imminent threat thereof, the Party of origin must ensure that affected Parties are notified; and
>
> iv) after the risk assessment procedure has been carried out, the Party of origin must notify the affected Party of any decision on the activity.

In contrast, under the Espoo Convention the term notification is used in only one context - the obligation of the affected Party to notify affected Parties of a proposed activities listed in Appendix I that is likely to cause a significant adverse transboundary impact [34] - therefore the current study of the provisions on notification shall focus on this issue.

The Espoo Convention contains a general provision on notification stating that "The Party of origin shall, consistent with the provisions of this Convention, ensure that affected Parties are notified of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact".[35] The more specific rule is found in Article 3.1 which provides:

> "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".

Similarly, the IA Convention includes a general commitment to notify affected Parties of proposed and also existing activities[36] and a detailed provision which borrows some of the language of the Espoo Article quoted above. Appendix III.2 states:

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[34] Existing activities and notification of accidents are not covered by the Espoo Convention. In relation to the final decision on the activity, the Espoo Convention Article 6.2 states that the Party of origin "shall provide to the affected Party the final decision on the proposed activity". See (m) below.

[35] Espoo Convention Article 2.4

[36] IA Convention Article 4.1

"For a proposed or existing hazardous activity, the Party of origin shall, for the purposes of ensuring adequate and effective consultations, provide for the notification at appropriate levels of any Party as early as possible and no later than when informing its own public about that proposed or existing activity. For existing hazardous activities such notification shall be provided no later than two years after the entry into force of this Convention for a Party of origin."

Leaving aside for the moment the question of existing activities, the substance of the obligation for Parties of origin to notify affected Parties is expressed in nearly identical terms in the two conventions. Both state that notification is to take place "as early as possible" and both incorporate the principle of non-discrimination in the treatment of nationals of the affected Party and the Party of origin. There are however some minor differences. The Espoo convention refers to "consultations under Article 5" whereas the IA Convention refers simply to "consultations".This difference is not important as the term "consultations" is used in the same context in both conventions.[37] Perhaps more important is that the IA Convention requires Parties to "provide for the notification at appropriate levels of any Party.." and the Espoo Convention only requires Parties to "notify any Party". The IA Convention does not define what the "appropriate levels" are, and it is unclear how this corresponds to the competent authorities which each Party must designate for the purpose of the Convention.[38]

It has already been mentioned that the IA Convention applies to both existing and proposed activities. Appendix III.2 allows the Party of origin a period of two years after the entry into force of the Convention to provide notification of existing activities. Obviously before the obligation to notify can be fulfilled Parties of origin will also have to perform the identification of existing hazardous activities within its jurisdiction as required by Article 4.1.

In the Espoo Convention the relationship between the general obligation to notify and the more specific provision is clear - the one compliments the other. In contrast the two provisions of the IA Convention on notification, III.2 and 4.1, appear to lack such consistency. Article 4.1 refers to notification for the purposes of undertaking preventative measures and setting up preparedness measures, and Appendix III.2 refers to notification for the purposes of ensuring adequate and effective consultations. Can this be explained as a drafting error or are two different notifications being considered?

Conclusion: Insofar as they relate only to proposed activities, the provisions are compatible

[37] see (i) below

[38] Article 10.2, concerning notification in the event or threat of an industrial accident also refers to "notification at appropriate levels through the industrial accident notification systems". Article 17.1 states "Each Party shall designate or establish one or more competent authorities for the purposes of this Convention" and Article 17(2) provides that "each Party shall designate or establish one or more point of contact for the purpose of industrial accident notifications pursuant to Article 10". The point of contact is intended to exercise functions under the Convention only in relation to Article 10 and Article 12 (Mutual Assistance) but not for the notification of hazardous activities.

b) Discussions to determine whether the convention applies and the Inquiry Procedure

Relevant provisions: Espoo Art 3.7, Appendix IV; IA Art 4.1-2, Annex II, Annex III.1

Both conventions provide that, in the event that a Party believes it may be affected by an activity under the jurisdiction of the Party of origin but no notification has taken place, discussions must, if requested by the affected Party, be held to determine whether the Convention applies.

Article 3.7 of the Espoo Convention applies when a Party considers that it would be affected by a significant adverse transboundary impact of a proposed activity listed in Annex I and no notification has taken place. In such an event, the concerned Parties are required, at the request of the affected Party, to exchange information for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact, and therefore whether the Convention applies. If the Parties cannot reach agreement then either Party can, unless the Parties agree on another method of settling the question, submit the question of the likelihood of a significant adverse transboundary impact to an inquiry commission in accordance with the detailed rules established by Appendix IV. According to Appendix IV the inquiry commission is to be composed of three members, comprising one expert appointed by each of the two Parties to the inquiry who shall then by agreement appoint a third expert. The final opinion of the inquiry commission, which should be presented within two months of the establishment of the commission, is to reflect the view of the majority of its members and shall include any dissenting view. Although this procedure is compulsory, at the request of one of the Parties, the decision of the inquiry commission is not binding on the Parties, merely advisory. [39]

The Industrial Accidents Convention establishes in Annex II an identical Inquiry Commission procedure to that of the Espoo Convention. However although the procedure itself is the same as in the Espoo Convention, the situations in which it can be used vary. The inquiry procedure applies to questions submitted pursuant to both Article 4.2, concerning the identification of existing and proposed hazardous activities that are reasonably capable of causing transboundary effects, and to Article 5, which allows Parties to voluntarily extend the application of the Convention by treating an activity not covered by Annex I as a hazardous activity.

As discussed above, the IA Convention requires Parties of origin to identify HAs within its jurisdiction and to ensure that affected Parties are notified of these HAs. Article 4.2 provides that concerned Parties must "at the request of any such Party, enter into discussions on the identification of those hazardous activities that are, reasonably, capable of causing transboundary effects. If the Parties concerned do not agree on whether an activity is such a

[39] Article 3.7 states that the question can be submitted to the Inquiry Commission "to advise on the likelihood...".

hazardous activity, any such Party may, unless the Parties agree on another method of resolving the question, submit that question to an inquiry commission in accordance with the provisions of Annex II hereto for advice". It should be noted that under the Espoo Convention the discussions on whether the Convention applies to a particular activity can be initiated only by the affected Party whereas the inquiry procedure pursuant to Article 4.2 of the IA Convention can be initiated by either the Party of origin or the affected Party.

Under the IA Convention the inquiry commission is also available pursuant to Article 5 which allows for the Parties to agree to voluntarily extend the application of the Convention to activities not covered by Annex I. Article 5 provides that concerned Parties should, at the initiative of any one of them, enter into discussions on whether to treat an activity not covered by Annex I as a HA. In this context, resort to the inquiry commission requires the agreement of both Parties. It should be noted that the comparable provision of the Espoo Convention, which permits the Parties to enter into discussions to extend the application of the Convention to proposed activities not specifically listed in the Appendix I, does not allow for resort to the inquiry procedure. [40]

In addition to discussions on the subject of whether an activity is a hazardous activity capable of causing transboundary effects the IA Convention, in Annex III.1, provides for consultations on whether a particular Party is an affected Party. Annex III.1 provides "A Party of origin may request consultations with another Party, in accordance with paragraphs 2 to 5 of this Annex, in order to determine whether that Party is an affected Party". This provision would appear to be superfluous as any doubt over whether a Party is an affected Party would be resolved in the discussions that can be held pursuant to Article 4.2 to determine if the activity is capable of causing transboundary effects.[41]

Why have a separate paragraph on consultations to determine whether a Party is an affected Party?. An "affected Party" is defined as meaning "any Party or Parties affected or capable of being affected by transboundary effects of an industrial accident".[42] The discussions that can

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[40] See Espoo Convention Article 2.5. The significance of this difference between the two conventions is lessened by the condition in Article 5 that resort to the inquiry commission is dependent on the mutual consent of both Parties.

[41] Annex III.1 has other anomalies. eg why can the consultations be initiated only by the Party of origin?; why does it refer to consultations in accordance with Annex III.2-5 rather than using the inquiry procedure? One possible explanation for III.1 is that it allows the Party of origin to go beyond what is required by the Convention. Where there is an activity with chemicals present at levels below the threshold at which would qualify it as a HA, the Party of origin may still have concerns that the activity under its jurisdiction could nevertheless, in the event of an IA, cause transboundary effects. Thus Annex III.1 allows the Party of origin to notify Parties that it is concerned may be affected Parties. The problem with this interpretation is (a) that it duplicates Article 5 on voluntary extension and (b) It should not be located in Annex III (as the Annex applies only to hazardous activities, see Article 4.3).

[42] Article 1(i)

be held under Article 4.2 on whether an activity is a HA reasonably capable of causing transboundary effects, and the available inquiry procedure would seem sufficient to resolve any doubt over whether a particular Party was an affected Party or not.

Conclusions:

-Annex III.1 is superfluous

-The main problem is that although the procedures to be followed for discussions to determine whether the convention applies to the activity in question are very similar, the criteria used to assess whether an activity is within the scope of each convention are different. In relation to Article 4.4 the issue is whether discussions held between Parties to determine whether an activity fell within the scope of the Espoo Convention could be relied on to waive the requirement to repeat those discussions under the IA Convention. In other words, can Articles 4.2 and 5 of the IA Convention can be considered as "relevant requirements" which could be fulfilled by performance of the Espoo Convention? As the scope of the Espoo Convention is much broader than the IA Convention, and that there is still uncertainty over the extent of the overlap,[43] it would seem unwise to allow an agreement that an activity was within the scope of the Espoo Convention to determine that the IA Convention also applied.

(NB distinguish discussions over whether an activity is a HA from discussions concerning possible transboundary effects. Any discussions/inquiry under the Espoo Convention on whether the activity was likely to cause significant adverse transboundary effects may have taken into consideration the risks of transboundary effects in the event of an industrial accident, and in that case could be relevant.)

-No Inquiry Commission applies to voluntary extension under the Espoo Convention.

c) Content of initial notification

Relevant provisions: Espoo Art 3.2; IA Annex 111.3

Article 3.2 of the Espoo Convention and Annex III.3 of the IA Convention contain a non-exhaustive list of the information that the Party of origin must provide when the affected Party. Both conventions require information to be supplied on the activity and its possible transboundary effects, and an indication of a reasonable time within which a response to the notification is required from the affected Party.

The IA Convention goes beyond the Espoo Convention by providing that the information on the hazardous activity on its possible transboundary effects in the event of an industrial

[43] see the discussion on the overlap in the scope of the conventions, section B above.

accident to be included in the notification may include "information produced in accordance with Article 6...". Article 6.1 requires Parties to take measures to induce action by operators to reduce the risk of IAs . These measures may include the nine preventative measures specified in Annex IV.[44] Article 6.2 provides that the Party of origin shall require the operator of a HA to demonstrate the safe performance of the HA by the provision of information such as basic details of the process, including but not limited to, analysis and evaluation as detailed in Annex V.[45] Was it intended that such extensive information- covering all preventative measures and the evaluation documentation- be supplied at the notification stage, before the affected Party has indicated whether it wishes to participate? Furthermore, if this information is to be transmitted at this early stage, how could the affected Party be allowed to participate in the evaluations of information (as required by Annex III.6(c)) when the information is prepared before it has been notified?

The other main difference between the two provisions is that the Espoo Convention also requires information to be given concerning the nature of the possible decision. Other discrepancies in the text of the two provisions relate to terminology (proposed activity/hazardous activity) and the Espoo Convention refers twice to the optional provision of more detailed information, whereas there is only one such reference in Article 3.2 of the Espoo Convention.

Conclusion: Apart from the reference to in the IA Convention to the provision of information produced in accordance with Article 6 the provisions are compatible. It is possible that this allowance for the provision of extra information, beyond the requirements of the Espoo Convention, would not pose an obstacle to the operation of Article 4.4 as it is an option rather than a requirement. However it is surprising that the IA Convention should allow for the provision of very detailed information at such an early stage of the process, and it is unclear the affected Party could have participated in the preparation of this information, as required by the Convention, if it had not been notified. In the interests of clarifying the Convention and allowing the participation of the affected Party in the preparation of the analysis and evaluation, the Parties may wish to consider deleting the reference to "such as information produced in accordance with Article 6" in Annex III.3(a).

d) response to notification

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[44] The preventative measures listed in Annex IV are the setting of safety objectives; adoption of legislation/guidelines concerning safety measures; identification of those HAs which require special preventative measures; the evaluation of risk analyses and an action plan for the implementation of necessary measures; provision to the competent authorities of the measures
needed to assess risk; the application of the most applicable technology in order to prevent IAs; education and training of all persons engaged in HAs; establishment of managerial structures and practices to implement and maintain safety regulations effectively; the monitoring and auditing of HAS and the carrying out of inspections.

[45] see (h) below.

Relevant provisions: Espoo Art 3.3; IA Annex 111.4

These provisions are virtually identical stating that the notified/affected Party shall respond to the Party of origin within the time specified in the notification, acknowledging receipt of the notification and indicating whether they/it intend to participate in the assessment procedure. There are differences of terminology: The IA Convention refers to the plural "notified Parties" and "enter into consultations" whereas the Espoo Convention refers to "the affected Party" and "participate in the environmental impact procedure".[46] The sole substantive difference arises from the distinction between "indicating", in the IA Convention, and "shall indicate" in the Espoo convention. The former would require that the indication of intent to enter into consultations be given in conjunction with the notification, and the latter implies that the indication could take place either at the same time, or subsequent to, the notification.

Conclusion:compatible

e) failure to respond accepting participation in EIA

Relevant provisions: Espoo Art 3.4; IA Annex 111.5

Both conventions provide for the non-application of rest of the assessment procedure where the notified Party has either failed to respond, or has replied declining to participate in the procedure. There are no substantive differences between the two conventions only variations of terminology and reference.

Conclusion: Compatible

f) provision of further information

Relevant provisions: Espoo Art 3.5; IA Annex III.5

If the affected Party responds indicating that it intends to participate in the EIA procedure the Party of origin must then provide further information. Under the Espoo convention this includes "(a) relevant information regarding the environmental impact assessment procedure, including an indication of the time schedule for the transmittal of comments; and (b) relevant information on the proposed activity and its possible significant adverse transboundary impacts". Both of these requirements are incorporated into the IA Convention with changes

[46] The Espoo Convention defines "affected Party" as the "Contracting Party or Parties..." therefore the difference between the singular affected Party in the Espoo Convention and the plural notified Parties in the IA Convention is not important. It is unclear why the IA Convention uses the term "affected Party" in some contexts and "notified Party" in others.

of terminology.[47] However Annex III.6(c) of the IA Convention contains a further requirement not found in Article 3.5 of the Espoo Convention: The Party of origin must provide the notified Party with the opportunity to participate in evaluations of the information or any report demonstrating possible transboundary effects. It is unclear why in a clause on the subject of the provision of information, the IA Convention provides for participation of the affected Party in the evaluations of the information. Such participation would be covered by Annex III.9 requires the Parties to ensure that the public and the authorities of the affected Party have an opportunity for making comments on or objections to the hazardous activity.

Conclusion: compatible, except for extra clause (c) in IA on participation in evaluations of the information. However this extra clause would appear to merely duplicate the public participation provisions found in the IA Convention and the Espoo Convention, and does not add anything to the IA risk assessment procedure. Another possible interpretation could be that Annex III.6(c) goes beyond the public participation provision in Annex III.9, which provides only that the affected Party is to have the right to make objections, by requiring that the affected Party is ti have the right to participate in the evaluation process.

g) Provision of information by the affected/notified Party

Relevant provisions: Espoo Art 3.6; IA Annex 111.7

The affected Parties must, if requested by the Party of origin, provide the Party of origin with the information that is necessary to prepare the EIA relating to the area under its jurisdiction which could be affected by the activity. The only differences between the two provisions are that the Espoo Convention refers to information relating to "the potentially affected environment under the jurisdiction of the affected Party" whereas the IA Convention refers to "information relating to the area under the jurisdiction of the affected Party capable of being affected", and again there is the reference to EIA documentation in contrast to "assessment and analysis and measures".

Conclusion: compatible, minor differences of terminology.

h) preparation and submission of the EIA documentation

Relevant provisions: Espoo Article 4, Appendix II; IA Annex III.8, Annex V

The requirements relating to the preparation and submission of the EIA documentation under the Espoo Convention and of the analysis and evaluation under the Industrial Accidents Convention contain significant differences both in the main provision and in the detailed

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[47] For example "analysis" rather than EIA procedure; "transboundary effects in the event of an industrial accident" instead of possible significant adverse transboundary impact".

requirements for the content of the documentation.

Article 4.1 of the Espoo Convention states that "The environmental impact documentation to be submitted to the competent authority of the Party of origin shall contain, as a minimum, the information described in Annex II". Appendix II contains a list of nine items: (a) A description of the proposed activity and its purpose, (b) A description, where appropriate, of reasonable alternatives 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 an estimation of its significance: (e) A description of the mitigation measures to keep adverse environmental impacts to a minimum; (f) An indication of the methods 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:

Paragraph 8 of Annex III of the IA Convention requires the Party of origin to "furnish the affected Party directly, as appropriate, or, where one exists, through a joint body with the analysis and evaluation documentation as described in Annex V, paragraphs 1 and 2". The first difference between this provision and Article 4.1 of the Espoo Convention is that it allows for the submission of the documentation via a joint body. the second difference is that the contents of the EIA documentation under the Espoo Convention are a minimum standard. These differences would not be obstacles to the operation of Article 4.4, as the first is only permissive and as in the second case the Espoo Convention imposes more stringent standards than the IA Convention.

The depth and scope of the analysis and evaluation of hazardous activities required under the IA Convention varies according to the purpose of the analysis.[48] Annex V differentiated between analysis for the purpose of emergency planning under Article 8, decision-making on siting under article 7, information to the public under Article 9 and preventative measures under Article 6. In relation to each of these categories the Annex list specific matters which are to be considered in the analysis and evaluation. In relation to the risk assessment procedure Annex III.8 does not specify that only certain elements of the analysis and evaluation are to be submitted therefore it is to be presumed that all the categories in Annex V are to be considered. Annex V.2 provides that the table contained in the Annex "illustrates...matters which should be considered in the analysis and evaluation". This wording indicates that Annex V offers illustrative guidance rather than mandatory requirements for the content of the analysis and evaluation, and that it will be for the Party of origin to use its discretion. Annex V matters to be considered include: the hazardous substances on site; scenarios of possible accidents, including for each scenario the quantity of a release, the severity of the resulting consequences for people and the environment, the time scale of any accident; the size and distribution of the population in the vicinity; the susceptibility of that

[48] Appendix V.1

population; the severity of the harm; the distance from the location of the HA at which harmful effects on people and the environment may reasonably occur in the event of an IA.

Conclusion: The different requirements for the content of the assessment documentation in the two conventions could pose problems if Article 4.4 was used. One of the conditions for the use of Article 4.4 is that the EIA of the hazardous activity must include an evaluation of the transboundary effects of industrial accidents from the hazardous activity which is performed in conformity with the terms of the IA Convention. For this condition to be fulfilled the EIA documentation would have to include the matters to be considered under Annex V of the IA Convention.

There are two possible solutions to this problem. One course of action would be to interpret the IA Convention Annex V table of contents as illustrative guidelines which are not binding on the Parties, therefore the EIA of the hazardous activity could include only the elements required under the Espoo convention, without breaching the terms of the IA Convention. The disadvantage of this solution is that it could greatly reduce the effectiveness of the IA Convention. A preferable solution, which would enable the aims of both conventions to be fulfilled, would be to combine the matters listed in Annex V of the IA Convention with the required contents of the Espoo EIA to produce a single EIA document.The required contents of the Espoo EIA are a minimum standard and thus could be expanded beyond this minimum to include the matters to be considered in the IA Convention analysis and evaluation.

i) public information and participation

Relevant provisions: Espoo Art 2.6 3.8 and 4.2; IA Annex 111.9 Article 9

The IA Convention is, in general, concerned with environmental risks of a more serious nature than the Espoo Convention, therefore it imposes duties upon Parties to provide information to the public and to allow for public participation that are more stringent than those of the Espoo Convention. Furthermore, the IA Convention also goes beyond the Espoo Convention by requiring Parties to provide the public of the affected Party with the same rights of access to administrative and judicial proceedings as exist for its own nationals.

There is a general provision on public participation in Article 2.6 of the Espoo convention requiring Parties of origin to provide an opportunity to the public in the area likely to be affected to participate in relevant EIA procedures regarding proposed activities. The Convention implements the principle of non-discrimination requiring the Party of origin to ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin. The more specific commitments are found in Articles 3.8 and 4.2. which provide for public participation prior to the preparation of the EIA AND also after the EIA has been prepared. Article 3.8 requires concerned Parties (ie both the Party of origin and the affected Party) to "ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with the possibilities for making

comments or objections on, the proposed activity and or the transmittal of these comments or objections to the competent authority of the Party of origin...". There are three elements of this provision - inform, allow to object and transmit comments. Once the EIA documentation has been prepared and submitted to the affected Party the concerned Parties must, according to Article 4.2, "arrange for the distribution of the documentation to the authorities and the public of the affected party in the areas likely to be affected and for the submission of comments to the competent authority of the Party of origin...within a reasonable time before the final decision is taken on the proposed activity".

The IA Convention contains provisions on public participation and public information in Annex III and also in Article 9. Whilst the Espoo Convention refers to "the public of the affected Party", Annex III.9 of the IA Convention refers to the "public in areas reasonably capable of being affected by the transboundary activity" and would therefore appear to apply to the public both in the Party of origin and the affected Party. Concerned Parties are required to "inform the public" however the Convention does not specify what it is that the public must be informed of. Concerned Parties are also to "arrange for the distribution of the analysis and evaluation documentation to [the public] and the authorities in the relevant areas" and to "ensure them an opportunity for making comments on, or objections to, the hazardous activity and shall arrange for their views to be submitted to the competent authority of the Party of origin...within a reasonable time".

In the Espoo Convention it is clear that the public is to be informed of the activity, and given the opportunity to comment prior to the EIA being prepared, thus creating the possibility that their comments may be taken into account in the preparation of the EIA. However, it would appear from Annex III.9 above that in the IA Convention the public need not be informed until the analysis and evaluation has been completed. The issue of at what stage in the process the public are to be involved is not clarified by the reference to public participation "whenever possible and appropriate" in Article 9.2 discussed below.

Article 9 contains three paragraphs on public information, public participation and equal access to judicial proceedings, however there is some ambiguity concerning which procedures these provisions are intended to apply to. Certain parts may apply to the risk assessment procedure and others are concerned with the post-EIA phase - involving the public in areas near operating hazardous activities in contingency plans and emergency preparedness measures.

Article 9.1 on public information appears to apply to emergency preparedness and contingency plans. Article 9.1 of the IA Convention states that "Parties shall ensure that adequate information is given to the public in the areas capable of being affected by an industrial accident arising out of a hazardous activity". This information must include the matters specified in Annex VII such as an explanation of the hazardous activity and its risks, the substances involved in the dangerous activity and their dangerous characteristics, relevant information resulting from an EIA, the nature of a possible industrial accident and its potential effects on the population and the environment, information on how the affected

population will be informed and the actions they should take in the event of an industrial accident, and general information. Moreover the information to be given to the public should also "take into account" certain matters set out in Annex V.[49]

The text of Article 9.2, which is concerned with public participation, is taken from the general provision in Article 2.6 of the Espoo Convention. Minor changes have been made to the language such as referring to "relevant procedures" rather than "relevant EIA procedures" and capable of being affected" instead of "likely to be affected". Also two new clauses have been inserted into the text. The requirement to provide the public with the opportunity to participate in relevant procedures is qualified by being "whenever possible and appropriate" and "with the aim of making known its views and concerns on prevention and preparedness measures". The references to "relevant procedures", "whenever possible" and that prevention measures are a part of the analysis and evaluation[50] imply that Article 9.2 applies to public participation in the risk assessment procedure.

In addition to provisions on public information and public participation the IA Convention provides for what is commonly known as "access to justice". Article 9.3 states "The Parties shall, in accordance with their legal systems and, if desired, on a reciprocal basis provide natural or legal persons who are capable of being adversely affected by the transboundary effects of an industrial accident in the territory of a Party, with access to, and treatment in the relevant administrative and judicial proceedings, including the possibility to start a legal action and appealing a decision affecting their rights, equivalent to persons within their own jurisdiction".[51] This provision could apply to decisions taken in the risk assessment procedure, such as the decision to authorize a proposed activity.

Both conventions contain provisions permitting the limitation of the supply of information, for example the Espoo convention provides in Article 2.8 that "The 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". The grounds on which the provision of information can be restricted are quite road and by leaving the issue to be determined by national law the Convention leaves a wide discretion to Parties. This could hinder the effectiveness of commitments to supply information to concerned Parties and the public. The text of the Espoo Convention was incorporated into Article 22(1) of the second draft of the IA Convention with an additional paragraph stating that "The Party receiving such protected information, as referred to in paragraph 1 of this Article, shall respect the confidentiality of the information received and the conditions under which it was supplied, and shall only use that information for the purpose for which it was supplied". However, at

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[49] Specifically, the matters specified in Annex V.2 (1-4,9).

[50] IA Convention Annex V.2(14).

[51] This issue is discussed in greater detail at (m) below

the fifth negotiating session amendments were made to Article 22(1) that serves to limit the degree of national discretion. The amended text refers not only to the rights of Parties but also to their obligations, and adds, after "in accordance with.." the phrase "accepted international regulations". Also two categories of information which could be protected were added - information relating to personal data and commercial secrecy was clarified as including intellectual property.

Conclusions: There are several important differences between the two conventions on the question of public information and participation:

1) Under the Espoo Convention it is clear that the public is to be informed, and given the opportunity to comment, prior to the EIA being prepared, and then once the EIA has been prepared they have the opportunity to make comments on or objections to the EIA. In the IA Convention procedure the issue of at what stage the public is to be involved is less clear. In this case The Espoo Convention would appear to impose commitments that are more stringent than the IA Convention and therefore Article 24(2) would apply.

2) Article 9.1 and the related Annexes contain much more detailed requirements for the provision of information to the public than are found in the Espoo Convention. However Article 9.1 is not a part of the risk assessment procedure and therefore could not be considered as one of the relevant requirements referred to in Article 4.4 the performance of which could be waived by a satisfactory EIA under the Espoo Convention.

3) The provision in the IA Convention on access to justice, has no parallel in the Espoo Convention.[52]

4) Appendix III.9 of the IA Convention requires that the public in areas capable of being affected, without distinction between the public of the affected Party and the Party of origin,shall be informed of the Hazardous Activity, have the analysis and evaluation distributed to it, and the right to make comments. The provisions of the Espoo Convention on public information and public participation apply only to the public of the affected Party. However other provisions of the Espoo Convention may imply that the rules apply internally to the public of the Party of origin.[53]

j) Consultations on the basis of the documentation

Relevant provisions: Espoo Art 5; IA Annex 111.10

After the EIA documentation has been prepared and transmitted to the affected Party

[52] For further discussion see section (k) below.

[53] Article 1(vi) defines EIA as a "national procedure".

consultations are to be held between the affected Party and the Party of origin on the subject of possible transboundary impacts of the activity. The subject matter for discussion in the consultations is left open to the Parties, the conventions only gives guidance on possible topics. The commitments imposed on the Party of origin in Article 5 of the Espoo convention and in Annex III.10 of the IA Convention to enter into consultations after the completion of the documentation phase are phrased in similar language. The Espoo Convention provides that the Party of origin must "enter into consultations with the affected Party concerning, *inter alia*, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact". The only difference in the IA Convention provision is that the latter refers to consultations concerning "the transboundary effects of the hazardous activity in the event of an industrial accident". The provisions go on to specify in greater detail possible subject matter for the consultations and here the two conventions are identical apart from paragraph (a) which in the Espoo Convention includes a reference to the monitoring of the effects of mitigation measures. This would not pose problems for the operation of Article 4.4 as firstly, it relates to optional matters which may be the subject for consultations, and secondly, in any case the provision of the Espoo Convention is more stringent than that of the IA Convention.[54]

Conclusion: compatible

N.B. One problem arising from the borrowing of the Espoo text for the risk assessment procedure of the IA Convention is that the former is drafted for only proposed activities whilst the latter treaty is concerned with both proposed and existing activities. As a result certain provisions of the IA Convention appear incongruous when applied in the context of existing activities. For example, Annex III.10 states that consultations may relate to the "No-action alternative". Also, Annex III.10 could specifically refer to consultations on prevention measures and emergency preparedness measures. Perhaps amendment of Annex III.10 should be considered so that it takes into account the specific circumstances of the IA Convention.

k) Due account obligation

Relevant provisions: Espoo Art 6.1; IA Annex 111.11

Article 6.1 of the Espoo Convention states that "The Parties shall ensure that, in the final decision on the proposed activity, due account is taken of the outcome.." the EIA, the EIA documentation, and also the comments received from the public and the authorities of the affected Parties and the outcome of the consultations. Similarly, the IA Convention require that the Parties ensure that due account is taken of the analysis and evaluation. The main difference between the provisions of the two conventions is that the Espoo convention refers to due account being taken "in the final decision on the proposed activity" however as there is

[54] see Ia Convention Article 24(2) on more stringent measures.

not necessarily a decision-taking process under the IA Convention (eg for existing activities) no such reference to a final decision is made.

Conclusion: compatible

Neither convention expressly provide for the situation where Party of origin fails to take due account of the EIA and the views of the affected Party and its public. If an EIA has demonstrated that a proposed activity is likely to cause a significant adverse transboundary impact, but the Party of origin allows that activity to proceed regardless, causing environmental damage in the affected Party, then there is certainly the possibility of an action being brought under customary international law. [55]It is widely accepted that there exists an obligation under international law to prevent significant damage to the environment of other states or to areas beyond national jurisdiction and that if a violation of this rule occurs, any state which has as a result suffered harm may bring an action for state liability for environmental damage.[56] Such actions can only provide compensation for environmental damage after it has occurred and do not prevent the harm occurring in the first place.

National EIA procedures sometimes allow for appeals to be made against the decision to allow the activity to proceed. It is desirable to have such a preventative remedy that could apply to EIAs in a transboundary context, allowing the affected Party to challenge the decision to proceed with the activity. This could operate at either the national court level, and/or the international level.

NATIONAL COURTS

The access to justice provisions of the Industrial Accidents Convention explicitly refers to the Parties providing persons in the territory who are capable of being adversely affected by the transboundary effects of an industrial accident "the possibilities of starting a legal action and appealing a decision affecting their rights, equivalent to those available to persons within their own jurisdiction".[57] It has already been mentioned that the Espoo Convention does not contain a parallel provision however where a Party allows its own citizens to bring legal proceedings to appeal against an EIA decision, the Espoo provisions on non-discrimination in public participation may require that the Party extends such rights to the citizens of the affected Party.

When an activity is subject to both Conventions, and Article 4.4 is applied so that only the

[55] eg Trail Smelter Case, 16 April 1938.

[56] see P. Sands, Principles of International Environmental Law 1994 p186-94. However very few such cases are ever brought because of various factors such as the problem of proving causation, non-acceptance of the jurisdiction of the ICJ, time consuming nature of international cases, and the resulting friction in interstate relations.

[57] Article 9.3. See (i) above.

Espoo EIA needs to be performed, does Article 9.3 apply to the final decision under the Espoo Convention?

INTERNATIONAL COURTS

The possibility of bringing an action at the International Court of Justice(ICJ) for transboundary environmental damage exists but remedies are normally compensatory rather than preventive.. The questions of whether EIAs in a transboundary context are a requirement of customary international law and what the consequent remedies would be, has not been resolved. A interesting development in this regard is the request for provisional measures by New Zealand to the ICJ in relation to the proposed French nuclear tests to be carried out at the Murora Atoll in the South Pacific.[58] New Zealand has asked the Court to declare that:

> "(i) that the conduct of the proposed tests will constitute a violation of the rights under international law of New zealand, as well as of other States;" and/or
>
> "(ii) that it is unlawful for France to conduct such nuclear tests before it has undertaken an Environmental Impact Assessment according to accepted international standards. Unless such an assessment establishes that the tests will not give rise, directly or indirectly, to radioactive contamination of the marine environment the rights under international law of New Zealand, as well as the rights of other states, will be violated."

Furthermore New Zealand has requested that the ICJ grant provisional measures including that France undertake an EIA of the proposed nuclear tests according to accepted international standards and that, unless the assessment establishes that the tests will not give rise to radioactive contamination of the marine environment, France refrain from conducting the tests.

If the Court pronounces on these issues it will hopefully clarify whether EIAs are required as a matter of customary international law, therefore binding on all states, and what preventative remedies are available where the EIA demonstrates transboundary impacts. Interestingly the New Zealand application places the burden of proof on France to show that no harm will occur, rather than having the potentially affected state having to prove it could be adversely affected.

"Accepted international standards" of EIA will of course include the Espoo Convention and many other instruments the most important of which may be the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (The

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[58] ICJ Press Release No. 95/22, 21 August 1995, New Zealand submits to the Court a Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's 1974 Judgement in the Nuclear Tests Case (New Zealand v France).

Noumea Convention).[59] Both France and New Zealand are Parties to this regional seas convention which contains a general provision on EIA.[60]

l) Notification of decision

Relevant provisions: Espoo Art 6.2; IA Annex 111.12

According to Article 6.2 of the Espoo Convention the Party of origin must provide to the affected Party the final decision on the proposed activity along with the reasons and considerations on which it was based. In a similar fashion the IA Convention requires that the Party of origin notifies the affected party of any decision on the activity.

Conclusion: compatible

m) Subsequent additional information

Relevant provisions: Espoo Art 6.3; IA Annex 111.13

These provisions relate to consultations being reopened, if requested, where additional information concerning the transboundary effects of the activity subsequently becomes available. There are several differences between Article 6.3 of the Espoo Convention and Annex III.14 of the IA Convention. One problem could be the limits on the time at which the information that can trigger new consultations becomes available. The Espoo Convention refers to information that was not available at the time of the decision which becomes available to a concerned Party before work on the activity commences, whereas the IA refers to information not available at the time of consultations and does not place an end limit. Thus under the IA Convention the time period begins at an earlier stage (consultations take place prior to the decision) and is open-ended. Less important differences are that the Espoo Convention refers to information which could have materially affected the decision and the IA refers only to relevant information, and the Espoo Convention states that consultations shall be held on whether the decision need to be revised whilst the IA Convention refers only to renewed consultations.

Conclusion: The question of at what time information becomes available may not seem appear very significant however it does create the potential for disputes between Parties.

[59] Adopted 25 November 1986, in force 29 January 1987; reprinted in 26 I.L.M. (1987), 38.

[60] Article 16.

E/ THE OPERATION OF ARTICLE 4.4
- LEGAL AND PROCEDURAL ASPECTS

One of the conditions for the waiving of the risk assessment procedure of the IA Convention pursuant to Article 4.4 is that the EIA of the hazardous activity is both in accordance with the Espoo Convention and includes an evaluation of the transboundary effects of industrial accidents which is performed in conformity with the terms of the IA Convention. In other words the EIA must comply with both conventions. The above comparison of the EIA procedure of the Espoo Convention and the risk assessment procedure of the IA Convention has shown that most elements of the EIA process of the two conventions are compatible and therefore would pose no barriers to the operation of Article 4.4. Many of the differences between the procedures did not affect the compatibility of the two conventions because:

-they were only differences of terminology and did not change the substance of the procedures; or

-the difference between the procedures related to an optional matter which the Parties are not bound to comply with; or

-the provisions of the Espoo Convention were more stringent than those of the IA Convention. In such cases, there is no barrier to the waiving of the performance of the requirements of the IA Convention as the EIA performed pursuant to the Espoo Convention would fulfil those requirements.[61]

Other differences between the two conventions, in particular where the IA Convention imposes requirements that are more stringent than the Espoo Convention, cannot be so easily dismissed. Where the procedures of the IA Convention go beyond those of the Espoo Convention, for example by setting higher standards for public participation, or more detailed lists of matters to be considered in the EIA, there may be problems for the operation of Article 4.4. The EIA performed in accordance with the Espoo Convention would fall short of the requirements of the IA Convention, and would therefore not be "performed in accordance with the terms of" the IA Convention as required by Article 4.4. Moreover, in such cases the waiving of the performance of the risk assessment procedure of the IA Convention could also prejudice the enjoyment of the rights of the affected Parties under the IA Convention.[62] The

[61] See Article 24(2) discussed above in introduction to section C.

[62] The Industrial Accidents Convention creates rights for affected Parties, such as the right to receive the analysis and evaluation documentation and to participate in evaluations of that documentation. Where a Party of origin relies upon Article 4.4 to waive the requirement of performing the "relevant requirements" of the IA Convention this cannot prejudice the enjoyment by the affected Party of its rights under the IA Convention. In some cases these rights are more expansive than the parallel rights that exist under the Espoo Convention, and in these instances the enjoyment by the affected Parties of its rights under the IA Convention would be prejudiced if the Party of origin applied only the procedures of the Espoo convention.

elements of the EIA procedure that fall into this category are:

-Consultations to determine whether the Convention applies (b) above;

-The participation of the affected Party in evaluations of the report demonstrating transboundary effects (f);

-Content of the ElA/the evaluation documentation (h);

-Public information and public participation (i). In particular the issues of the application to the public of the party of origin; equal access to justice; grounds on which release of information can be restricted; and

-Subsequent additional information (m).

For a couple of elements of the EIA procedure there was uncertainty over whether the two conventions were compatible, these matters MAY fall within the above category:

-content of initial notification(c); and

-provision of further information (public participation) (f).

The following example illustrates how apparently minor differences between the procedures of the conventions could create considerable potential for disputes if Article 4.4 was used.

Two neighbouring states, X and Y, are Parties to both conventions. There was a proposal to build a chemical plant in state X close to the frontier with state Y. An EIA was carried out in accordance with the Espoo Convention, and consultations were held with state Y on possible transboudary impacts. State X took into account the views of state Y expressed in the consultations but decided to authorise the construction of the plant. The plant is also a hazardous activity within the scope of the IA Convention, however Article 4.4 is applied waiving the requirement to perform the risk assessment pursuant to the IA Convention. What is the situation where state Y wishes to hold new consultations because, for example, either during construction new scientific evidence reveals a greater likelihood of adverse impacts, or, after the plant begins to operate state Y experiences significant adverse impacts. State X could rely on Article 6.3 of the Espoo Convention and claim that as the information became available after work on the activity had commenced it was not obliged to enter into new consultations. State Y on the other hand might argue that under Annex III.9 of the IA Convention it was entitled to request that renewed consultations be held and that state X must

participate in good faith.[63]

To ensure the smooth operation of Article 4.4 and prevent such disputes from arising, procedures to accommodate the differences in the EIA requirements of the two conventions will be considered.

1. Harmonisation of the EIA Procedure of the Espoo Convention and the Risk Assessment Procedure of the IA Convention

In order to satisfy the requirements of both the Espoo Convention and the Industrial Accidents Convention it may be necessary to devise a single EIA procedure that complied with both Conventions. The simplest way to do this would be to identify the elements of the risk assessment procedure of the IA Convention that go beyond the Espoo EIA procedure and then combine these extra elements with the Espoo procedure. A set of guidelines could be elaborated, for consideration by the Conference of the Parties to the IA Convention, on additional elements that would need to be included in the EIA procedure when applying the Espoo Convention to a hazardous activity, in order to create a harmonized EIA procedure that could conform with the requirements of both Conventions. Thus when Parties to the IA Convention wished to take advantage of Article 4.4 they could use the harmonized procedure set out in the guidelines. Such a set of guidelines could also contain (i) advice on when an activity is likely to be within the scope of both conventions; and (ii) specify which provisions of the IA can be counted as "relevant requirements" which can be waived by satisfactory performance of the Espoo Convention. Such a harmonised procedure has several advantages:

i) It would create a single EIA procedure that was in conformity with both conventions (one of the conditions for use of Article 4.4).

ii) Where a Party applied Article 4.4 and performed only the Espoo EIA procedure there would be a potential for disputes as affected Parties could argue that the EIA did not comply with the requirements of the IA Convention. The use of a harmonised procedure could prevent such disputes.

2. Alternatives

What other solutions are there for the operation of Article 4.4 apart from the harmonisation approach?

-The Party of origin could perform an EIA of the hazardous activity in accordance with the

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[63] There are two relevant rules of the law of treaties that could help resolve such a dispute: (1) the waiving performance of the requirements of the IA Convention cannot affect the enjoyment by other Parties of their rights under the treaty (NB would consent to Article 4.4 waive such rights?); and (2) where two treaties apply to the same subject matter the later treaty prevails.

Espoo Convention, without taking into account the differences with the risk assessment procedure of the IA Convention, and apply Article 4.4. This would involve interpreting Article 4.4 flexibly so that an EIA carried out in accordance with the Espoo Convention that gave some consideration to transboundary effects in the event of an industrial accident, but did not fully comply with the requirements of the IA Convention, would satisfy Article 4.4.There are some problems with this approach - this could weaken the effectiveness of the IA Convention as it would not be fully implemented; and there is potential for disputes over the Party of origin had complied with Article 4.4.

-The Party of origin and the affected Party could enter into a bilateral agreement govèrning the operation of Article 4.4. Such an agreement could specify which assessment procedure was to be followed and which elements of the risk assessment procedure of the IA Convention could be regarded as "relevant requirements" which could be fulfilled by the Espoo EIA.

- The Party of origin could perform an EIA of the hazardous activity in accordance with the Espoo Convention and then apply Article 4.4. Interpret Article 4.4 strictly - so that only requirements that are compatible could constitute "relevant requirements" that could be waived. Problem - difficult to apply.

-Amendment of the Convention to harmonise the procedures - could result in reopening negotiations on other issues.

F/ CONCLUSIONS

There is a broad overlap in the scope of the IA Convention and the Espoo convention and it is probable that most, or perhaps even all (depending on future clarification of the listed activities in the Espoo Convention), proposed hazardous activities that are within the scope of the IA Convention will also be subject to the Espoo Convention. Therefore normally for a proposed hazardous activity a Party of origin that is party to both Conventions will be under an obligation to perform both the EIA pursuant to the Espoo Convention and the risk assessment in accordance with the IA Convention for the same activity. The mechanism in Article 4.4 could prove to very helpful in avoiding duplication and assisting in the implementation of the IA Convention.

This report has identified a number of areas of the assessment procedure in which the provisions of the IA Convention go beyond what is required in the Espoo Convention, and which could therefore pose problems of non-compliance with the IA Convention if a Party of origin was to apply only the Espoo EIA procedure and use Article 4,4 to waive the requirement to perform the risk assessment procedure. In order to accommodate the differences between the procedures of the two conventions, to avoid disputes in the operation of Article 4.4, and to ensure that the objectives of the IA Convention are fulfilled, it is recommended a harmonised assessment procedure that complied with the requirements of both

conventions be devised. This could be done by identifying the elements of the IA risk assessment procedure that are more stringent than those of the Espoo Convention, and then adding these extra elements to the EIA procedure of the Espoo Convention in order to create a single procedure that met the requirements of both conventions. The Parties to the IA Convention may wish to consider the elaboration of such a harmonised EIA procedure in a set of guidelines for the operation of Article 4.4. Such a set of guidelines could also specify in which activities were within the scope of both conventions, and which elements of the risk assessment procedure were "relevant requirements" the performance of which could be fulfilled by an EIA

Annex I: The Law of Treaties

The waiving of the performance of commitments under one Convention by the performance of commitments under another convention is not explicitly covered by the 1969 Vienna Convention on the Law of Treaties[64] (the Vienna Convention) however it contains several provisions that could be of some relevance. Foremost amongst these potentially relevant rules of the Law of Treaties are those governing the suspension of the operation of a treaty.[65] It

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[64] Vienna Convention on the Law of Treaties, adopted 23/5/1969

[65]Article 57 - *Suspension of the operation of a treaty under its provisions or by the consent of the Parties:*
"The operation of a treaty under its provisions or by consent of the parties or to a particular party may be suspended:
(a) in conformity with the provisions of the treaty; or
(b) at any time by the consent of all the parties after consultation with the other contracting States."

Article 58 - *Suspension of the operation of a multilateral treaty by agreement between certain of the parties only:*
"1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:
(a) the possibility of a suspension is provided for by the treaty; or
(b) the suspension in question is not prohibited by the treaty and:
(i) does not affect the enjoyment by other parties of their rights under the treaty or the performance of their obligations;
(ii) is not incompatible with the object and purpose of the treaty.
2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend."

Article 65 - *Procedure to be followed with respect to....suspension of the operation of a treaty:*
1. Must notify other Parties of suspension.
2. If no objections may carry out suspension.

will be necessary to consider whether the operation of Article 4.4 on the IA Convention would qualify as a suspension of the operation of a treaty governed by the rules of the Vienna Convention.

The rules of the Law of Treaties concerning successive treaties relating to the same subject matter could also be relevant. Where there are two successive treaties that relate to the same subject matter, then between states which are Parties to both treaties, the latter of the treaties prevails and the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty. Between a state party to both treaties and a state party to only of the treaties, the treaties to which both states are parties shall govern their mutual rights and obligations.[66] These rules are however without prejudice to the suspension of the operation of a treaty.

Annex II: National EIA Legislation and the assessment of the risk of an industrial accident

Estonia:
EIA procedure requires an expert review to assess the activity from the point of view of environmental safety including "consideration of possible consequences dangerous for the environment; suitability of solutions for mitigation of risks, accidents, and for remediation of their expected results".[67]

Hungary:
Environmental impacts caused by "possible failures or accidents" are to be investigated in the

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Article 67 - *Instruments for the...suspension of the operation of a treaty.*
1. Notification must be in writing.

Article 72 - *Consequences of the operation of the treaty*
!1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the treaty under its provisions or in accordance with the present Convention:
(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;
(b) does not otherwise affect the legal relations between the parties established by the treaty...
2.."

[66] see the Vienna Convention Article 30.

[67] Government Regulation No.314 of 13 November 1992 Article 17.2, reprinted in EIA Legislation, EBRD 1994

EIA.

Lithuania:
Comments on potential emissions in case of accidents; potential accidents; accident prevention and mitigation measures

Annex III: Decision-making on siting

Article 7 of the IA Convention requires both the Party of origin and affected Parties to seek the establishment of policies on siting. The Party of origin must establish policies on the siting of new hazardous activities and on significant modifications to existing hazardous activities, with the objective of minimizing the risk to the population and the environment of all affected Parties. Affected Parties are to establish policies on significant developments in areas which could be affected by transboundary effects of an industrial accident.

The Parties are directed to consider the matters specified in Annex VI and certain sections of Annex V (V.2 (1)-(8)).Amongst the matters to be taken into account in the forming of the policy on decision-making on siting are the results of the risk analysis and evaluation; the results of consultations and public participation processes; and the evaluation of the environmental risks, including any transboundary effects. This will allow for the lessons learned in the application of the EIA procedure to enlighten policy on siting of hazardous activities.

Article 7 provides that this process elaborating policies on siting will be carried out "[w]ithin the framework of its legal system".