

The institutional context for transboundary environmental impact assessment in Belgium: multi level setting — a matter of smooth governance?

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Due to its particular institutional context, Belgium has different environmental assessment systems based on separate sets of legislation (federal and regional). All sets contain arrangements on transboundary approaches as well as provisions to assure the quality of the statements or reports. Regarding the intra-Belgian environmental assessment systems, the Espoo Convention has inspired the regional governments to adopt a cooperation agreement. This convention is also applied in the bilateral arrangements of the regional government of Flanders with the neighbouring state of the Netherlands. Internal (at national or subnational level) institutional arrangements have an impact on the feasibility of good impact assessments in a transboundary context. Experiences with transboundary impact assessment may inspire internal policy developments.

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ENVIRONMENTAL IMPACT assessment (EIA) and strategic environmental assessment (SEA) procedures are prescribed in laws and regulations. These formal instruments are supplemented by more informal administrative practices. An EIA or SEA process always involves a number of categories of participants or stakeholders (including institutions). Given the objective of this process, describing the relationships between these stakeholders in the impact assessment process as an ‘administrative negotiation process’ is quite acceptable

(De Hemptinne, 1994). So the EIA/SEA serves multiple purposes (Cashmore *et al*, 2004). As the participants or stakeholders have different expectations regarding the process and its outcome given their interests, perceptions and societal values, their opinions about a ‘good quality EIA’ might differ as well. From this participatory perspective, one may agree with observations in the literature that EIA professionals — but also the other stakeholders in the process — should come to grips with the facts that EIAs (and, even more, SEAs, given their ‘strategic nature’) are not science and will always contain unexamined and unexplained value assumptions (Beattie, 1995).

In a transboundary context, these value assumptions might even be culturally influenced (Van Dijk and Nijsten, 2004), as even ‘administrative cultures’ in neighbouring states may differ (Berkenbosch, 2002; Van Schie and Raessen, 2001).

Within some European Union member states, the devolution of policies (by giving subnational entities growing and sometimes even legislative

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competencies) has created different institutional and administrative approaches. So certain EIA or SEA procedures within one state may involve transboundary negotiations or even the need for an institutionalized arrangement. Otherwise more centralized states may have institutional distrust towards emerging subnational — but fully competent — impact assessment approaches in a neighbouring state. All these developments and factors indicate that the growing practice of transboundary impact assessment (TIA) undoubtedly has a number of specific features and encounters peculiar problems. On the other hand, TIA is also very much a product of the application of national and subnational impact assessment systems based on regulations and administrative practices. As such TIA will reflect the strengths and weaknesses of these systems.

The Belgian impact assessment systems are quite diverse also regarding the transboundary and quality assurance issues. This article aims to introduce these systems and illustrate current practices.

Belgium is a federal state, made up of three communities (language-related: Flemish-, French- and German-speaking) and three regions (territory-related: Flanders, Wallonia and Brussels, the capital). In Flanders, the community-related and territorial aspects have been merged into one regional entity.

Constitutional reforms in 1970, 1980, 1988, 1993 and 2001 have resulted in devolution of competences. Substantial powers in the cultural, social, economic and environmental spheres have been transferred from the federal level to the regional level (Deketelaere and Schutyser, 2000). However, as the heart of the federal state is an economic and monetary union, it is no surprise that quite a number of socio-economic issues remain under federal competence, contrary to the major part of environmental policy-making which came in the hands of the regional policy-makers (Lavrysen, 1999). The legislative power of the communities and the regions is exercised by the enacting of decrees (ordinances in Brussels). Decrees or ordinances have force of law throughout the territory for which they are intended. In order to improve cooperation between the different policy levels and to avoid expected deadlock situations, constitutional reform has also introduced 'co-operation agreements'. Some agreements may have direct effect, others require additional approval by the different parliaments (federal and regional). Already a number of these agreements (e.g. on EIA in a 'trans-regional' context) exist but their enforcement remains questionable due to a lack of enforcement mechanism.

Particular features of the Belgian federal system are the absence of a hierarchy of norms as well as the possibility for regions or communities to conclude international agreements in the allocated areas of responsibility (e.g. most environmental issues).

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policy approach at different policy levels: municipal, provincial, regional and national (federal). Competencies regarding particular policy fields, such as environment, are often not attributed to one policy level. The application of policy instruments in such a framework leads to complex processes and regulatory frameworks for decision-making within Belgium.

The transposition of the consecutive European Union (EU) directives (EIA Directive 85/337/EC as amended) has resulted in a growing environmental impact assessment practice. (E)IA approaches and requirements are found in horizontal as well as in specific sectoral legislation. Most EIA legislation, however, is to be found at the regional level, except for the projects in the Belgian marine environment and also for nuclear installations, as the decision-making for both categories was kept under federal competency.

Later on, the transposition of the strategic environmental assessment EU directive of 2001 (SEA Directive 2001/42/EC) revealed a more profound 'impact' on decision-making processes. The final adoption of federal and regional SEA legislation happened in the course of 2006–2008.

The application of the impact assessment frameworks has raised questions about the coherence and both proponents and authorities have to deal with these institutional features. Institutions provide not only for frameworks, they are also stakeholders in decision-making and have an interest in impact assessment (Nooteboom, 2007).

This contribution gives a brief overview of the major relevant legal frameworks at the federal and the Flemish-regional level. Given that the Flemish region borders the Netherlands, some examples of TIA approaches are presented and situated within the Belgian institutional setting.

Legislation at the Belgian federal level

As a limited number of environmental policy items — such as the protection against ion radiation, transit of waste, protection of the marine environment, and the policy concerning product norms — remained within the federal competence, instruments

that have to be applied in order to fulfil the implementation of legal requirements are addressed at this level.

So at the federal level, EIA and SEA regulations and provisions have been adopted concerning:

1. Protection against ionizing radiation from nuclear installations;
2. Protection of the marine environment; and
3. A limited number of plans and programmes.

Given the scope of activities, all three regulatory sets are important from a potential transboundary impact perspective.

Nuclear installations

The Belgian sites for nuclear plants are situated in border areas so, given the amplitude of radioactive impacts, the establishment and (mostly the further) exploitation of such installations is subject to transboundary impact assessment requirements.

The Act of 15 April 1994 on the protection of the population and the environment against ionizing radiation from nuclear installations and the Federal Agency for Nuclear Control (FANC) is the basic act and replaced a similar act of 1958 which became outdated.

This act classifies nuclear installations in different categories. The permit application for installations of category I must include an EIA which contains:

- Information as stipulated by the recommendations of the European Commission of 6 December 1999 (1999/829/Euratom) concerning the application of Article 37 of the Euratom Treaty;
- The necessary information to provide and assess the effects on the environment related to ionizing radiation;
- A draft of the most important alternatives, including a justification of the final choice with respect to the effects on the environment.

The permitting regulation concerning nuclear issues stipulates that the EIA is the responsibility of the developer who has to appoint natural persons or a legal person for drafting the environmental impact statement (EIS). These persons can do this work only after the developer receives approval from the FANC that has based its opinion on a document submitted by the developer, containing information about the consultant(s), such as their technical competencies and other relevant references.¹

International consultation The royal order on the permit procedure contains a specific provision (Article 6.3.2) on international consultations. In cases as provided for by Article 37 of the Euratom Treaty, the FANC has to consult the European Commission for advice. Also the Scientific Board of FANC may consult the European Commission on, for example,

the effects on the environment. If the Scientific Board is of the opinion that the planned installation may have significant effects on the environment of one or more states which are party to the European Economic Area, or on request of one or more of these parties which have the opinion that the planned installation may have significant effects on their environment, the FANC will send a summary of the EIA to these states at the same moment that the permit application file is submitted to the concerned municipalities.

Belgium has two major nuclear sites, one in Wallonia, the other in Flanders. The nuclear park in Flanders is at Doel (near the Dutch border) where four reactors are located. In 2009 the steam generators of one of the reactors will be replaced, and the permit procedure started in 2007. Consultation of the public is part of this procedure as well as advice from the municipalities which are located within 5 km of the site. This permit application has been open for consultation in two municipalities in The Netherlands, so foreign citizens and the local governments were able to submit comments and objections.

Marine developments

Offshore activities for energy production are an example of marine developments that lead to environmental effects and other impacts, including transboundary ones.

Activities in the small Belgian part of the North Sea became rather controversial given Belgium's rather limited capacity for land-based wind farms and the need for renewable energy resources. Currently the proportion of renewable energy in Belgium is 2.2%, and the projection is 7% by 2013. The EU requires Belgium to use 13% of its energy from renewable sources by 2020 and according to studies off-shore wind farms could produce up to 27% of current energy consumption. The European Wind Energy Association has calculated that this means a need for 1,100 new windmills. Over the past eight years the Flemish Government has been able to issue 167 construction permits for (land-based) windmills. Like a number of other off-shore activities, the construction of wind farms is subject to federal legislation.

The act of 20 January 1999 on the protection of the marine environment in sea areas under Belgian jurisdiction, the 'MMM Act' (changed by the acts of 17 September 2005 and 21 April 2007 and implemented through a number of royal orders) establishes the legal basis for the protection of the Belgian part of the North Sea against sea-related pollution and for the conservation, restoration and development of nature. This act summarizes some general principles of environmental law and transposes international legal obligations:²

- The prevention principle: prevention is better than cure.

- The precautionary principle: preventive measures must be taken if there are grounds for concern regarding pollution.
- The principle of sustainable management: human activities must be managed in such a way that the marine ecosystem remains in a condition which ensures the continued use of the sea.
- The polluter pays principle: the costs of measures to prevent and fight pollution are to be borne by the polluter.
- The principle of restoration: if the environment is damaged or disrupted, the marine environment must be restored to its original condition as far as is possible.

The principle of objective liability is also established: in the event of any damage to or disruption of the environment in sea areas as a result of an accident or an infringement of the law, the party having caused the damage to or disruption of the environment is obliged to remedy this, even if they are not at fault.

A general obligation is established, as regards activities for which a permit is required in advance, to prepare a report on the environment effects (the 'classical' EIA at the initiative of the proponent) and to undertake environmental assessment before and during these activities (carried out by the government). The legal requirements of the MMM Act are elaborated in a number of royal orders, including: the royal order of 7 September 2003 on the procedure for permits required for certain activities in sea areas and the royal order of 9 September 2003 on the assessment of environmental effects.³ Article 6 of the royal order of 9 September 2003 requires that a co-ordinator is in charge of the supervision of the EIA drafting. This co-ordinator may be employed by the proponent and, if such is the case, the co-ordinator gets certain safeguards in order to assure independence. This royal order transposes the procedural requirements of the EIA directive but refers also to the Espoo Convention (the UNECE Convention on EIA in a Transboundary Context) in the definition of 'activity with a transboundary dimension' that is to be understood as any activity that falls under the scope of application of the Espoo Convention or the EIA directive.

Next to the legal requirements regarding the contents of an EIA, the proponent may address the competent authority (the Management Unit of the North Sea Mathematical Models and the Scheldt Estuary, MUMM) for scoping advice. The review or quality control is done by the MUMM. The MUMM investigates if the proponent's EIS is complete and of a sufficient quality. It may require additional information or research to be done by the proponent or the MUMM may commission the additional research or do it on its own. The MUMM presents a report (assessment of the proponent's EIS) about its investigation and issues an advice to the minister who is responsible for granting or refusing the permit.

Article 23 of the above-mentioned royal order concerns also transboundary impacts, but from an *ex post* perspective when the activity has been permitted. Such activities are being monitored and a kind of permanent EIA is being executed if the MUMM has stated that the activity may have significant effects on the marine environment of another EU member state, or a party to the Espoo Convention or on request from such a state or party. In case the permanent EIA indicates that significant negative effects may happen, the concerned state or party is informed immediately in order to start consultations about necessary measures.

This provision implements Article 7 of the Espoo Convention on post-project analysis. Though this article has a non-mandatory character, it offers some opportunities. The guidance on the practical application of the Espoo Convention clarifies this provision and indicates that a post-project analysis has to analyse, as a minimum, both the activity as well as its potential adverse transboundary impacts. A post-project analysis is typically based on the monitoring of the activity and its impacts.⁴

The MMM Act does not deal with plans and programmes, so SEA is not an issue under this Act. However, given the size of at least the wind farm projects and their role in an overall energy strategy, one may question the appropriateness of this project-level approach. This is also recognized in the literature; however, the need or usefulness of SEA is not always obvious (Douvere *et al*, 2007). SEA for marine developments is being addressed by the federal SEA Act (see below).

There are three projects for the construction of windmills in the Belgian part of the North Sea: C-Power on the Thorntonbank, Belwind on the Bligh Bank and Eldepasco on the *Bank zonder naam* (Bank without name) (Figure 1). The C-Power wind farm has 60 windmills and is located 27 km off Zeebrugge. The park will be built in water 6–25 m deep and the turbines will be installed in an area of 18 km². Work started on land in 2007 with the construction of the first six foundations. In spring 2008 work started at sea. With a capacity of 330 megawatts, the Belwind farm will deliver energy to 330,000 households. The wind farm, which is located 42 km off the coast of Zeebrugge, is the world's farthest offshore wind farm. The park will be built in water 20–35 m deep and the turbines will be installed in an area of 35 km².⁵

*Consultation with the Dutch authorities about the Belwind farm*⁶ The concession for this wind farm is located 530 m from the Dutch maritime border. So the application for this project as well as the relevant information about the procedure was sent to the Dutch authorities on 1 August 2007. The MUMM received a request for consultation on 17 September 2007 but received no remarks or objections before the final deadline of the consultation period (24 October 2007). However, on 18 October 2007 a

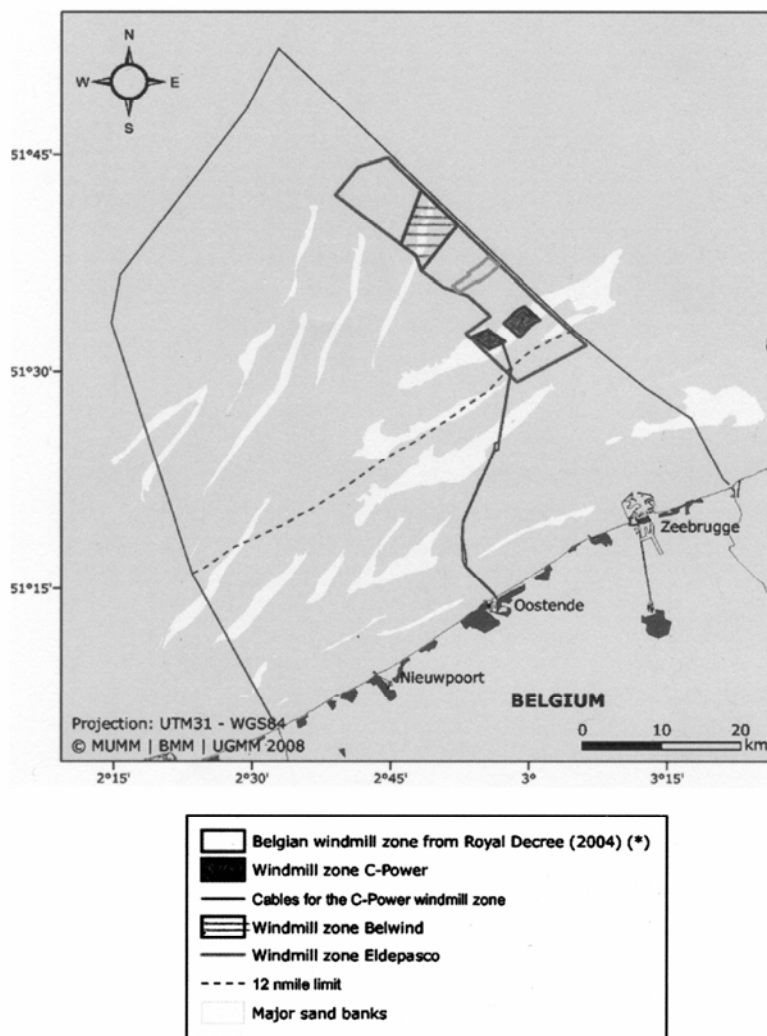


Figure 1. Windfarms in the Belgian part of the North Sea
 Note: * Royal decree, 17 May 2004; Belgian official journal, 29 June 2004

consultation meeting between the Belgian and Dutch authorities took place in Brussels. The Dutch Minister of Transport and Water sent a letter on 23 October 2007 to indicate possible problems for maritime traffic and requesting further research on fauna issues.

In its opinion to the federal minister in December 2007, the MUMM gave an overview of the trans-boundary consultation and indicated that all elements mentioned by the Dutch authorities were addressed

The Management Unit of the North Sea Mathematical Models and the Scheldt Estuary opinion says that the Dutch objections apply not specifically to the concerned project but to the cumulative impacts of all possible wind farms in the concession zone

in the EIA. Regarding the Dutch concerns, the MUMM opinion is quite remarkable as it says that the Dutch objections apply not specifically to the concerned project but to the cumulative impacts of all possible wind farms in the concession zone. The opinion continues by stating that these concerns can only be handled on a higher governmental level. This point of view illustrates that an SEA can be seen as the missing link between the planning of the wind-farm zone and the project-level decision-making.

Regarding the Dutch ecological concerns, the opinion states that all issues mentioned during the consultation were researched in the EIA that concluded that the effects were expected to remain limited and not significant. The MUMM has the opinion that the proposed monitoring measures — particularly on avifauna, sea mammals, noise and fish — should be sufficient to register and assess unforeseen ecological damage with consequences for the nature in the *Voordelta* area. If such would be the case, compensatory measures could be taken but at present no additional measures were deemed necessary or proposed.

Regarding the economic loss for the shipping sector, the opinion sees no differences between the Dutch and Belgian interests. It puts also the need for environmental friendly energy developments on a higher level than the maritime transport interests.

Plans and programmes and strategic environmental assessment

The field of application of the federal SEA Act (Act of 13 February 2006 on the environmental assessment of certain plans and programmes and the participation of the public in the development of certain environmental plans and programmes and its implementing royal orders of 22 October 2006 and 5 June 2007) is rather limited. A SEA is mandatory for only six types of plans. For some of these types, earlier sectoral legislation (e.g. on the organization of the electricity market and on the transport of gas products) already provided for a SEA requirement. One category concerns plans and programmes for the exploration and exploitation of non-living resources in the Belgian territorial sea and the continental shelf. To introduce a SEA requirement for other types of plans or programmes, a royal order has to be approved. The SEA Act stipulates also that for certain plans or programmes the proponent has to provide for a SEA after the Council of Ministers has decided so after consulting an Administrative Advisory Committee (established by this SEA Act).

The Administrative Advisory Committee is also involved in SEA scoping. The proponent has to present a draft scoping document to the committee. The committee gives an advice and the proponent decides on the scope but has to inform the committee about the decision. Members of this committee belong to several federal departments, such as energy, mobility, economy and also sustainable development. When the proponent relies on consultants for drafting the SEA, he needs to assure there is no conflict of interest. Contrary to the regional approaches there is no obligation to contract certified consultants. The proponent (and consultants) needs to follow or apply the advice of the committee.

The proponent has to submit the draft plan or programme and SEA to the Advisory Committee as well to the Federal Council on Sustainable Development and the regional governments for advice.

Regarding the consultation of foreign authorities when the implementation of the plan or programme might have a transboundary environmental impact, Article 13 of the SEA Act refers to the UNECE Espoo Convention.⁷ This is quite intriguing given the existence of the Kiev Protocol on SEA to this convention (not yet into force; signed but not yet ratified by Belgium), but might be explained by the provision in the convention that encourages the application of its principles to policies, plans and programmes.

Transboundary SEA The royal order of 5 June 2007 makes a distinction between different parties of origin of the plan or programme.⁸

In case of a *Belgian plan or programme*, this federal approach contains two phases:

1. The notification phase: the proponent of the plan or programme needs to provide to the possibly affected party:
 - The draft plan or programme and the SEA (environmental report).
 - A description of the planning and decision-making procedure for the plan/programme.
 - The arrangements for the consultation of the public, including the starting date as well as the duration.
2. The consultation and information phase: the possibly affected party needs to inform the proponent about the organization of national consultation.
 - Within 45 days after the notification has been sent; if this is not done, the internal procedure continues.
 - The proponent and the possibly affected party agree on a reasonable timing regarding the organization of the national consultation.
 - The possibly affected party gives its advice to the proponent within the agreed deadline.
 - The possibly affected party receives a copy of the plan or programme and the environmental report within 10 days after publication in the official journal.

In case of a *foreign plan or programme*, this federal approach contains the following steps:

- In case a federal service (administration, institution, minister) receives a foreign draft plan or programme and SEA on the presumption that it may have significant effects on the Belgian environment (which means in practical terms only the Belgian part of the North Sea as the other 'territorial environments are governed by the regions'), the information is forwarded to the federal Minister for the Environment, the federal Minister for the North Sea, the Federal Council on Sustainable Development, the regional governments and the Administrative Advisory Committee.
- The minister competent for the protection of the marine environment decides if the proposed plan/programme might have a significant environmental effect
- If the minister decides there might be a significant effect, he organizes consultation of the public.
- After the public consultation, the minister competent for the protection of the marine environment sends the comments and advice to the competent authorities of the party of origin and informs the federal Minister for the Environment and the Administrative Advisory Committee.

If no significant effects are expected all involved authorities are informed immediately.

Legislation at the Flemish regional level

All three Belgian regions have EIA and SEA systems. The Walloon Region has the oldest EIA system. It had a quite elaborate system that later has been amended.⁹ The general provisions on EIA and SEA are found in the fifth part of book I of the Walloon Environmental Code. The Brussels EIA procedure is also elaborated.¹⁰ As both regional EIA and SEA regimes have to transpose and implement the EU directives they also contain provisions on transboundary impact assessment which provide for information exchange and consultation.

The EIA/SEA decree of 18 December 2002 introduced the first comprehensive set of provisions on environmental assessment at the Flemish level. Through this decree EIA, SEA (see Table 1) and safety reporting (as required by the Seveso Directive) became part of the framework decree on general provisions regarding environmental policy. The decree of 27 April 2007 replaced the SEA chapter completely.¹¹ The current EIA and SEA provisions were supplemented by the implementing orders of the Flemish Government of 10 December 2004 (lists of projects for which an EIA is mandatory, directly or after screening), 12 October 2007 (on SEA,

mainly consultation requirements)¹² and 18 April 2008 (on the SEA integration in the physical planning procedures). Based on the relevant provisions of the decree of 27 April 2007, Articles 6 and 11 of the implementing order of 12 October provide for (but mainly repeat) the requirement for transboundary consultation in the screening and scoping phases and also in the public inquiry phase of the decision-making on the plan or programme.

The interregional EIA cooperation agreement

During the first decade of regional EIA practices in Belgium the lack of information exchange between the regions became obvious, especially for projects located at the regional 'borders' or for major (even cross-border) projects. For that reason the three regions agreed on a cooperation agreement on 4 July 1994.¹³ This agreement has been force since 4 September 1994. The federal level was (and is) not involved in this agreement. The contents of this agreement reveal many similarities with transboundary 'international' EIA arrangements, as based on the Espoo Convention.

Article 2 of this agreement concerns the scope which includes every project that requires an EIA. The government of the affected region is informed about a project for which a permit application is

Table 1. The Flemish SEA procedure: steps and involvement of actors

Step	Action	Actors	Delay – target date
0	Informal pre-consultation	Proponent, competent SEA authority, consultants	
	PM screening opportunity	Proponent, competent SEA authority, consultants	30 days (+ 60 days in case of transboundary procedure)
1	Notification (including documentation)	Competent SEA authority	Date = N
2	Declaration of completeness of notification is sent to proponent	Competent SEA authority	Receipt N + 20 days Date = Y
	Scoping phase = > requirements about SEA contents		
3	Start of consultation	Competent SEA authority,	Y + 30 days
	Gathering of advices, organization of publicity of notification and documentation, discussions, meeting (optional)	governmental services, local authorities, foreign authorities, the public, proponent, consultants	
	Comments are analyzed and processed	Competent SEA authority	Y + 50 days (+ 60 days in case of transboundary procedure)
	Scoping decision		
	Decision is sent to proponent*		
	Middle phase		
4	SEA is being drafted	Proponent, consultants	(months)
	Intermediate consultation (including meetings) is possible		
	Final phase – quality control		
5	Submission of the final SEA	Proponent	
6	Review of the SEA	Competent SEA authority	50 days
	Approval or rejection of SEA		
	Decision is sent to proponent*	Competent SEA authority	

Note: * After receiving this decision the proponent may decide to introduce an 'appeal' to an administrative advisory commission

submitted. The agreement does not include any criteria that might help a government to assess whether a project may lead to transboundary effects. A common interpretative declaration to this agreement does not really clarify this issue. The government of the region of origin has to send a copy of the EIS to the government of the affected region. The latter has to receive this information before the public inquiry in the region of origin is organized and has to be informed about the practical modalities of this inquiry. The inhabitants of the affected region have the same rights to participate in the public inquiry as the inhabitants of the region of origin. The affected region may hold its own public inquiry on its own territory and send the outcome of this inquiry to the government of the region of origin.

However, this public inquiry in the affected region may not lead to a prolongation of the duration of the public inquiry as provided for in the legislation of the region of origin. This means that, for example, in Flanders an EIS shall contain a chapter on transboundary impacts in case the competent environment administration (EIA-SEA Unit) has concluded on the basis of the notification documentation that the project could lead to transboundary effects on the environment of the neighbouring region. However, this cooperation agreement is not implemented strictly, and its existence has revealed a number of problems and enhanced political discussions.

The approach in this agreement remains rather vague and complex as the principle actors are the regional governments and the agreement does not assign a particular role to the competent environmental administrations. Also the legal nature of this kind of internal agreement (it was not endorsed by the regional parliaments) is not helpful to ensure its application.

The common declaration to this agreement included an evaluation before the end of 1995. This intention was repeated in an interregional agreement of 6 April 2000. A couple of years later a revision of this cooperation agreement came on the political agenda due to a serious case of (transboundary) air pollution (caused by a fire in Brussels) that raised questions even from Germany. Given the expanding EIA and SEA regulations within Belgium at the different policy levels, one might suppose that a coherent proposal — involving all covered policy fields and levels — would be an option, but up to now this cannot be confirmed. Some years ago, the FANC started a separate initiative for a cooperation agreement on nuclear installations that has yet not been finalized.

Flemish–Dutch arrangements and agreements

A Bilateral EIA arrangement

On the basis of the Espoo Convention and responding to growing pressure from NGOs some 15 years

The Flemish and Dutch environmental administrations agreed on an information and consultation approach on the basis of the existing EIA legislation in both jurisdictions

ago, the Flemish and Dutch environmental administrations agreed on an information and consultation approach on the basis of the existing EIA legislation in both jurisdictions. This approach was endorsed by the political level — through an exchange of letters — in both countries (but it is not to be considered as an agreement or treaty) and has been applied since 1 September 1995. Initially planned for only one year, the approach has not been amended up to now (Spring 2008). However, in the course of the past years, several bilateral meetings have taken place and elements for amendments were raised, including particular text proposals, *inter alia* due to the changes to the legislation in both countries such as the introduction of SEA.

As this arrangement had to incorporate the requirements of two sets of legislation, the different steps to be followed in case of its application contain two stages:

1. The EIA-process stage; and
2. The permit application stage.

In case a proponent plans an activity (project) in Flanders for which an EIA is mandatory, and the project may have potential significant adverse transboundary effects in The Netherlands, the bilateral arrangement requires the following actions (steps):

1. The Flemish EIA-SEA Unit has approved the team of EIA-experts and determines that significant adverse transboundary impacts may occur. Decision to initiate and apply the transboundary EIA-procedure.
2. Simultaneously, the following actions take place:
 - a. The Flemish EIA-SEA Unit sends the notification file to the involved Flemish provincial and municipal government.
 - b. The Flemish EIA-SEA Unit sends the notification file to the Dutch focal point: the relevant provincial government, with an accompanying letter containing the following information:
 - An explanation of the EIA procedure including an indication of the possibilities for the Dutch governmental bodies for involvement;
 - A list of possible involved Dutch governmental bodies;
 - A list of involved Dutch governmental bodies receiving the notification-file (including

the EIA start document that is a kind of scoping report).

The notification file contains:

- A brief description of the proposed activity;
 - A brief description of the location of the project;
 - The name of the proponent;
 - The composition of the team of experts.
3. The Flemish Minister of the Environment notifies the Dutch Minister of the Environment that the transboundary EIA procedure has been initiated.
 4. The Dutch focal point reacts without delay in case not all involved Dutch governmental bodies received a copy of the notification-file (including the EIA start document). Furthermore the focal point informs about the means for informing the public, including the possibility for inspection in the Netherlands, about:
 - The means of publicity in the Netherlands of an EIS which has a certificate of conformity;
 - The means of publicity of the public enquiry in Flanders of the permit application for which an EIS is mandatory.
 5. The proponent is informed about the application of the transboundary EIA procedure. The Flemish EIA-SEA Unit sends the EIA start document to the involved Dutch governmental bodies and invites them, together with the Flemish bodies, to a meeting about the EIA start document.
 6. The Flemish EIA-SEA Unit invites the involved Dutch governmental bodies for a discussion about the draft EIS, including the opportunity for comments.
 7. Immediately after the Flemish EIA-SEA Unit has sent the EIS (including its approval) to the proponent, it sends a certified copy to:
 - a. The involved Flemish provincial and municipal governments; an accompanying letter explains that it concerns a project for which the transboundary EIA procedure is being applied.
 - b. The focal point and the involved Dutch governmental bodies; an accompanying letter indicates how information about the EIS may be obtained on written request, as well as the period within which consultation as provided for by Article 7 of EIA directive may be initiated.
 8. The Flemish Minister of the Environment informs the Dutch Minister of the Environment about the sending of the EIS to the provincial government.

The next set of steps are beyond the formal EIA procedure as they are part of the environmental permit application procedure:

9. The Flemish Environment administration takes care of the publicity about the EIS by way of announcement in Dutch newspapers and the EIS is open to the public through the services of the Dutch focal point.

10. One of the involved Dutch governmental bodies may ask for consultation within the specified period on the basis of the EIS and as provided for by Article 7 of the EIA directive.
11. The consultation takes place between the requesting parties and the Flemish EIA-SEA Unit.
12. Within the framework of the public inquiry about the environmental permit application for a project for which an EIS is mandatory, the competent mayor takes care of the publicity about the EIS by:
 - a. Bill posting.
 - b. The announcement of the public inquiry in at least two Flemish and two Dutch newspapers with, for each, one with a local character.
 - c. The publicity (open for inspection) of the permit application including the EIS and annexes.
 - d. The organization of at least one information meeting in Flanders, which has to be announced in at least two Flemish and two Dutch newspapers with, for each, one with a local character.

The competent mayor informs the Dutch focal point about these initiatives.

13. The competent authority sends a certified copy of its decision about the environmental permit application to the Dutch focal point.
14. On written request, the competent authorities are obliged to provide all information about the inspection possibilities concerning the permit.

The Scheldt River developments and agreements

Flanders and the Netherlands share the Scheldt Estuary, which is situated on both Dutch and Flemish territory. It stretches over some 160 km between the city of Ghent in Flanders and the river mouth in the Netherlands. The management of this river has always been a sensitive issue given the historical relationship between the countries, as Belgium was once part of the Netherlands (e.g. Secession Treaty of 1839). Given the major economic importance of the harbour of Antwerp for the Belgian economy, accessibility is an ongoing concern. The estuary is regularly subject to storm floods from the North Sea; it provides maritime access to important ports, such as Antwerp; and its ecological value is considerable with both fresh and salt-water tides.

In 1998, the Netherlands and Flanders decided to develop a joint long-term vision for the Scheldt Estuary and its functions of flood safety, ports accessibility and important natural ecosystem. In this, the basic idea was: 'Developing a healthy and multi-functional water system, supporting human needs in a sustainable way'. The Technical Scheldt Commission (TSC, established in 1948 by the governments of Belgium, Luxemburg and the Netherlands) took the lead in drawing up this holistic vision and was able to present the result to the competent government representatives in January 2001. The long-term

vision was summarized in an overall target for the year 2030. This target has five characteristics:

- The preservation of the estuary's physical system characteristics is the point of departure for management and policy.
- Maximum safety against flooding is an important condition of existence for both countries.
- As driving forces for welfare, the Scheldt ports require optimal accessibility.
- The estuarine ecosystem is healthy and dynamic.
- The Netherlands and Flanders cooperate in the administrative-political and operational fields.

In 2001 the governments of both countries adopted this overall target and already in 2002 the drawing up of the 2010 Development Outline (DO) for the Scheldt Estuary was started. The aim of the 2010 DO was to define those projects and measures which, in a first stage, must be started up no later than 2010 to ensure the realization of the long-term vision in 2030. A special project organization, ProSes (Project management Scheldt Estuary), was created in order to draw up this DO in close consultation with all stakeholders and under the supervision of the TSC.¹⁴ In December 2004, the official version was presented to government representatives, after intensive communication with the stakeholders and a consultation into the general public's views on the outline. On 11 March 2005 both governments agreed to start the implementation of the full 2010 DO. The main projects in the 2010 DO are:

- Safety against flooding: implementation of the updated Sigmaphan (a plan dating from 1977 that aims to reduce the risk of floods in Flanders).
- Accessibility: deepening and widening of the shipping lane to the port of Antwerp.
- Ecosystem: development of 600 ha of estuarine nature along the Western Scheldt in the Netherlands and 1,100 ha of estuarine nature and wetlands along the Sea Scheldt in Flanders.
- Both countries will jointly monitor the evolution of the estuary and the effects of the implemented projects in order to extend knowledge of the estuary and to facilitate possible corrections.

Besides these large-scale projects, a considerable number of smaller administrative and legal measures were defined. Regarding the bilateral institutional framework, particular Scheldt treaties were concluded on 21 December 2005. Only at the end of 2007 were these treaties approved by the Dutch legislature. The treaty on the policy and management of the Scheldt Estuary includes provisions that very much stress the need and willingness to align the existing decision-making procedures for plans, programmes and projects and even possibility of specific bilateral regulation (Article 5). Another important provision in this treaty concerns the monitoring of the morphological evolution of the Scheldt

Estuary but also the *ex post* evaluation of effects of, for example, projects (Article 6).

This treaty establishes also a Flemish–Dutch Scheldt Commission. The role of this bilateral commission is to foster the structural engagement of local authorities and relevant societal stakeholders in the implementation of treaty's objectives. This commission is also the liaison with the International Scheldt Commission established by the Scheldt Treaty (Ghent, 2 December 2002).¹⁵ The treaty on the implementation of the 2010 DO contains a number of more detailed provisions, *inter alia* concerning technical, financial and administrative arrangements, including administrative and physical monitoring issues.

Strategic environmental assessment

Given the nature of the overall goal of the 2010 DO, it was obvious that a SEA was necessary. It was decided to make a joint SEA but that meant also developing a procedure acceptable for both countries. The existing regulations in both countries revealed the need to address the following challenges:

- Who is the joint authority in a joint procedure?
- How to agree on and formulate identical guidelines for the environmental report.
- Procedural timing differences.

The SEA was the first basic step and was followed by several transboundary EIAs and (national) EIAs and SEAs (see Box 1).

The consultants who steered the SEA of the 2010 DO published afterwards some reflections about their experiences, which included the following:

- The quality of research and decision-making can be improved by connecting them. Stakeholders should have their say in formulating research objectives. They should be involved in discussing intermediate results, and consultants should not be afraid of using unfinished results in the debate. (Zanting *et al*, 2004)
- The scoping phase should focus on the information necessary for the decision-making. Choices should be made, justified and communicated. Be aware of the risk of researching all interesting issues but in a superficial way.
- An integrated approach is not always better. Thematic approaches or separate studies on specific measures can be sufficient. This was done in the SEA and only in the last phase 'expert judgement' has been used to evaluate the combined effects of sets of measures.
- The research should be focused as much as possible on the 'principles of alternatives'. If alternatives are changed afterwards, the research conclusions may remain valid. In order to get a grip on these principles, the use of representative 'example projects' is recommended.

Box 1. Environmental impact assessment for the deepening of the Scheldt River

For the decision-making on the project for the deepening of the Scheldt River (as agreed and preliminarily researched in the SEA on the 2010 DO) a transboundary EIA was made and approved by the competent EIA authorities in both countries. Contrary to the Flemish EIA approach, which is purely internal-administrative, the Dutch EIA approach includes an external, independent review institution, the EIA Commission, which uses a pool of experts.

In the Netherlands a specific commission is established for each EIA and the Scheldt EIA Commission published its advice on 1 February 2008 (Commissie-MER, 2008).

Elements of an EIA evaluation

In its evaluation, the commission seeks to identify shortcomings with respect to the requirements as formulated at the start. Next the commission will assess the shortcomings. The central question concerns the availability of all necessary information to give the decision-makers the opportunity to take fully into account the environmental concerns. If this is not possible, the commission shall indicate an essential shortcoming and advice that the required information needs to be made available before the decision-making. Other shortcomings of the EIA will also be addressed in the commission's advice as far as they can be formulated as clear recommendations for the competent authority. This means that the commission's advice is limited to important issues.

This particular advice was positive about the EIA (e.g. on the research of alternatives) and was also based on additional information that was provided by the proponent. The commission stressed also the uncertainty about the predictions regarding the morphological developments which also have an impact on the effect-predictions for some environmental factors. Furthermore, the advice confirms the need for monitoring, evaluation and ongoing research.

Under the title 'particularities', the commission remarked that, at the time of its advice, the Flemish authorities had already approved the EIA, so the EIA could be used in further decision-making in Flanders.

Differences in the EIA-legislation are the underlying reason and reveal 'another' transparency approach:

- In the Netherlands, the commission gives its advice after the EIA has been made public (for comments);
- In Flanders, the EIA becomes public after the approval. In this case, the commission had already given comments on the draft EIA, to assure a substantial congruency and allow the finalization of the Flemish EIA procedure.

Some final observations

In general the Belgian federal and regional assessment systems reveal a certain degree of diversity with respect to the specific procedural elaboration of the main EIA and SEA phases as provided for in the EU EIA and SEA directives. This intra-Belgian diversity is the result of the creation of regional jurisdictions, the inevitable outcome of the deconstruction of the unitary Belgian state. But also at the federal level the different sectoral EIA systems have their own particularities, though they are mainly influenced by the international legal requirements. The public and advising institutions may also play a (rather limited) role at this stage. All systems implement the supranational requirements on transboundary EIA and even SEA. The final review of

the EIS or environmental report remains in Flanders an 'in house' operation for the environment administration that approves or rejects the EIS or environmental report, while in the Walloon region, some advising institutions can comment on the quality of the report.

In general terms there is no coherent national system into which the different federal and regional EIA and SEA systems can be fit. The poor implementation of the 1994 cooperation agreement on EIA illustrates a strong internal institutional border. As even the highest administrative court, the Council of State, is mostly functioning with single language chambers, there is no central Belgian public law 'guardian' of the impact assessment policy and practices, except for the Constitutional Court.¹⁶

It seems that the range of Belgian EIA and SEA systems have weakened the practice and definitely not supported the perception among outsiders of a 'strong EIA system'. The example of the Netherlands illustrates nevertheless that another approach, namely a consistent national EIA system that is branded as an effective tool in decision-making even without using accredited consultants, can enhance the export of internal knowledge, expertise and capacity.¹⁷

As a result of the experiences with the Flemish–Dutch arrangements (including the role of national institutions like the Dutch EIA Commission) it is obvious that transboundary impact assessment can provide 'institutional' inspiration even to remediate internal failures. In the current debate in Belgium about greater efficiency in public administrations, one may question the added value of the different EIA/SEA systems. In the search for acceptable solutions towards smooth governance, the creation of a 'joint body' as suggested in the Guidance on the Practical Application of the Espoo Convention and confirmed in practice (e.g. Albergia and Fidelis, 2006), might be an option. This new institution could be the subject of a new cooperation agreement on impact assessment. To avoid the risk that the role of this joint body would be reduced to the management of procedures, a more substantial function should be the aim. We should not forget the fundamental role of impact assessment in increasing early transparency and accountability in decision-making

As a result of the experiences with the Flemish–Dutch arrangements it is obvious that transboundary impact assessment can provide 'institutional' inspiration even to remediate internal failures

(Nooteboom, 2007), so a Belgian Quality Board for Impact Assessment is desperately needed.

Notes

1. Royal order of 20 July 2001, see: <http://www.fanc.fgov.be/download/reglementation_20_07_2001_fr.pdf>, last accessed 19 August 2008. The act was amended on 15 May 2007.
2. The key instruments in this context are the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 1992), the Bonn Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances (1983) and the system of International Conferences on the Protection of the North Sea.
3. Royal order of 7 September 2003, see: <<http://www.mumm.ac.be/Downloads/MBBS170903pp46101-46111.pdf>>, last accessed 19 August 2008.
4. ECE/MP. EIA/8, Guidance on the practical application of the Espoo Convention, UN, Geneva, 2006, 20.
5. <http://www.mumm.ac.be/EN/Tools/viewimage.php?Pic=Atlas2007/WindmillsCurrent_large_EN.gif>, last accessed 15 April 2008.
6. Advies van het bestuur aan de minister bevoegd voor de bescherming van het mariene milieu betreffende de machtigings- en vergunningsaanvraag van de n.v. Belwind voor de bouw en exploitatie van een windmolenpark op de Bligh Bank in de Noordzee (Advice/opinion from the federal marine protection administration regarding the EIA for the Belwind project to the competent federal minister), December 2007, available on <www.mumm.ac.be>, last accessed 20 May 2008.
7. Belgium approved its ratification on 9 June 1999, published in the Official Journal of 31 December 1999 (the Espoo Convention on EIA in a transboundary context came into force on 10 September 1997).
8. Published in Official Journal of 21 June 2007.
9. See: <<http://wallex.wallonie.be/indexMain.html>>, last accessed 19 August 2008; look at: 'évaluation des incidences sur l'environnement – droit interne'.
10. Ordinance of 5 June 1997 (art. 70-78), see: <<http://www.ibgebim.be/>>, last accessed 15 April 2008.
11. Official Journal of 20 June 2007; this decree amended the Decree on General Provisions regarding Environmental Policy, as amended by the Decree of 18 December 2002; see: <<http://www.mervlaanderen.be>>, last accessed 20 May 2008.
12. Official Journal of 7 November 2007.
13. Official Journal of 11 August 1994.
14. Proses was abolished as a separate organization by the end

of 2007 and split into a Working Group 2010 DO and as also incorporated in the TSC.

15. <http://www.isc-cie.com/index_nl.asp>, last accessed 19 August 2008.
16. E.g. Judgement of 14 September 2006.
17. Private sector consultancies as well as experts working for or with the Dutch 'M.e.r. or EIA Commission' are worldwide active; an overview of their contributions in international reports and journals and their contributions to international meetings such as the IAIA illustrates this clearly.

References

- Albergia, R and T Fidelis 2006. Transboundary EIA: Iberian experiences. *Environmental Impact Assessment Review*, **26**, 614–632.
- Beattie, R 1995. Everything you already know about EIA (but don't often admit). *Environmental Impact Assessment Review*, **15**, 109.
- Berkenbosch, R 2002. Langetermijnvisie Schelde-estuarium. *KenMERken*, **9**.
- Cashmore, M, R Gwilliam, R Morgan, D Cobb and A Bond 2004. The interminable issue of effectiveness: substantive purposes, outcomes and research challenges in the advancement of environmental impact assessment theory. *Impact Assessment and Project Appraisal*, **22**, 297.
- Commissie-MER 2008. Verruiming vaargeul Beneden-Zeeschelde en Westerschelde Toetsingsadvies over het milieueffectrapport, Utrecht, 1 februari / rapportnummer 1702-204.
- De Hemptinne, J 1994. La négociation: outil d'aide à la prise de décision et de règlement des conflits environnementaux. *Revue Interdisciplinaire d'Etudes juridiques*, 129–161.
- Deketelaere, K and F Schutyser 2000. *International Encyclopaedia of Laws: Environmental Law: Belgium*. The Hague: Kluwer.
- Douvere, F, F Maes, A Vanhulle and J Schrijvers 2007. The role of marine spatial planning in sea use management: the Belgian case. *Marine Policy*, **31**, 182–191.
- Lavrysen, L 1999. *De bevoegdheidsverdeling in België: Leefmilieu en waterbeleid*. Brugge: Die Keure.
- Nooteboom, S 2007. Impact assessment procedures for sustainable development: a complexity theory perspective. *Environmental Impact Assessment Review*, **27**, 645–665.
- Van Dijk, J and R Nijsten 2004. Inspraak over grenzen. *KenMERken*, **21**.
- Van Schie, R and M Raessen 2001. Grensoverschrijdend adviseren. *KenMERken*, **11**.
- Zanting, H, P Weijers and E van Essen 2004. Strategisch MER Schelde-estuarium. *KenMERken*, October, **5**.

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