UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

MP.EIA/WG.1/2000/16
CEP/WG.5/2000/9
17 April 2000

ORIGINAL : ENGLISH

ECONOMIC COMMISSION FOR EUROPE

Meeting of the Parties to the Convention
on Environmental Impact Assessment
in a Transboundary Context
Working Group on Environmental Impact Assessment
(Second meeting, Geneva, 29-31 May 2000)
(Item 4 of the provisional agenda)

Meeting of the Signatories to the Convention on
Access to Information, Public Participation in
Decision-making and Access to Justice in Environmental
Matters
(Second meeting, Dubrovnik, Croatia, 3-5 July 2000)
(Item 9 Of the provisional agenda)

STRATEGIC ENVIRONMENTAL ASSESSMENT

Note by the secretariat

Introduction

1. The attached discussion paper on strategic environmental assessment was prepared by a consultant to the secretariat, pursuant to a decision taken at the first meeting of the Working Group on Environmental Impact Assessment (MP.EIA/WG.1/1999/2, para. 24). It has been discussed at a joint meeting of the Bureaux of the Meeting of the Parties to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context and of the Meeting of the Signatories to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The note was presented to the joint meeting, as a background paper rather than for endorsement. It is submitted to the Working Group and the Meeting of the Signatories so that the issue of strategic environmental assessment can be further discussed.

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2. In particular, they may wish to discuss the following questions:

(a)Should a legally binding instrument, for instance in the form of a protocol, be prepared?

(b)Should the instrument be applicable to decision-making in both transboundary and non-transboundary contexts?

(c)Should such an instrument be applicable at local, national and international levels?

(d)Should such an instrument cover all, or just some, of the following categories of strategic decision-making: (I) plans; (ii) programmes; (iii) policies; (iv) legislation, regulations and other legally binding normative instruments?

(e)For the various types of decision-making, should an assessment procedure be required in principle for all categories of decisions having environmental implications, irrespective of whether the decision-making body is primarily “environmental”?

(f)Which part of the EIA procedure should be included in such an instrument?

(g)How should the issues of public participation be addressed in the instrument?

(h)Should the instrument also include provisions on access to information and to justice?

BACKGROUND DOCUMENT ON OPTIONS FOR DEVELOPING A LEGALLY BINDING UN/ECE INSTRUMENT ON STRATEGIC ENVIRONMENTAL ASSESSMENT

Executive summary

3. At their first meeting, the Signatories to the Aarhus Convention agreed that at their next meeting they should give consideration to the issue of public participation in programmes, plans, policies and legislation. The related idea that a protocol to the Convention should be developed on the topic of strategic environmental assessment (SEA) was raised during the third European Ministerial Conference on Environment and Health, and the sixth session of the UN/ECE Committee on Environmental Policy, where the idea of such a protocol was also linked with the Espoo Convention. To facilitate further discussion of the issue, UN/ECE commissioned this study.

4. The first chapter outlines certain major features of SEA, discusses the main advantages and concerns related to the environmental assessment of strategic decisions, and describes the link between environmental impact assessment (EIA) and SEA. The second chapter briefly describes activities related to SEA at international, regional and national level.

5. The third chapter considers various alternatives: an instrument that makes certain elements of an SEA procedure mandatory for certain strategic decisions; an instrument that only makes elements of the SEA procedure mandatory and that does not authoritatively determine the decisions to which it should be applied; and an instrument that authoritatively determines the decisions to which the SEA procedure shall be applied, but which does not point out mandatory elements for such a procedure. Legally non-binding elements, e.g. in the form of guidelines, codes of conduct or recommendations, can be added to these three alternatives.

6. Thereafter follows an examination of how an instrument can be established under the Espoo Convention, under the Aarhus Convention, and as a more free-standing instrument. An instrument adopted within the framework of the Espoo Convention could focus on the transboundary effects of strategic decisions, but need not be limited to such effects. The instrument could be adopted as a protocol to the Convention, if necessary supplemented by a non-binding instrument, or as a multilateral agreement related to the Convention in accordance with its article 8. An instrument adopted within the framework of the Aarhus Convention could focus on those elements related to SEA that are covered by the Convention, i.e. access to information, dissemination of information, participation in decision-making, and access to justice, but need not be limited to such elements. The instrument could be adopted as a

protocol to the Convention, if necessary supplemented by a non-binding instrument. There are several approaches possible if a more free-standing instrument is chosen. One is to adopt a protocol to both Conventions, but such an approach would raise certain problems primarily related to the negotiation process. Another approach could be to adopt a stand-alone instrument. Such an instrument would be related to both Conventions since it would cover issues of relevance to both, but would not be linked to them in a formal sense.

7. The fourth chapter considers the scope of a legally binding instrument and elements that may be included in it. The framework chosen for the instrument is likely to have some, although not necessarily any decisive, implications for the scope and for the relevance of various elements. The elements mentioned reflect those included in the Espoo Convention, the Aarhus Convention, the European Union's draft directive on SEA, and other elements that are regularly part of SEAs.

I. GENERAL BACKGROUND

8. The goal of this study is to provide an objective source of information to facilitate discussions on the possible development at the UN/ECE level of a legally binding instrument on strategic environmental assessment. Its purpose is to explore various options and their implications, rather than to come up with specific recommendations.

9. SEA is a tool for integrating environmental and health issues into strategic decision-making processes. There is no authoritative definition of SEA. The following definition has been proposed: 1/

> SEA is a systematic process for evaluating the environmental consequences of proposed policy, planning or programme initiatives in order to ensure they are fully included and appropriately addressed at the earliest appropriate stage of decision-making on a par with economic and social considerations.

10. The following are some major features of SEAs:

(a) The decision-making processes to which SEA can be applied are policies, plans and programmes; 2/

(b) SEA is a systematic process in the sense that it helps relevant actors to systematize their efforts to integrate environmental (and other) issues into decision-making processes;

(c) The SEA process should lead to the production of a written report, often referred to as an environmental impact statement;

(d) The results of the SEA should be taken fully into account during the decision-making process. One important issue in this context is timing - the SEA should be carried out, or at least initiated, early in the decision-making process;

(e) Public involvement in the SEA is an important aspect, even if some measure of confidentiality for certain stages or elements of the decision-making process may be necessary;

(f) Environmental issues are one of three major categories of issues that should be addressed in the decision-making processes, the others being economic and social considerations. These three issues may be considered collectively or separately. 3/

11. Based on a number of case studies that covered a wide variety of strategic decisions at both the national and international level, Sadler and Verheem (1996) found the following principles to be widely supported:

(a) Initiating agencies are accountable for assessing the environmental effects of new or amended policies, plans and programmes;

(b) The assessment process should be applied as early as possible in proposal design;

(c) The scope of assessment must be commensurate with the proposal's potential impact or consequence for the environment;

(d) Objectives and terms of reference should be clearly defined;

(e) Alternatives to, as well as the environmental effects of, a proposal should be considered;

(f) Other factors, including socio-economic considerations, are to be included as necessary and appropriate;

(g) Evaluation of significance and determination of acceptability are to be made against policy framework of environmental objectives and standards;

(h) Provisions should be made for public involvement, consistent with potential degree of concern and controversy of proposal;

(i) Public reporting of assessment and decisions (unless explicit, stated limitations on confidentiality are given);

(j) Need for independent oversight of process implementation, agency compliance and government-wide performance;

(k) SEA should result in incorporation of environmental factors in policy-making; and

(l) Tiered to other SEAs, project EIAs and/or monitoring for proposals that initiate further actions.

12. The need for integrating environmental and health concerns into strategic decision-making processes that may have significant environmental effects has been emphasized in several key environmental instruments. 4/ SEA procedures have become major tools for ensuring such integration with a view to achieving sustainable development. They were initially developed at a national level as a response to problems encountered when carrying out environmental impact assessment (EIA) of projects, reflecting in particular the need for placing individual projects into a broader context.

13. SEA procedures and methodologies have developed on the basis of EIA procedures and methodologies. Hence, there is no clear distinction between EIA and SEA, and SEA includes important elements of EIA. However, as the nature of decision-making processes related to specific projects and strategic decisions differs, one cannot assume that one may apply the same procedures and methodologies for SEA as for EIA. Moreover, the nature of the various categories of strategic decision-making processes differs to such an extent that one may have to apply different SEA procedures and methodologies for assessing the environmental impacts of the various categories of decisions. In this context, it may be useful to draw distinctions between SEA procedures and methodologies applied to physical planning (which resemble those of EIA), sectoral plans and programmes (which are further removed from those of EIA), and general policy decisions (which are generally even further removed from those of EIA). Nevertheless, certain key elements are common to both EIA and SEA, 5/ and a larger group of key elements are common to the various categories of strategic decisions.

14. The main advantages of SEAs are that:

(a) They may improve the basis for decision-making through, inter alia, improved internal consistency, more systematic environmental considerations, improved data collection, improved target-setting, and presentation of options that could otherwise have been overlooked;

(b) They can be used to rationalize EIA of projects. SEAs may reduce the costs of each individual EIA, and they may help streamline and focus EIAs. 6/ Moreover, SEAs may ensure the consideration of cumulative impacts that may be difficult to assess in individual EIAs;

(c) They allow the consideration of alternatives and mitigation measures at a time when there is greater flexibility and lower costs related to dealing with potential problems;

(d) They may lead to greater legitimacy of, fewer objections to, fewer formal complaints against, and faster implementation of strategic decisions;

(e) They may lead to greater awareness of environmental and health issues among those involved in the decision-making process, which may improve the quality of decision-making processes in other context;

(f) They enhance the role of the general public in strategic decision-making processes, and they may thus improve public awareness of strategic decisions and their environmental and health implications;

(g) They facilitate the translation of sustainability concepts into policies based on key environmental principles.

15. Certain concerns related to the application of SEA procedures can be advanced, and need to be addressed when developing a multilateral instrument:

(a) SEA will constitute an additional requirement on those participating in decision-making processes, and they may increase the time and resources needed during the preparatory phases. The processes of screening and scoping are particularly important to address these concerns; 7/

(b) Public servants are subject to various requirements during decision-making processes. They are in general expected to examine economic and administrative consequences of proposals. The introduction of environmental and health issues can be seen by some as a first step on a "slippery slope" since it may lead various pressure groups to demand that a number of other issues should be given similar attention during strategic decision-making processes. Such a development could lead to inefficient decision-making. The main problem with such an argument is that it does not pay sufficient attention to sustainable development as a key objective endorsed by all countries. The realization of sustainable development would require the integration of three categories of issues into decision-making processes, namely economic, social and environmental. Other issues would fall into one of these categories;

(c) As SEA addresses issues at a strategic level, it can be argued that uncertainty related to the assessment will be greater than in relation to EIA, and that SEA may in many cases be irrelevant to the final decision due to the uncertainties. While it is true that SEAs rely more than EIA on forecasting, probability and other statistical methods to predict the impacts of future scenarios, there are a number of techniques available to deal with uncertainty. Moreover, experience indicates that uncertainty represents no serious obstacle to the application of SEA. 8/

16. The importance of communicating information on experience with applying SEA is frequently emphasized in the literature. There is in general a lack of knowledge about the effects of SEA. This lack of knowledge may lead to too much emphasis on potential concerns.

II. RELEVANT INTERNATIONAL, EUROPEAN, EUROPEAN COMMUNITY AND NATIONAL ACTIVITIES

A. International and European developments

17. There are two ways in which issues related to SEA are dealt with at the international level. First, there are international institutions that have integrated SEA into their policies to ensure that their activities are sustainable. Such environmental assessment initiatives, first for projects, but subsequently also for strategic decisions, have been most prominent in multilateral financial institutions, such as the World Bank and the European Bank for Reconstruction and Development. 9/

18. Second, various multilateral and regional instruments include references to SEA. Such references are a fairly recent phenomenon. There are references to SEA in legally binding instruments and in non-binding instruments, such as recommendations and guidelines. In many cases the references concern the use of SEA as a tool in the national implementation of obligations under a legally binding instrument. 10/

19. In many cases where the use of SEA could be relevant in relation to the national implementation of obligations under a multilateral instrument, there is no reference to the use of SEA. 11/ In some cases, multilateral or regional institutions carry out analytical work of relevance to SEA. These initiatives are not directly linked to legally binding instruments, and the cooperation focuses on information sharing and coordination of national policies. 12/

B. Development and use of SEA by the European Community

20. In relation to the European Community, a distinction must be drawn between application of SEA by institutions of the European Community, and the application of SEA by the member States. As to the application of SEA by the institutions, article 6 of the Treaty establishing the European Community obliges it to integrate environmental protection requirements into the definition and implementation of its policies and activities, in particular

with a view to promoting sustainable development. One important initiative implementing this provision is the so-called Cardiff Strategy, whereby the European Council invited all relevant sectoral councils to establish their own strategies for the integration of environment and sustainable development. The European Commission has developed a “tools guide” for this purpose. Moreover, many of the financial mechanisms of the European Community prescribe processes equivalent to those of SEA. 13/

21. Within certain sectors, the European Community has adopted directives that make explicit or implicit reference to SEA. The most explicit reference can be found in article 6 of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, which requires environmental

assessment of implications for protected sites of "[a]ny plan ... not directly connected with or necessary to the management of the site but likely to have significant effect thereon". 14/

22. More recently, the European Commission produced a Proposal for a Council directive on the effects of certain plans and programmes on the environment (COM(96) 511 final). The Proposal was submitted to the European Council in December 1999, which adopted a common position. The draft SEA directive will require member States to establish mandatory procedures for the environmental assessment of certain plans and programmes. The only major amendment adopted by the Council was to restrict its scope of application. The common position adopted by the European Council in this respect is as follows: 15/

> "An obligatory assessment shall be carried out for all plans and programmes, (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annex I and II of Directive 97/11, or (b) which in view of the likely effect on sites have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.
>
> For other plans and programmes which set the framework for development consent of projects, Member States shall carry out an environmental assessment if they determine, on the basis of a set of given criteria, that they are likely to have significant environmental effects."

However, the European Commission declared that it could not support the common position of the European Council since the scope of the draft SEA directive had been too much restricted compared to the original Commission proposal. Hence, the scope of the draft SEA directive is still subject to discussion.

C. Overview of national or sub-national SEA-related procedures applied by UN/ECE countries

23. Certain countries, such as Bulgaria, Czech Republic, Denmark, Germany, the Netherlands, Slovakia and the United States, have legally binding requirements for undertaking SEA for certain strategic decisions, and some of them have long experience with the use of SEA. Other UN/ECE countries do not have legally binding requirements for undertaking SEA, but have nevertheless undertaken SEAs as part of their decision-making processes for certain strategic decisions. 16/

24. The nature of and the framework for strategic decision-making processes vary considerably between the countries of UN/ECE. Efforts at harmonizing strategic decision-making processes between countries have so far only to a limited extent been systematic or formalized. The harmonization that has taken place seems to have been more a side effect than the main intention of relevant initiatives. 17/ Nevertheless, increased international environmental cooperation has inevitably led to and will continue to lead to the harmonization of strategic decision-making processes between countries. However, the nature of and the frameworks for such decision-making processes are essential parts of the administrative traditions and constitutional systems of countries. Hence, harmonization of strategic decision-making processes must be expected to be slow.

25. Another important factor is that the degree of privatization of different sectors, for example within the energy and the transport sectors, varies significantly between countries. This may have implications for the design of decision-making processes, and thus also for the relevance and design of SEA procedures and methodologies.

26. Among the countries that have applied SEA, the United States has the most long-standing and broad-based experience. A federal agency must prepare an environmental impact statement for any of the following types of actions if they have the potential to significantly affect the quality of the human environment: agency proposals for legislation; adoption of rules, regulations, treaties, conventions, or formal policy documents; adoption of formal plans which guide or prescribe alternative uses of federal resources; or adoption of programmes, such as a group of concerted actions or connected actions which implement a specific policy. 18/

27. Many central and east European countries and newly independent countries formally request the preparation of SEA for national policies, plans and programmes. However, there seems to be limited practical application of these requirements at the national level. On the other hand, many of these countries have extensive experience with environmental assessment of regional and local land-use plans.

28. As to the kind of strategic decision-making processes to which SEA is applied, one case study concludes that: 19/

> “SEA is becoming well established in sectors such as land-use planning, energy, waste management and transport. SEA application in the sectors of water management, industry, agriculture and tourism is still very rare, and needs to be encouraged by e.g. undertaking pilot studies and developing appropriate methodologies.

SEA practice is still mainly applied at the plan and programme levels. SEA at the policy level requires a fundamentally different approach, which needs to be investigated through additional case analysis, and should be supported by specific method development."

It should be noted, however, that there are countries within the UN/ECE that have gained considerable experience with the use of SEA in the context of policies. This is the case, inter alia, of Canada, Denmark, the Netherlands, Slovakia and the United Kingdom, which have applied SEA to parliamentary bills and/or cabinet submissions.

III. POSSIBILITIES FOR DEVELOPING A LEGALLY BINDING INSTRUMENT ON SEA

A. General issues

29. Initially, it may be useful to consider the potential advantages and concerns associated with the development of a legally binding multilateral instrument for SEA. The main advantages of establishing a multilateral instrument seem to be the following:

(a) The instrument can provide important efficiency and environmental gains, since it will improve the opportunity to cooperate across borders and to learn from the experience of others;

(b) By establishing a multilaterally agreed minimum standard for the conduct of SEAs, one may expect improved integration of environmental concerns into strategic decision-making, and thus improved environmental and health conditions;

(c) The instrument will improve the opportunity for addressing transboundary environmental issues in a way that takes appropriately into account the interests of all those affected;

(d) The instrument may facilitate transboundary economic activities, in particular foreign investment, since it is likely to improve predictability for foreign actors.

30. The main concern is linked to the fact that a multilateral instrument will limit the flexibility of national authorities with respect to whether and how SEAs shall be undertaken. This concern can be addressed by designing the multilateral instrument so that countries maintain a certain margin of discretion. Hence, a balance should be struck between the need for establishing certain minimum standards for the use of SEAs, and countries' need for flexibility.

31. Another possible concern relates to the fact that SEA is a decision-making tool with which many countries have limited experience. Some may thus

argue that it is premature to develop an international instrument for SEA. However, while the experience of some countries is limited, other countries have used SEAs for a considerable period of time and for various decisions, and numerous efforts are made to share experience between countries. 20/ Moreover, the negotiation of a multilateral instrument would provide valuable information and an important framework to those countries that have limited experience with SEA, and that consider expanding their use of it.

32. There are four main alternatives for establishing a multilateral instrument for SEA. First, one may introduce an instrument that makes certain elements of the SEA procedure mandatory for certain strategic decisions. Such an instrument would thus contain two main elements: a specification of procedures to be followed where SEAs are to be carried out, and a specification of the strategic decisions to which SEA shall be applied.

33. Second, one may establish a multilateral instrument in which only one of the above elements is mandatory. Within an instrument where certain elements of the SEA procedure are mandatory, one could adopt recommendations concerning the strategic decisions to which the framework should apply. Third, an instrument that makes SEA mandatory for certain strategic decisions could be supplemented by guidelines on how SEAs should be carried out.

34. Finally, one may establish a multilateral instrument which is not legally binding, but which recommends SEA to be carried out for certain strategic decisions, and which establishes guidelines for how SEAs should be carried out. Such a binding instrument could be a first step on the way towards a binding instrument. 21/

35. The four main alternatives can be illustrated as follows:

Elements of the instrument	1	2	3	4
Decisions to which SEA applies	Binding	Binding	Non-binding	Non-binding
Procedure for SEA	Binding	Non-binding	Binding	Non-binding

36. There are three main options for establishing a legally binding multilateral instrument in the context of UN/ECE:

(a) A multilateral instrument may be established under the Espoo Convention;

(b) A multilateral instrument may be established under the Aarhus Convention;

© A more free-standing multilateral instrument may be established which in one way or another is linked to the two Conventions.

The first two options cover the possibility of amending the Conventions in order to extend their scope to SEA. The third option covers a number of possibilities, ranging from the establishment of a free-standing convention (which must be linked to the other Conventions since they would, to some extent, overlap) to an instrument that is established under both Conventions (e.g. a common protocol).

37. Before entering into a detailed discussion of these options, some general differences between the Espoo and Aarhus Conventions that may be relevant when considering the feasibility of the options should be pointed out. First, the Espoo Convention has entered into force, while the date at which the Aarhus Convention will enter into force remains uncertain. Second, the Aarhus Convention is open to all countries of the United Nations, while the Espoo Convention is open only to members of UN/ECE or States having consultative status with UN/ECE. There is a proposal to open the Espoo Convention to other countries. 22/ Third, the procedure for amending annexes to the Aarhus Convention is less onerous than that under the Espoo Convention. Finally, only the Aarhus Convention contains an explicit reference to the possibility of adopting protocols (see art. 10, para.2(e)).

B. The Espoo Convention

38. Certain elements of the Espoo Convention show that the Convention is of relevance to SEA. There is reference to SEA in article 2, paragraph 7, which states that:

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

39. Moreover, paragraph 10 of the Oslo Ministerial Declaration stipulates that the Ministers:

> "Recognize that a systematic analysis of the environmental impact of proposed policies, plans and programmes is enabled by the application of EIA principles and recommend that the principles of EIA in a transboundary context should also be applied to the strategic level; to

this end invite Parties and non-Parties to introduce those principles into their national systems; and emphasize that the environmental impact of international sectoral policies, plans and programmes in areas such as transport, energy and agriculture should be assessed as a matter of priority."

40. Although the focus of the Espoo Convention is on decisions related to specific projects, it can be argued that some of its provisions may also be applicable to certain strategic decisions, 23/ for example decisions concerning land-use planning or emissions of pollutants within a limited geographical area (e.g. cumulative effects of specific projects).

41. Against this background, it can be concluded that the development of a general multilateral instrument for SEA in the context of the Espoo Convention would constitute action that "may be required for the achievement of the purposes of this Convention" (see art.11, para.2(f)). The main limitation related to making use of the Espoo Convention could arguably be that it relates to activities that have transboundary environmental impacts. However, this does not constitute any decisive argument against the possibility of adopting an instrument under the Espoo Convention that would apply to SEA generally and not only in a transboundary context. The recently adopted Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes shows that countries do not necessarily feel compelled by the scope of a convention when adopting protocols to it. Moreover, the practical implications of limiting an instrument to transboundary effects seem negligible, since countries would generally consider it appropriate to apply domestic SEA requirements regardless of whether decisions have transboundary effects.

42. How a multilateral framework can be developed under the Espoo Convention? The Convention itself refers to three main approaches that may be relevant in relation to the development of new obligations. First, there is the adoption of legally binding rules under the Convention (see arts. 11, para. 2(e), and 14). These rules would not only apply to amendments of specific provisions. They would also apply to the development of new rules in the form of new provisions or the addition of a separate protocol. The lack of references to protocols in the Convention does not represent any formal barrier to the adoption of such instruments by the Parties to the Convention. 24/ If one chooses to develop a separate protocol to the Espoo Convention, one may include a provision in the protocol and/or in the Convention that regulates the relationship between the Convention and the protocol.

43. A second approach is to adopt a non-binding instrument through a decision of the Parties (see rule 37 of the rules of procedure). Such decisions may take various forms. The Meeting of the Parties may adopt non-binding decisions in the form of, for example, recommendations, guidelines or codes of conduct.

44. A third approach may be to adopt instruments referred to as bilateral and multilateral arrangements or agreements in article 8. Such an approach may be of interest if the development of a common framework for SEA would initially be acceptable only to a limited number of countries. Such instruments may be a step towards the inclusion of new rules under the Convention itself. They would be more free-standing in relation to the Convention than a protocol. The secretariat of the Espoo Convention would not serve as secretariat to such agreements unless the Meeting of the Parties so decides (see art. 13(c)).

C. The Aarhus Convention

45. The Aarhus Convention contains a number of provisions that explicitly refer to strategic decision-making. The Convention provides for public participation in relation to plans and programmes (art. 7), policies (art. 7), and executive regulations and other generally applicable legally binding rules (art. 8). There is no further definition of the concepts “plans”, “programmes” and “policies”, and the exact meaning of these terms remains unclear. Moreover, the provisions leave a broad margin of discretion to the Parties.

46. In addition to the provisions that concern public participation, article 5, paragraph 5(a), imposes an obligation on Parties to disseminate:

> “Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government”.

47. There are also other provisions of the Aarhus Convention that are relevant to strategic decisions, even if such decisions are not explicitly mentioned. The right of access to information is applicable regardless of the nature of the decision to which the information relates. Moreover, the right of access to justice is relevant both in cases of access to information (art. 9, para. 1), and in cases of public participation in decision-making pursuant to articles 7 and 8 (art. 9, para. 2).

48. The above-mentioned provisions show that some aspects of SEA fall within the scope of the Aarhus Convention. The Convention contains no obligation to carry out SEAs. It includes obligations to integrate into strategic decision-making processes certain elements that are commonly regarded as essential parts of the SEA procedure, namely access to information, dissemination of information, and public participation.

49. Although the Convention does not focus on SEA as such, but only on certain essential elements of SEA, there is nothing in the Convention that would prevent the Parties from adopting protocols or amendments to the Convention setting out a general instrument on SEA (art. 10, para. 2(e) and (f)). However, the question is whether the development of a general multilateral instrument for SEA would constitute action that "may be required for the achievement of the purposes of this Convention" (art. 10, para. 2(g)). In practice, this problem would arise only in relation to the adoption of a non-binding instrument, since legally binding instruments would fall within the scope of article 10, paragraph 2(e) and (f). On the one hand, access to environmental information, dissemination of environmental information, public participation in decision-making, and access to justice in environmental matters can be achieved without the establishment of a multilateral instrument on SEA. On the other hand, a multilateral instrument on SEA would clearly facilitate the fulfilment of the purposes of the Convention, and constitute an essential tool for domestic implementation of articles 7 and 8 of the Convention. In sum, it remains somewhat unclear whether the development of an instrument on SEA would be "required" for the achievement of the purposes of the Convention. In any case, if consensus can be established among the Parties to the Convention with respect to the adoption of such an instrument, article 10, paragraph 2(g), would not prevent them from doing so.

50. Approaches similar to those that are available under the Espoo Convention are available under the Aarhus Convention. First, one could adopt a legally binding instrument in the form of a protocol, amendments, and/or new annexes to the Convention (art. 10, para. 2(e) and (f), and 14). As there are no specific rules for the adoption of protocols to the Convention, they would have to be adopted in the same way as amendments to the Convention itself. Such protocols could deal with horizontal issues, i.e. issues that are of relevance to access to information, dissemination of information, public participation in decision-making and access to justice.

51. A second approach would be to adopt a non-binding multilateral instrument through a decision of the Meeting of the Parties (art. 10, para. 2(g)). The Meeting of the Parties may adopt such decisions in the form of, for example, recommendations, guidelines or codes of conduct.

D. A free-standing instrument

52. As indicated above, several approaches are available if a more free-standing instrument is chosen. One approach would be to adopt an instrument under both Conventions, for example a protocol to both Conventions. There are several examples of arrangements that have been established as a result of cooperation between two international institutions. However, this author is not aware of any protocol that has been adopted under two conventions with separate institutional structures. This does not mean that such an approach would be illegal under international law. However, it does mean that one may run into unprecedented problems, in particular related to the competence of the Meeting of the Parties or subsidiary bodies under the two Conventions. 25/ Moreover, certain questions would arise prior to or during negotiations: Which countries should participate in the negotiations? How should the framework for the negotiations be laid down? To whom should the result of the negotiations be submitted? These are questions that have to be addressed. The fact that the Aarhus Convention has not yet entered into force may have some implications for how these question can be dealt with. The main advantages of this approach is that it will ensure a coordinated approach to issues relevant to both Conventions, and that it will serve to underline the relevance of both to SEA.

53. To avoid problems of competence, one may negotiate a protocol to both Conventions that will have a free-standing status in the sense that it will not be subject to the rules of either of the Conventions or decisions adopted by their institutions. However, the above-mentioned questions related to the negotiation of such an instrument would arise also if this option were chosen. It would also ensure a coordinated approach to issues relevant to both Conventions, although perhaps not to the same extent as the above option after the instrument has entered into force, and it will serve to underline the relevance of both Conventions to SEA.

54. Another approach may be to adopt a stand-alone instrument to deal with SEA. Such an instrument may be given a broader scope than one closely related to both Conventions, since it may not to the same extent focus on transboundary aspects of SEA, and on the link between SEA and access to information, dissemination of information, public participation, and access to justice.

IV. POSSIBLE ELEMENTS FOR A LEGALLY BINDING INSTRUMENT

A. General issues

55. It is necessary to strike a balance between countries' need for flexibility and the need for establishing certain minimum standards related to SEA when designing the elements of a legally binding instrument. Flexibility can be ensured by designing the elements so that a broad margin of discretion is left to the Parties, and by combining legally binding and non-binding elements. While the legally binding elements would establish minimum standards, the non-binding elements could set out best practices.

56. When defining the elements of a multilateral instrument, one should take into account the fact that the nature of various decision-making processes differs considerably both within and between countries. The main distinctions can be drawn between decision-making related to land-use planning, sectoral plans or programmes (e.g. energy, transport and tourism), and general policy decisions (e.g. legislation and budgets). The nature of the SEA may differ significantly between these groups of decisions. This can be resolved by distinguishing between different kinds of strategic decision-making procedures in the instrument, or by focusing on the main elements and principles of the SEA and leaving a broad margin of discretion to the Parties. Both approaches, but in particular the latter, could be supplemented by non-binding instruments setting out more specific standards for the environmental assessment of different categories of strategic decisions.

57. As indicated above, it can be argued that the elements considered to be relevant could depend on whether the instrument is adopted under the Espoo Convention, the Aarhus Convention, or as a more free-standing instrument. However, the link to one or both of the Conventions would not formally prevent countries from including in the instrument the elements of their choice.

58. The next section focuses on two main issues that must be dealt with in a potential instrument, namely the scope of the instrument, i.e. to which strategic decisions it may apply, and the substantive rules of the instrument. Procedural issues, including arrangements for the exchange of information or for technical cooperation between the Parties to the instrument, will not be examined.

B. The scope of the instrument

59. The way the scope of the Espoo Convention has been defined may constitute a model for how to define the scope of the new instrument. The Espoo Convention combines specific provisions defining projects that shall be subject to EIA, with general provisions giving Parties a fairly broad margin of discretion with respect to other projects that may be subject to SEA pursuant to a screening process. A similar approach may be appropriate for SEA, although it may be harder to arrive at clearly defined groups of strategic decisions that should always be subject to SEA.

60. The nature of strategic decision-making processes can be assumed to vary more within and between countries than the nature of decision-making processes related to projects. Hence, the question is whether lists of strategic decisions for which SEAs are mandatory should be country-specific. 26/ One advantage of country-specific lists is the flexibility they provide. Each country can ensure that the multilateral instrument is adjusted to its particular system for strategic decision-making. In addition, countries will have flexibility to amend the lists. One may establish mechanisms for further developing and harmonizing country-specific lists, for example based on peer pressure. Moreover, the possibility of generating detailed lists for each country may increase the predictability for relevant stakeholders. One weakness of such an approach is that some countries may accept to carry out SEA for fewer decisions than they would have been willing to do had there been one general list applying to all. Another weakness is that this approach would not lead to the establishment of a clearly defined common minimum standard for the application of SEA.

61. The European Community's draft SEA directive has identified certain general groups of strategic decisions to which the SEA procedure apply (see paras. 20-22 above). These may constitute a starting point for negotiations of a multilateral instrument. First, the draft SEA directive makes SEA mandatory for certain plans and programmes. It may thus be questioned whether and to what extent mandatory SEA procedure should be extended to policies. An instrument that is to apply to all strategic decisions identified in relevant provisions of the Aarhus Convention would have to cover plans, programmes, policies, executive regulations and other generally applicable legally binding rules. The Aarhus Convention does not include any definition of these concepts, and it may be useful to specify these concepts in the instrument.

62. Second, the draft SEA directive makes SEA mandatory for the following sectors: agriculture, forestry, fisheries, energy, industry, transport, waste management, water, telecommunications, tourism, town and country planning, and land use. In addition, it sets out that countries shall carry out an

environmental assessment if they determine, on the basis of a set of given criteria, that other plans and programmes are likely to have significant environmental effects. As the multilateral instrument will define the legal relationship between countries, it can be argued that it should primarily focus on groups of strategic decisions that are most likely to lead to transboundary environmental problems. On the other hand, if the main aim of the instrument is to establish minimum standards for SEA, it would be more appropriate to focus on sectors in which strategic decisions are likely to have significant environmental effects. The Aarhus Convention applies to plans and programmes to the extent that these relate to the environment. In addition, it also applies to policies to the extent that these relate to the environment, and to executive regulations and other generally applicable legally binding rules to the extent these may have a significant effect on the environment. Hence, the latter approach would be closest to the approach of the Aarhus Convention. In any case, an instrument based on the scope of the Aarhus Convention will apply to a wider range of strategic decisions than the draft SEA directive.

C. The substantive rules of the instrument

63. It falls outside the scope of this study to present a detailed discussion of the range or content 27/ of the substantive elements that may be included in a legally binding instrument. The lists presented below are meant to reflect the main elements of relevance. However, it should be kept in mind that they are not exhaustive. Moreover, while some of the elements may most appropriately be included in a legally binding instrument, others may be more appropriate for a non-binding instrument. The elements to be included will depend on the scope and purpose of the instrument.

64. While there are certain fundamental differences between EIA and SEA, the basic elements of EIA may be transferable to SEA. The assumption is thus that the main rules that apply to EIA in a transboundary context could be relevant to a multilateral instrument for SEA. Against this background, a starting point when considering the substantive rules could be the following elements from the Espoo Convention:

(a) Notification to those countries that may be affected by the decision to be taken. The notification should be submitted early in the decision-making process;

(b) Rules on the content of assessment documentation, and on its dissemination to relevant Parties;

(c) Rules on how, when and with whom consultations should be undertaken, and on the content of such consultations;

(d) Rules on how the comments received should be taken into account during the final stages of the decision-making process, e.g. presentation in the final decision of the comments received and of the reasoning related to them;

(e) Rules establishing an obligation to carry out a post-decision analysis in order to reduce negative environmental effects. An analysis may include a review of the quality of the assessment.

Although the main focus of the Espoo Convention is on the relationship between countries, the Convention includes a number of provisions that ensure public participation. In addition to the above core elements, there are also references to bilateral and multilateral cooperation and to research programmes in the Espoo Convention.

65. In addition, certain elements related to the Aarhus Convention should be considered:

(a) Rules on access to information and the duty to collect and disseminate information;

(b) Rules on public participation in decision-making processes;

(c) Rules on access to justice, including access to administrative appeals procedures;

66. The above elements could be supplemented by elements identified in the European Community's draft SEA directive. The draft covers the following main additional elements:

(a) Rules on when the assessment should be carried out;

(b) Rules on the preparation of an environmental report (this is parallel to the above requirement concerning "assessment documentation"). The report should identify, describe and evaluate reasonable alternatives;

(c) Rules on the dissemination of information on the final decision to those that were consulted;

(d) Rules on how the instrument shall be implemented at a national level;

67. While EIA procedures are fairly well established within UN/ECE, and countries have gained substantial experience with such procedures, this is for many countries not yet the case for SEA. This indicates that one should consider the usefulness of supplementing the above elements with certain elements that would reflect the core elements of SEA. The following elements have been identified as common to many of the SEAs that have been carried out:

(a) Rules that define who should be responsible for ensuring that the SEA is carried out, and that give a framework for determining who should carry out the SEA;

(b) Rules ensuring the establishment of common approaches to scoping, including rules on consultation with relevant stakeholders;

(c) Rules providing an indication of the main methodological principles and/or elements for impact identification and analysis; 28/

(d) Rules providing for the identification of flanking/compensatory measures to reduce or eliminate negative and enhance positive environmental effects;

(e) Rules on the preparation of an environmental impact statement on the basis of the assessment documentation, and information and opinions presented during consultations. The statement may be an integral part of the final decision.

The inclusion of these elements in a multilateral framework would most likely improve its effectiveness in reducing the negative and enhancing the positive environmental impacts of the decision.

Notes

1/ Sadler and Verheem (1996): Strategic Environmental Assessment. Status, Challenges and Future Directions, Netherlands Ministry of Housing, Spatial Planning and the Environment. Thérivel et al. (1992): Strategic Environmental Assessment, London: Earthscan; define SEA as: “The formalized, systematic and comprehensive process of evaluating the environmental impacts of a policy, plan or programme and its alternatives, the preparation of a written report on the findings, and the use of the findings in publicly-accountable decision-making”.

2/ The following general definition of these concepts has been suggested (UN/ECE Task Force 1992): UN/ECE task force on application of EIA to policies, plans and programmes in Application of Environmental Impact Assessment Principles to Policies, Plans and Programmes, Environmental Series No. 5. “... policy, plan and programme refer to an action or a course of actions with a set of objectives and measures related to the deployment of financial or other resources or tools intended to affect the future use of natural resources, and the form or location of development and other activities in one or more social or economic sectors or geographical areas”. Sadler and Verheem (1996) have suggested a definition of each element. “Policy: a general course of action or proposed overall direction that a government is, or will be, pursuing and which guides ongoing decision-making. Programme: a coherent, organized agenda or schedule of commitments,

proposals, instruments and/or activities that elaborates and implements policy. Plan: a purposeful, forward-looking strategy or design, often with coordinated priorities, options and measures, that elaborates and implements policy."

3/ The sustainability impact assessment initiated by the European Commission in relation to the upcoming WTO negotiations aims at considering all these three issues collectively, see http://www.europe.eu.int/comm/trade/pdf/cawn01.pdf.

4/ See, inter alia, principles 14-17 of the Stockholm Declaration of the United Nations Conference on the Human Environment (1972); paras. 7, 8, 11(c), 16 and 23 of the United Nations General Assembly resolution 37/7 on the World Charter for Nature (1982); and Principles 4, 10 and 17 of the Rio Declaration on Environment and Development (1992).

5/ See UN/ECE Task Force (1992), which identified seven main groups of elements related to EIA that should apply to SEA, namely initiation, scoping, outside review, public participation, documentation, decision-making, and post decision analysis.

6/ The concept of "tiering" is particularly relevant in this context. It refers, inter alia, to the opportunity of basing subsequent environmental assessments of more specific decisions on the findings of the SEA. DHV Environment and Infrastructure BV (1994): Strategic Environmental Assessment. Existing Methodology.

7/ Various strategies have been suggested, see in particular DHV Environment and Infrastructure BV (1994): Strategic Environmental Assessment. Existing Methodology, para. 13 of the Summary. One study (European Commission 1998): Environmental Impact Assessment in Europe: a Study on Costs and Benefits concluded that "The overriding impression gained from the review of the 20 case studies contained in [the] report, is that SEA is being used by the organizations in question as a logical extension to their existing strategic planning processes, and that increases in costs are regarded as marginal to the overall scale of investment in development of the respective policies, plans and programmes."

8/ See DHV Environment and Infrastructure BV (1994), para. 8 of the Summary.

9/ In the World Bank, SEA has been introduced in the form of Sectoral and Regional Environmental Assessment, see Operational Directive on Environmental Assessment, and Updates Nos. 1, 4 and 15 to the Environmental Assessment Source book. The European Bank for Reconstruction and Development states in its Environmental Procedures that "[I]n addition to EIAs on specific operations, the Bank may also carry out strategic environmental assessments ... [i.e.] the process of evaluating the likely environmental consequences of a proposed plan or programme which has the potential to significantly affect the environment, before it is approved."

10/ See, inter alia, article 4 of the United Nations Framework Convention on Climate Change: “All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: ... (f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change”; article 14 of the Convention on Biological Diversity: “Each Contracting Party, as far as possible and as appropriate, shall: ... (b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account”; and decision IV/10 of the Conference of the Parties to the Convention on Biological Diversity: “Invites ... to transmit to the Executive Secretary for the purpose of exchanging information and sharing experience on: ... (b) Strategic environmental assessments”. Under the Convention on Wetlands (Ramsar Convention), Guidelines of relevance to SEA have been produced, in particular the Guidelines for reviewing laws and institutions to promote the conservation and wise use of wetlands (Resolution VII.7, 1999). See also Articles 6 and 14 of the Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Article 3, paragraph 1, of the UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes states that: “To prevent, control and reduce transboundary impact, the Parties shall develop, adopt, implement and, as far as possible, render compatible relevant legal, administrative, economic, financial and technical measures, in order to ensure, inter alia, that: ...(h) Environmental impact assessment and other means of assessment are applied”. (See also art. 9, para. 2(j)).

11/ See, inter alia, the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the Cartagena Protocol on Biosafety, and the Convention on the Conservation of European Wildlife and Natural Habitats.

12/ Examples include the following: the European Conference of Ministers responsible for Regional Planning (CEMAT) has been meeting regularly since 1970 within the Council of Europe, and has adopted the European Regional/Spatial Planning Charter (Torremolinos Charter 1983). CEMAT is carrying out work on Guiding Principles for Sustainable Spatial Development of the European Continent. The OECD Ministerial Council adopted the following procedural guideline in 1993: “Governments should examine or review trade and environmental policies and agreements with potentially significant effects on the other policy area early in their development to

assess the implications for the other policy area and to identify alternative policy options for addressing concerns." This guideline has subsequently been supplemented by specific methodologies (OCDE/GD(94)103). Within NATO, the Committee on the Challenges of Modern Society launched a study in 1991 piloted by Belgium on Methodology, Focalisation, Evaluation and Scope of Environmental Impact Assessment, which, inter alia, focuses on SEA (see fourth and fifth report).

13/ See, inter alia, Regulation 1260/99 on the Structural Funds, and Regulation 1257/99 on Support for Rural Development from the European Agricultural Guidance and Guarantee Fund. SEA is also considered relevant to the activities of the European Investment Bank.

14/ See also proposal for a Council directive establishing a framework for Community action in the field of water policy (COM(97) 49 final), in particular article 6.

15/ Press Release 13854/99 (Presse 409), 2235th Council meeting, Environment, Brussels, 13/14 December 1999.

16/ See European Commission (1997): Case Studies on Strategic Environmental Assessment, Final Report. Of the 18 SEA cases examined, 12 were conducted on the basis of a mandatory framework.

17/ One important exception is the coordinated development of various plans, including regional development plans, in central and east European countries that apply for membership of the EU.

18/ See 40 Code of Federal Regulations 1508.18(b).

19/ European Commission (1997).

20/ One example is the work carried out by the Regional Environmental Center for Central and Eastern Europe in the context of public participation and SEA.

21/ This option will not be discussed further, since it falls outside the terms of reference for this study.

22/ See document MP.EIA/WG.1/1999/12, and para. 13 of the Oslo Ministerial Declaration.

23/ This is the case for the fourth and seventh preambular paragraphs; article 2, paragraph 1, which applies to "proposed activities" (see the definition in art. 1); articles 3-7, which apply to "proposed activities" that are "likely to cause significant adverse transboundary impact" (see the definition in appendix III and the report on Specific methodologies and criteria to determine the significance of adverse transboundary impacts (CEP/WG.3/R.6)); article 8 and para. 2 of appendix VI; article 9(e); and article 11, paragraph 2(a) and (f).

24/ The Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes was adopted regardless of the fact that the Convention does not refer to the possibility of adopting protocols.

25/ A somewhat similar issue occurs in the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes. According to article 17 of this Protocol, the secretariat functions are split between the Executive Secretary of the UN/ECE and the Regional Director of the Regional Office for Europe of the World Health Organization.

26/ Country-specific lists are an approach that is well known from international trade and investment instruments. See, inter alia, the General Agreement on Trade in Services and the Agreement on Government Procurement (WTO), which provide for the opportunity to “opt in”. The draft multilateral agreement on investment (OECD) provided for the opportunity to “opt out”.

27/ The list of principles presented in paragraph 11 above is relevant when proceeding to define the content of the various elements to be included in the instrument. The list is not exhaustive, and other issues and principles will be relevant when determining the content of the elements.

28/ The methodologies to be applied may vary considerably from case to case. A multilateral framework should therefore include a large degree of flexibility in this respect. The methodologies may cover measures to deal with uncertainty.