Assessment of the draft law on environmental assessment prepared by Azerbaijan

Opinion paper

Background

1. The Committee initiative on Azerbaijan was prompted by Azerbaijan's responses to the questionnaire on its implementation of the Convention in the period 2009–2011, indicating that it lacked national legislation on the application of the Convention and by the request from Azerbaijan for technical assistance from the Committee in that regard. In its decision V/4 (2011), the Meeting of the Parties (MOP), encouraged Azerbaijan to implement the recommendations of its second Environmental Performance Review (ECE.CEP/158) with respect to EIA and SEA and welcomed the technical advice for the review of Azerbaijan's current and draft legislation on EIA, which was carried out by an international consultant to the secretariat. Since 2012, has been regularly reviewing reports by Azerbaijan on its progress in implementing the consultant's recommendations. At its thirtieth session (Geneva 25–27 February 2014), it invited the secretariat to explore opportunities to provide further legislative assistance to Azerbaijan in order to ensure its full compliance with the provisions of the Convention and the Protocol, in view of Azerbaijan's accession to it, including a review of its draft framework law on environmental assessment, and other relevant legislation. The draft framework law aims to regulate three assessment frameworks, i.e. EIA, SEA and State Ecological Expertise (SEE). Upon adoption of the law by the Parliament, it is expected that the three procedures will be further detailed through implementing regulations, – Instructions of the Cabinet of Ministers, which according to Azerbaijan are of the same legal nature as legislation adopted by Parliament.

2. This assessment is based on the version of the Draft Law on EIA provided on April 28, 2014[1]. (The draft Law on EIA is attached to this report. Annex 1)

3. This opinion paper is prepared by Mr. Dmytro Skrylnikov in coordination with Mr. Jerzy Jendroska and Ms. Matanat Asgarova.

General issues

4. The object of the draft law is to establish a new legal framework for both EIA and Strategic Environmental Assessment (SEA) processes.

5. It is noted that since 2012 there has been some progress in implementing the international consultant's recommendations[2] and some recommendations have been taken into account,

1 Unofficial translation to English was done by the technical support of OSCE Baku Office

number of changes have been made to the draft Law and additional provisions were elaborated (e.g. list of activities). However, the draft law still requires further elaboration including the provisions related to both national and transboundary EIA procedures.

6. Provisions on SEA (Chapter 3) are also not fully in line with the SEA Protocol and require further elaboration. The draft law does not provide procedural details and it is expected that the SEA procedure will be further detailed through implementing regulation. However, the law should include all main elements of the procedure (e.g. determination of whether SEA is required[3]; determination of the scope of the SEA report; consultation with relevant environmental and health authorities and the public, including transboundary consultations; inputs into decision-making and monitoring of implementation). The issue of regulating EIA and SEA by separate laws can be also considered.

7. It should be noted that the Article 9 of the SEA Protocol requires that the environmental and health authorities have an early, timely and effective opportunity to express their opinion on the draft plan or programme and the environmental report. The SEE can be considered as a form of obtaining the opinion of environmental authority but the draft law does not provide for consultations with the health authorities. It is also important to consider that according to the SEA Protocol the consultation with environmental and health authorities occurs at a number of stages in the SEA process: in determination of significant effects, if required while determining whether SEA is required (art. 5, para. 2); during scoping (art. 6, para. 2); and in the preparation of the environmental report (art. 9, para. 3).

8. More detailed review of the current system and recommendations on how to strengthen the legal framework for SEA will be provided under the specific project within the framework of the Greening Economies in the Eastern Neighbourhood (EaP GREEN) programme.[4]

9. Despite the fact that the latest draft named the Law on EIA[5] it still reflects the "ecological expertise oriented" concept which is almost the same as the current system (EIA(OVOS)+ SEE). The main responsibility at the first stage is vested on the executor[6] who shall undertake to develop the EIA (OVOS) document including assessing alternatives, mitigation measures,

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2 Review of legislation on environmental impact assessment of the Azerbaijan Republic with regard to implementation of the Espoo Convention.(August 2012) is attached to this Opinion paper. See. Annex 2
3 Art.8 of the draft law envisages very broad list of strategic documents that are subject to SEA.
4 www.unece.org/env/sea/eapgreen.html
5 The previous version of the law (September 2011) that was reviewed was named the Law on Ecological Expertise.
6 The executor of environmental impact assessment (EIA) process – is a relevant individual or legal entity having scientific and technical and methodical capabilities related to implementation of environmental impact assessment by itself or with its assignment (request). From the content of the law it appears that the executor is the person who develops EIA document and is hired by the client/proponent (in the translation of the draft law the term "client" is used which is equal to proponent or initiator). The relations of client/proponent with "executor of EIA" is not clear (according to the previous draft Law the Environmental impact assessment document of planned (scheduled) economical activity is developed by the client/initiator or by the performer (or executor – in different translation) of EIA upon the request of the client/proponent.

public participation. The state authorized body is involved only at the stage of quality control of the developed documentation, the SEE stage. Positive conclusion of the SEE is a necessary condition for the realization of an economic activity. Positive conclusion of the SEE is valid for a period of time not exceeding 5 (five) years.

10. The name of the draft law – Law on EIA seems to be inconsistent with the current content and the general concept of the draft law. The draft law still puts more attention to the ecological expertise, its procedure and outcomes. The part on EIA (OVOS) (Chapter 2) is lacking procedural provisions and describes mainly general recommendation on what shall be assessed by proponent during EIA (OVOS) and included into the relevant documentation. The draft law also includes the provisions related to the SEA. If this law consider EIA in a broad sense (not as elaboration of the OVOS documentation by proponent/executor only), this must be clear in the law. The law should also clearly distinguish between the process of elaboration of EIA (OVOS) documentation by the proponent/executor and the entire environmental impact assessment process.

11. The SEE can be considered as the element of the assessment process (representing review or opinion provided by the environmental authority) but should not replace the EIA or SEA procedures.

12. For the further elaboration of the draft Law on EIA it is recommended to consult with the General guidance on enhancing consistency between the Convention and environmental impact assessment within State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia[7] (hereinafter – the General guidance).

Comments and recommendations

National EIA system

13. From the provisions of the Espoo Convention implies the need for a national EIA procedure that is implemented before the decision-making, and first of all, is targeted to the environmentally-sensitive types of activity, anticipates public participation, preparation of the EIA documentation and taking into account the EIA results during the decision-making on implementation (articles 2.2, 2.3, 4.1, 6.1 of the Espoo Convention).

14. *Activities.* For Parties to both the Espoo and the Aarhus Conventions, the national framework for EIA as a tool to implement both Conventions should cover all the proposed activities listed in appendix I to the Espoo Convention and annex I to the Aarhus Convention. It should be borne in mind that Article 1, paragraph (v), of the Espoo Convention defines a "proposed activity" as "any activity or any major change to an activity", thus, for example, including the

7 http://www.unece.org/fileadmin/DAM/env/documents/2014/EIA/MOP/ECE.MP.EIA.2014.2_e.pdf

modernization of motorways and express roads (ECE/MP.EIA/IC/2009/2, para. 30 (b)). See also p.p. 52, 53 of the General guidance.

15. *Content of EIA documentation.* Content of EIA document defined in the Article 4 of the draft Law does not fully provide all the elements of the EIA documentation as required in the appendix II to the Espoo Convention. Some of elements are mentioned in the Art. 3 as the issues to be considered during the assessment, but they are not reflected in the content of the EIA document provided in the following Article 4.

16. It is not clear in paragraph 2 of Article 4 what means "Environmental impact assessment document which is written in the style and form to be understandable by the people at large…" According to the Espoo and Aarhus Conventions it is not required that the whole EIA document is prepared in a plain language, however, the non-technical summary is a mandatory element of the EIA documentation and it should outline in non-technical language the findings included in each of the earlier chapters of the EIA document. See also p.56 of the General guidance.

17. *Scoping.* Introducing "scoping" stage in the draft law with involvement of public authorities (authorised bodies) at this stage, can also be considered in the law.

18. *Public participation.* The draft law except for the public ecological expertise does not provide relevant details of public participation procedure. According to the draft law the rules of setting-up and hosting of public hearing of EIA document are defined by the relevant executive authority considering the requirements of this law. However, it is recommended to amend the draft law and define main stages and elements of public participation in the law. The draft law should contain detailed requirements for informing the public about the initiation of the procedure and possibilities for the public to participate, in particular, the required form and content of the public notice.

19. In case the procedure for public participation will be defined by the by-law, in the law should set as a minimum the following main elements:
    - requirements for notification and informing the public in an adequate, timely and effective manner;
    - possibility to examine the documentation;
    - forms of public participation (hearings and the possibility to submit in writing any comments) ;
    - specific time frames for notification and public participation ;
    - responsibilities of public authorities for the organization of public participation;
    - taking into account of public comments;
    - requirement that in the decision due account is taken of the outcome of public participation.

20. According to the Article 5 of the draft Law on EIA the executor is responsible for informing the public and organizing the public participation (including public hearings). Reliance on the proponent/executor in providing for public participation is not in line with the Espoo Convention, in which it is implicit in the provisions of article 3, paragraph 8, and article 4,

paragraph 2, that comments should be submitted to the competent public authority. This has been confirmed by the Implementation Committee which stated that "the organization of public participation under the Convention was the responsibility of the competent authority and not of the proponent. Nevertheless, it might be possible under national systems that the competent authority and the proponent would organize the public participation together. However, the proponent should not be responsible for public participation without the competent authority" (ECE/MP.EIA/IC/2010/4, para. 19 (b)). A similar opinion was given by the Aarhus Convention Compliance Committee, which stated that "it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2 (d) (iv) and (v), and article 6, paragraph 6)" and therefore found that "reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention" (ECE/MP.PP/2008/5/Add.6, para. 78; see also ECE/MP.PP/2011/11/Add.2, para. 77)

21. It is recommended that the responsibility to hold the public hearings is moved from the executor to the public authority, including at the EIA(OVOS) stage. Responsibility for public participation should rest on public authorities (although the project proponent may be involved or finance it). See also p.p.57, 58 of the General guidance.

22. Specifics of public participation procedure in EIA (and SEA) should be also incorporated into the Law on "On public participation" (November 22, 2013).

Transboundary EIA

23. There is no detailed provision on transboundary EIA in the draft law. All international agreements to which Azerbaijan is a Party are applied directly in accordance with the provision in the Azerbaijan Constitution. However, without more detailed provisions in the national legislation, such a general provision in the Constitution is not sufficient for proper implementation of the Espoo Convention.

24. It is noted that there are several references to the transboundary EIA in the draft law such as that documents of environmental impact assessment (EIA) in trans-boundary context is considered as the object of the SEE (Art.14); competence and rights of the of the relevant public authorities (Art.16,17). However the aforementioned provisions are not sufficient for the implementation of the Convention.

25. It is important to ensure that transboundary EIA procedure contains clear mechanisms for notification, provision of information, consultation and public participation.

26. With regards to transboundary procedures, the law should properly address and incorporate the following elements:

- sending a notification as a Party of origin
- receiving a notification as an affected Party
- issue when authorities receive information of any activity that might have significant transboundary environmental impact, but no notification from the Party of origin had been received
- the content of the EIA documentation
- sending or receiving the EIA documentation
- consultations between the Parties on the basis of the EIA documentation
- procedure for public hearings
- timeframes for public participation, and modalities of participation at different stages
- post-project analysis and monitoring
- the situation in which Azerbaijan is the affected Party (although some provisions in this regard is envisaged by the new draft law but need to be revised)
- the final decision and the transmission of final decision documentation to the affected Party along with the reasons and considerations on which it was based.

27. The EIA framework as set out in the new draft law seem not to allow for identification of activities likely to have a significant adverse transboundary impact that would trigger the transboundary EIA procedure envisaged by the Espoo Convention. Moreover, the state authority becomes aware of planned activity only at the SEE stage, after the EIA (OVOS) was done and public consultations on the national level were supposed to be held.

28. Therefore, the draft law should be revised to extend the role of the competent authority and provide obligation for the proponent to notify the authorized governmental body (competent authority) to submit the Application (containing basic information on the proposal) /"Declaration of Intent" (or other type of notification) to the competent authority at the beginning of the process. In such case the competent authority can decide whether such activity may have significant transboundary impact or not, and in case it may have such impact apply the transboundary procedure that shall be also clearly defined. The specific list of activities with potentially significant transboundary effects that will trigger the transboundary EIA procedure may be also elaborated and adopted in addition to the national list.

29. The draft law also does not sufficiently address the situation in which Azerbaijan is the affected Party, or to provide for cooperation with the Party of origin in notifying the public of Azerbaijan and in allowing that public to submit comments.

Other

In finalizing the draft, it is strongly recommended that the following also be considered:

30. To amend relevant provisions on funding including the issue of funding in case of transboundary procedure.

31. Since the competent authority should be involved at the early stage of the EIA procedure, to provide that the competent authority also bears the responsibility for the organization of the public participation procedures. This may lead to changes in timing and other financial

arrangements and may also require developing and adopting special provisions or regulation on financial mechanisms of national and transboundary EIA in a form of special provisions in the law or separate regulation.

32. To incorporate relevant provisions on transboundary EIA procedure into the law and coordinate them with relevant provisions on national EIA/SEE. This may also lead to revision of the timeframes of both stages. However, at this point it is difficult to recommend how to do this as some procedural details still need to be defined in the law or relevant implementing regulations.

33. Given that EIA and SEA procedures are interconnected relevantly with the procedures of issuing the construction permit and urban planning, to review and revise/amend, as appropriate, the provisions of the Urban Planning and Construction Code (June 29, 2012).

Annexes

Annex 1. The draft law on EIA
Annex 2. Review of legislation on environmental impact assessment of the Azerbaijan Republic with regard to implementation of the Espoo Convention. (August 2012)
Annex 3. The draft law on EIA with comments provided by Mr. Jerzy Jendrośka