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MEETING OF THE PARTIES TO THE CONVENTION
ON ENVIRONMENTAL IMPACT ASSESSMENT
IN A TRANSBOUNDARY CONTEXT

Implementation Committee

Seventeenth session
Geneva, 14–18 September 2009
Item 2 of the provisional agenda

FOLLOW-UP TO DECISION IV/2 REGARDING UKRAINE (PARAGRAPHS 7–14)

**Independent review of Ukraine's legal, administrative and other measures to implement
the provisions of the Convention**

Note by the secretariat

Summary

The Meeting of the Parties to the Convention endorsed the findings of the Implementation Committee that Ukraine had been in non-compliance with its obligations under the Convention (ECE/MP.EIA/10, decision IV/2, para. 7). The Meeting of the Parties agreed to support the Government of Ukraine in the undertaking of an independent review of its legal, administrative and other measures to implement the provisions of the Convention for consideration by the Committee in the first half of 2009 (decision IV/2, para. 11). The independent review was to be undertaken by a consultant to be nominated by the Committee and financed from the budget of the Convention.

The report included in the annex presents the independent review carried out in the first half of 2009 by consultants nominated by the Committee.

Annex

Independent review of Ukraine's legal, administrative and other measures to implement the provisions of the Convention

Report by consultants*

I. BACKGROUND AND APPROACH

1. The Meeting of the Parties to the Convention on Environmental Impact Assessment (EIA) in a Transboundary Context (Espoo, 1991), in its decision IV/2 (ECE/MP.EIA/10), endorsed the findings of the Implementation Committee that Ukraine had been in non-compliance with its obligations under the Convention, in particular with articles 2, 3, 4, 5 and 6, and decided to issue a declaration of non-compliance to the Government of Ukraine.

2. The Meeting of the Parties requested the Government of Ukraine to ensure that its legislation and administrative measures were able to implement fully the provisions of the Convention, and agreed to support the Government of Ukraine in the undertaking of an independent review of its legal, administrative and other measures to implement the provisions of the Convention for consideration by the Implementation Committee in the first half of 2009. The independent review was to be undertaken by a consultant to be nominated by the Committee and financed from the budget of the Convention. The present report is the independent review.

3. The Meeting of the Parties also requested the Government of Ukraine to submit to the Committee by the end of 2009 a strategy, taking into account the efforts by the Government of Ukraine to implement the provisions of the Convention and based on the outcome of the independent review, including its time schedule and training and other actions to bring about compliance with the Convention, and thereafter to report to the Committee on the implementation of the strategy.

4. Thus the objectives of this review were:

(a) To undertake the independent review for consideration by the Committee in the first half of 2009;

(b) To present recommendations and steps to be taken by the Government of Ukraine to comply with the Convention, including recommendations for legislative amendments;

(c) To identify possible areas for amendments to primary legislation in order to bring Ukraine into full compliance with the Convention;

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(d) To identify possible areas for subordinate legislation (regulations) regulating procedural actions;

(e) To make recommendations to the Committee and to identify further steps to be taken to strengthen Ukraine's capacities to comply fully with its obligations under the Convention.

5. This review uses six review criteria derived primarily from articles 2, 3, 4, 5 and 6 of the Convention (see box 1) and is based on an analysis of relevant legislation, regulatory and administrative acts and norms as well as other documents (see appendix). In addition, one of the authors visited Ukraine from 26 January to 6 February 2009 and conducted a series of meetings and interviews with officials and experts from Ukraine, which have also been used in preparing this review. The Implementation Committee examined a draft of the review during its sixteenth session (10–12 March 2009) and asked that a number of changes be made prior to its finalization and presentation to the Government of Ukraine (ECE/MP.EIA/IC/2009/2, paras. 6–7). It has also been reviewed by two non-governmental legal experts from Ukraine and, again, by members of the Committee.

6. The remainder of this review is organized in three parts. Chapter II summarizes the EIA (OVNS or OVOS¹) system in Ukraine including provisions for transboundary EIA. Chapter III evaluates the Ukrainian EIA system against the criteria listed in box 1. The final chapter contains recommendations for enhancing the compliance of the Ukrainian EIA system with the Convention's requirements.

¹ OVNS is the anglicized Ukrainian acronym for the national procedure similar to EIA; OVOS is the anglicized Russian acronym.

Box 1. Criteria for reviewing legal and administrative provisions related to EIA in a transboundary context in Ukraine

- | | |
|----|---|
| A. | Existence of a national EIA procedure, preceding a final decision, focusing on environmentally significant activities and including public participation and preparation of EIA documentation and the taking into account of EIA findings in the implementation decision (arts. 2.2, 2.3, 4.1, 6.1) |
| B. | Existence, timing and content of a mechanism to notify affected Parties (arts. 2.4, 3.1, 3.2) |
| C. | Opportunity for affected Parties to participate in a procedure for determining the content of the EIA documentation (the scoping procedure) (art. 2.11) ² |
| D. | Provision of information to affected Parties including timely provision of the EIA documentation and the final decision (arts. 3.5, 4.2, 6.2, 6.3) |
| E. | Opportunities for the participation of public in EIA, including for the public of affected Parties (arts. 2.6, 3.8) |
| F. | A mechanism for consultations concerning EIA documentation and taking the results of this consultation into account in the final decision (arts. 5, 6.1) |

**II. ENVIRONMENTAL IMPACT ASSESSMENT SYSTEM IN UKRAINE:
BRIEF DESCRIPTION**

A. Terminology

7. The EIA system or process means the system or process for evaluating potential environmental effects of planned activities and related planning, consultation and decision-making processes. It includes:

(a) OVNS undertaken by the developer;

(b) The State environmental review³ (SER) procedure by State environmental authorities, i.e. a review by experts or State officials, or both, of the OVNS and other project materials;

(c) Permitting processes by local and other authorities that take environmental assessment considerations into account.

8. OVNS materials are documents prepared by the developer, as part of the project documentation for the planned activity, to meet the requirements of the EIA system.

² This article is from an amendment to the Convention that is not yet in force, so it is not a mandatory requirement on the Parties to the Convention.

³ Sometimes translated as Ecological Expertise or Environmental Expert Review.

9. The environmental impact statement is a self-standing document prepared by the developer as part of the OVNS procedure. By law, the statement is publicly available.

B. Principles and legislation

10. As in many other States in Eastern Europe, Ukraine has a well-established national EIA system composed of two distinct components:

(a) A procedure for SER by which a competent environmental authority judges the environmental acceptability of proposed activities;

(b) A procedure for the assessment of impacts on the environment (OVNS).

11. A detailed description and analysis of such systems is available in the academic literature and is not repeated here. However, it is important to note that the SER/OVNS system is substantially different from the EIA system required by the European Union Directive on EIA⁴, which served as an initial model for the Convention. Consequently, it is more difficult for Ukraine and other Eastern European countries to align their legal requirements with the Convention.

12. Although the Ukrainian national regulatory framework for authorization of projects and for OVNS seemed “extremely complicated” to the Implementation Committee (ECE/MP.EIA/2008/6, para. 31), it is possible to identify key regulatory acts (see appendix) and principles.

13. Whereas the SER procedure is regulated by the Law on Environmental Review, the OVNS procedure is guided by the State Construction Standard No. 214. This arrangement, by which SER has a higher legal status and is organizationally anchored in the Ministry of Environmental Protection whereas OVNS is a technical standard under the auspices of the Construction Ministry, potentially complicates compliance with international norms that are not usually tuned to such specifics.

C. Environmental impact assessment procedure

1. Overview: State environmental review and assessment of environmental impacts

14. Ukraine requires both SER and OVNS for all proposed activities representing a potential environmental hazard, which in practice means a very wide range of activities. A structural obstacle in the Ukrainian EIA system is that it envisages a common procedure for a very wide range of activities, which makes it difficult formally to focus on environmentally significant proposals.

⁴ Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directives 97/11/EC of 3 March 1997 and 2003/35/EC of 26 May 2003.

15. SER is compulsory for all activities and construction projects that are recognized as environmentally hazardous, as listed in the Resolution of the Cabinet of Ministers on List of Activities and Objects Prone to Causing Higher Environmental Risks. Activities with significant transboundary impact are included in the list (item 22), and the list is broadly comparable with appendix I to the Convention.

16. The SER legislation requires that OVNS materials and an environmental impact statement are prepared for all these activities and submitted for SER. The Construction Standard prescribes how the OVNS procedure is implemented for construction and investment activities. In addition, as stipulated in the Law on Investment Activity (art. 15), all investment projects and programmes are subject to a complete State review, which includes SER and other sectoral reviews. In this case, OVNS is also compulsory.

17. It is not clear whether the OVNS procedure is prescribed to the same level of detail for activities that do not involve construction or investment (e.g. groundwater abstraction, forestry).

18. The OVNS procedure, as regulated by the Construction Standard, envisages a complex sequence of stages as shown in table 1⁵, involving the preparation of various documents (including the environmental impact statement), consultation with authorities and public participation. The figure presents a simplified illustration of the EIA process in Ukraine.

19. The OVNS materials (and their terms of reference) may be prepared, and SER may be conducted, at several stages in project planning, including during the feasibility study and during the detailed project design. It is possible (and often the practice) that only one set of OVNS materials is prepared and used for both the feasibility study and, with amendments, for the detailed project design.

Table 1. OVNS of investment projects in Ukraine

(source: State Construction Standard No. 214)

Stage	Planning and constructing activities	SER/OVNS stage	Authors' comments on the relevance to the Convention
Proponent's decision on initiating the activity			
Pre-investment studies			
1	Preparation of input data about the construction, formulation of the technological programme, investment intentions, assessment of the demand in raw materials, energy, human resources, etc.; pre-investment studies	Publication of the declaration of intent. Preparation of a preliminary EIA ⁶	This is an appropriate stage for notification

⁵ The scheme given in table 1 relates to "investment projects". The criteria for defining an "investment project" were not clear to the authors, but most large projects appear to fall within this category.

⁶ In the authors' opinion, this is an informal, internal procedure that helps to prepare the declaration of intent and to decide on the nature and scale of the required OVNS.

Stage	Planning and constructing activities	SER/OVNS stage	Authors' comments on the relevance to the Convention
2	Development of the alternative options for locating the site taking into account the state of the environment and existing infrastructure	Development of a brief EIA ⁷ as part of the documentation justifying the project site or corridor location	
3	Development and endorsement of terms of reference for preparing a feasibility study for the investment and a draft project plan	Preparation of the terms of reference for the OVNS materials to be included in the feasibility study and draft project plan	This stage may be considered as scoping as defined in article 2, paragraph 11, of the Convention (as amended)
4	Preparation of the feasibility study and draft project plan in accordance with the regulations	Preparation of the OVNS materials as part of the feasibility study and draft project plan; public hearings for the activities listed in annex E to the Construction Standard. Preparation of the environmental impact statement	
5	Endorsement and approval of the feasibility study and draft project plan	Complete State review and endorsement of OVNS materials as a part of the feasibility study and draft project plan. Submission of the environmental impact statement to local authorities.	SER resolution may be issued at this stage
Project design			
6	Preparation and endorsement of the terms of reference for the project design	Preparation of the terms of reference for the OVNS materials as a part of the terms of reference for the project design, with changes incorporated that relate to changing investments, details of the draft plan or infrastructure	This stage may also be considered as scoping.
7	Development of the project design	Carrying out of OVNS if it was not conducted in previous stages, or updating OVNS according to the project design	
8	Endorsement and approval of the project	Complete State review and endorsement of the final OVNS materials	SER resolution may also be issued at this stage
9	Development of working documents	Update of the OVNS materials according to changes in technological processes or construction activities; submission to the State review for endorsement.	SER resolution may also be issued at this stage. May be considered a final decision

⁷ The State Construction Standard provides little explanation of what is meant by a "brief EIA". It appears that an environmental assessment is required at this stage to justify site selection. However, this environmental assessment cannot be detailed as the site is not determined and the developer does not have access to all data. The brief EIA is submitted, as part of the application, to the competent authority responsible for land allocation; it is not necessarily used for any other purposes.

Stage	Planning and constructing activities	SER/OVNS stage	Authors' comments on the relevance to the Convention
		Construction	
10	Construction	Application for the construction activities permit. Implementation of the OVNS recommendations	This is formally the final decision
		Operation	
11	Start-up and adjustment (post-project analysis)	Assessment of environmental protection and safety measures prescribed by OVNS, and carrying out of a post-project analysis if deemed necessary	

20. From the perspective of the Convention, the following stages of the EIA process are important:

(a) The first stage of preparing the declaration of intent, which must be published in the relevant mass media. At this stage, the public should be notified of the proposed activity for the first time and, therefore, any affected Party should also be notified;

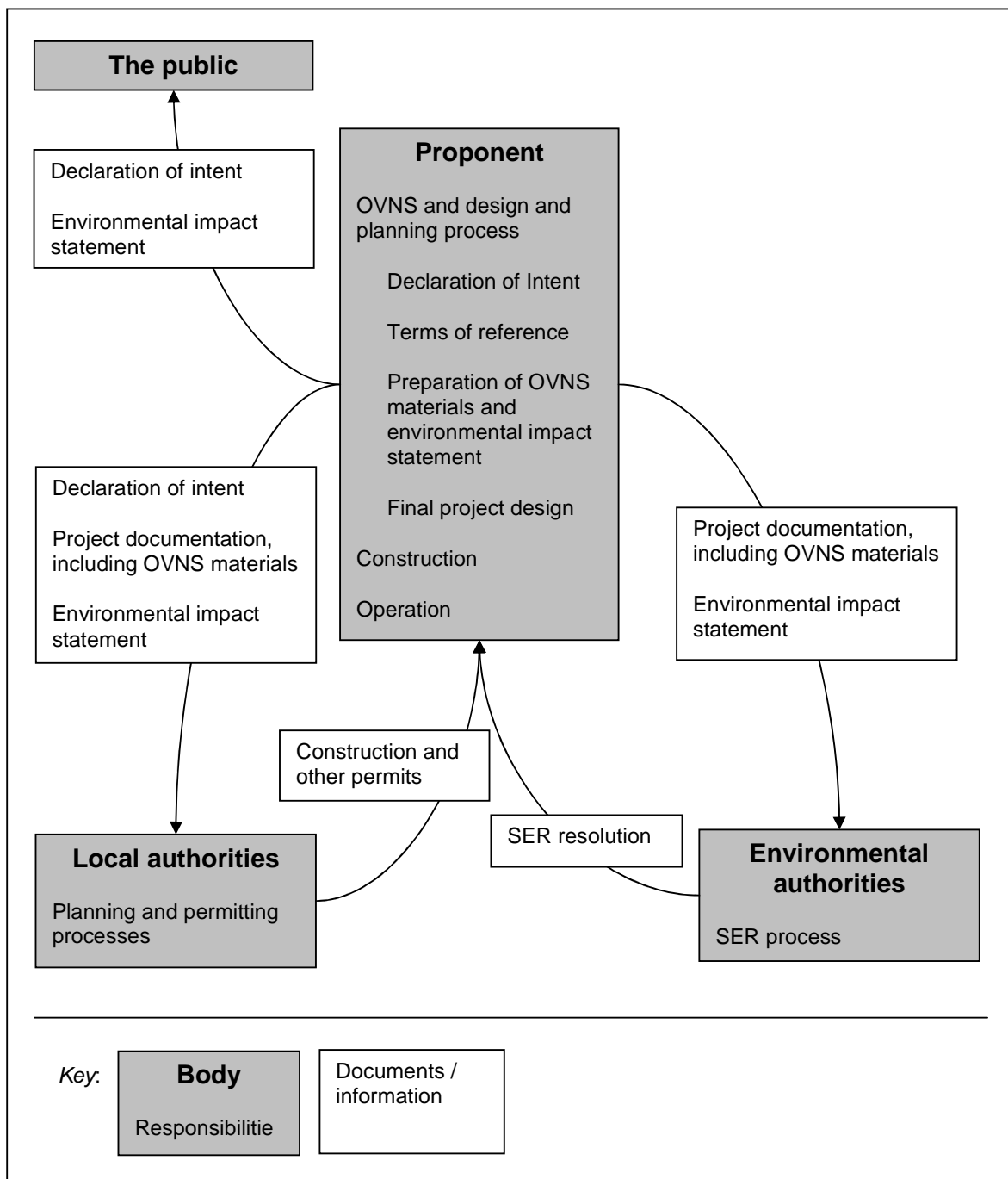
(b) The preparation of terms of reference for OVNS, where the exact content of OVNS materials may be discussed and endorsed (for either the feasibility study or the detailed project design);

(c) The preparation of OVNS materials as part of project documentation, and their review by the competent authorities (including the Ministry of Environmental Protection and its local offices) in the framework of SER;

(d) The preparation and publication of an environmental impact statement, a self-standing document summarizing the findings of OVNS. It should be available to the general public, as well as to environmental and other authorities;

(e) A project cannot go ahead without endorsement – a positive resolution – by SER (Law on Environmental Review, art. 39). A positive SER resolution is valid for a period of three years from the date of issue. If project activities do not start within this period, the project has to be submitted for a new SER; this includes preparation of new OVNS materials.

Figure. Simplified illustration of the EIA process in Ukraine



2. Types and content of environmental impact assessment documentation

21. Several types of documents are produced during the EIA process. Project design and planning documents include the feasibility study, draft project plan and final project design. EIA-related documents include the declaration of intent, the OVNS materials (as part of project documentation) and the environmental impact statement.

22. The Construction Standard sets the structure and contents of the OVNS materials, which include:

- (a) The reasons for undertaking OVNS;
- (b) The geographical and ecological characteristics of the area or site intended for the proposed activity;
- (c) A general description of the proposed activity;
- (d) An assessment of environmental impacts to be caused by the proposed activity;
- (e) An assessment of social impacts to be caused by the proposed activity;
- (f) An assessment of impacts on existing infrastructure to be caused by the proposed activity;
- (g) Systematic measures to ensure environmental compliance;
- (h) An assessment of environmental impacts to be caused by construction activities;
- (i) The environmental impact statement.

23. The Construction Standard regulates the contents of the environmental impact statement, which summarizes the OVNS materials and must contain:

- (a) Data on the proposed activity, its objectives and implementation plans, and significant factors that may affect the state of the environment, including environmental accidents;
- (b) Quantitative and qualitative indicators of environmental hazards and threats to public health and safety associated with the proposed activity, and measures to be taken to ensure environmental compliance;
- (c) A list of residual impacts;
- (d) The measures taken to inform the broader public about the proposed activity, its objectives and implementation plans, and obligations to ensure that project solutions comply

with environmental protection and environmental safety regulations on all the stages of construction activities and operations.

24. Whereas the OVNS materials are part of project documentation and may be confidential, the environmental impact statement should be available to the public.

3. Environmental impact assessment procedure and public participation

25. Public participation in environmentally-significant decisions is regulated by EIA and other legislation (see appendix). Principles of public participation in environmental decision-making, including participation in OVNS, are laid down in laws, including those on: Environmental Protection, Environmental Review, the Principles of Regulatory Policy in Economic Activity, and the Planning and Development of Territories.

26. In particular, one of the principles of the regulatory policy is (from the Law on the Principles of Regulatory Policy in Economic Activity, art. 4):

“Transparency and taking into account public opinion: openness of the activities of regulatory bodies for persons, legal entities and their unions; mandatory examination by the regulatory bodies of all proposals, comments and initiatives duly submitted by persons, legal entities and their unions; timely circulation to persons, legal entities and their unions of new regulations; communicating to the broader public information about regulatory activities”.

27. The principles of public participation in OVNS are detailed in the Construction Standard and in the Regulations on Public Participation in Decision-making in Environmental Matters. In addition to the already mentioned declaration of intent, the public and local authorities should also receive an environmental impact statement as defined in stage 4 of the OVNS procedure (see table 1). The legislation also envisages public consultations through meetings and other forms of interaction. The outcomes of public participation should be submitted to SER together with other OVNS materials. Furthermore, the public should be informed through the media of the SER resolution.

28. The Construction Standard requires that the following materials documenting the consideration of public interests are included:

(a) Evidence that the declaration of intent and information about public hearings were published in the mass media;

(b) Comments from the local population in writing or other forms;

(c) A list of materials made available to the local population and non-governmental organizations, questions and comments by citizens and answers to the questions and comments;

(d) Summarized decisions on the citizens' comments taken into account and explanations of any rejected comments, and conclusions of any public environmental review⁸.

29. Having completed SER, the relevant authorities must publish the SER resolution in the mass media (Law on Environmental Review, art. 10).

4. Environmental impact assessment procedure and final decision

30. The concept of the "final decision" is very important in the context of the Convention. The Convention obliges the Party of origin to distribute the EIA documentation "within a reasonable time before the final decision" (art. 4), to take due account of consultations in the final decision and to provide this decision along with the reasoning to the affected Party (art. 6). However, the Convention does not define the "final decision".

31. A reasonable interpretation of the "final decision" was provided by the European Court of Justice⁹ and clarified by the Implementation Committee, which "was of the opinion that if the conditions attached to a decision can be altered subsequently by other decisions, the former cannot be considered the 'final decision' in the meaning of the Convention" (ECE/MP.EIA/IC/2009/2, para. 21).

32. The Ukrainian legislation determines a sequence of permitting stages (see box 2). This process does not contain the term "final decision", but the authors of this review are of the opinion that the "construction activities permit" issued at the end of the planning and project design cycle is the closest in its meaning to the "final decision". This is because all the preceding decisions, including the SER resolution and the "location permit", do not automatically allow the project to proceed and do not impose any rules that cannot be made more stringent by the final decision of the local authorities.

33. At the same time, from the practical standpoint the final decision might also be interpreted as the SER resolution, as it is at this stage that all environmental factors can and should be taken into account. It would be practical from the point of view of the implementation of the Convention if such an interpretation were adopted, since it would allow the competent authority in Ukraine to consider the outcomes of the transboundary procedure while deliberating the SER resolution. In contrast, the local authorities issuing the construction activities permit are likely to be less well equipped to take into account transboundary environmental requirements and considerations.

⁸ A parallel environmental review process that may be organized by a citizens' group, though this rarely occurs in practice.

⁹ Judgment of the Court (Fifth Chamber) of 7 January 2004 in Case C-201/02, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0201:EN:HTML>.

III. ENVIRONMENTAL IMPACT ASSESSMENT SYSTEM IN UKRAINE: EVALUATION IN THE LIGHT OF THE CONVENTION

34. Ukraine deposited its instrument of ratification of the Convention on 20 July 1999 following a law on the ratification. The Convention entered into force in Ukraine 90 days later. Both the point of contact for notification and the focal point for administrative matters under the Convention are within the Ministry of Environmental Protection.

Box 2. Overall scheme of the endorsement of investment projects in Ukraine

The general scheme of project decision-making steps is based on the Law on the Planning and Development of Territories. The decision-making is also based on the general scheme of territorial planning in Ukraine, developed by the Government and approved by the Parliament; at the regional level (including the Republic of Crimea), there are regional schemes of territorial planning based on the general scheme and approved by regional authorities. At the local level, these schemes are laid down in general plans for cities or settlements and local schemes of territorial planning; these schemes must be approved or amended by local councils. The general plans are used for detailed plans of territories. Physical planning authorities use these plans to develop suggestions on possible developments within an area, and submit their suggestions to relevant local or regional councils.

A body that wishes to develop a construction project on land that it owns or uses must apply to the executive bodies of local or regional councils for a location permit. If the project is accompanied by a transfer of land that is in State or municipal ownership, the decision on the land transfer also serves as the location permit. The location permit is provided on condition that relevant physical planning authorities issue an analytical document certifying that the proposed activities fully comply with plans and development schemes, Construction Standards and local construction rules. A location permit does not mean that actual construction activities may start.

Having secured the location permit, the proponent can request input data for the project development, start survey and planning activities and, as a final step, apply for the construction activities permit. The input data are provided by executive bodies of relevant councils or district administrations. The project documents are developed by the proponent, who uses the input data for the project development and seeks to comply with physical planning and architectural legislation. The OVNS conclusions are included in project documents if OVNS is compulsory for this kind of activity.

Once the project documents have been approved (possible only if a positive SER resolution is secured), the proponent is allowed to apply for the construction activities permit; the issuing authorities are Inspectorates for Architectural and Construction Control. Having secured this second permit, the proponent may start construction. Construction begun without the construction activities permit is unauthorized and illegal.

35. According to the Law on International Agreements of Ukraine (art. 19):

“International treaties whose mandatory character is endorsed by Parliament [i.e. by law] are part of national legislation and are implemented in the same way as national legislation”.

36. This provision seems to apply the Convention in Ukraine directly. However, the authors agree with the Implementation Committee's opinion that the "provision in the Constitution to directly apply international agreements ... is considered by the Committee as being insufficient for proper implementation of the Convention without more detailed provisions in the legislation" (ECE/MP.EIA/2008/6, para. 59).

37. The lack of more detailed provisions is not corrected by the single direct reference to the Convention identified by the authors in national legislation, or rather in a technical standard. The Construction Standard (item 1.11) states that "if there are impacts of the proposed activity that affect the territory of neighbouring states then EIA should be conducted according to the requirements of the Convention on EIA in a Transboundary Context"¹⁰. Neither of the above two provisions (in the Constitution and in the Construction Standard) specify the roles and responsibilities of various actors, or the procedures and other elements that should be clear if legislation is to be effective.

38. On 2 April 2008, the Government of Ukraine established the Intergovernmental (strictly interdepartmental) Coordination Council on the Implementation of the Espoo Convention in Ukraine. The Chairman of the Council is the Deputy Prime Minister and the Deputy Chairman is the Minister of Environmental Protection. The Council includes 10 Deputy Ministers, a representative of the National Defence and Security Council and a representative of the Academy of Sciences. The Council meets at least twice a year¹¹ and is concerned with:

- (a) Developing proposals for implementing the Convention;
- (b) Coordinating activities of various authorities related to the implementation of the Convention;
- (c) Monitoring the application of the Convention and analysis of its effectiveness;
- (d) Review of draft legislation aimed at implementing the Convention;
- (e) Identification of scientific research that should support the implementation of the Convention;
- (f) Advising various authorities on public consultation procedures in the context of transboundary EIA.

39. Despite its important role, the Council is not supposed to be the competent authority as defined by the Convention (box 3). It appears that Ukrainian legislation does not define such an authority: the Resolution of the Cabinet of Ministers on the Procedure for Participation of the Central Authorities in the Activities of the International Organisations in which Ukraine

¹⁰ This statement raises several questions: How does one know that a transboundary impact is likely? Why is only the "territory" of other States mentioned? What does it mean exactly to conduct EIA in accordance with the Convention?

¹¹ The Council met four times in its first year or so.

Participates does not mention the Convention in the list of international conventions and organizations (item 4).

40. Current practice is that the Ministry of Environmental Protection (the point of contact and the focal point of the Convention) performs some of the responsibilities of the competent authority. However, the lack of clear legal designation of the competent authority and definition of its responsibilities is a clear disadvantage. This disadvantage becomes especially apparent given that Ukraine can be the Party of origin under the Convention or an affected Party or both. The authors were unable to identify formal procedures that would allow Ukraine to perform the role of an affected Party.

41. The rest of this chapter evaluates the Ukrainian EIA system against the criteria defined in box 1.

Box 3. Competent authority in the context of the Convention

According to article 1(ix) of the Convention, “competent authority” means the national authority or authorities designated by a Party as responsible for performing the tasks covered by this Convention and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity. Thus, at least four distinct roles should be clear:

- A point of contact for the Convention, for receiving notifications;
- A focal point for administrative matters under the Convention;
- An authority overseeing and enforcing the implementation of the Convention;
- An authority making final and other decisions (see section II.B.4 above)

It would naturally be practical if all four roles were combined in one organization, but in any case the allocation of these roles should be clear for both domestic and international actors.

A. Existence of an adequate national environmental impact assessment procedure

42. In general, Ukraine satisfies this criterion, since it has a national EIA procedure in which EIA precedes the final decision and which covers all environmentally significant activities, includes possibilities for public participation and the preparation of EIA documentation, and takes into account the EIA findings in the final decision.

43. Although the OVNS procedure is prescribed in great detail for construction and investment projects, it may not be clear for non-project activities such as deforestation of large areas. The compliance with the Convention of planning, consultation, and permitting arrangements for such non-project activities should be verified in the future.

44. The national EIA system has certain weaknesses. It is not the task of this report to analyse these weaknesses, but it should be noted that some of them may become crucial when the initial alignment with the Convention’s provision has been completed and the time for fine-tuning comes.

45. For example, the current EIA procedure is regulated by a Construction Standard that cannot be copied or disseminated, in whole or in part, without the official permission of the State Committee on Construction and Architecture. This cannot be the basis for a transparent and accountable, internationally recognized system of transboundary EIA.

46. **Overall assessment: Adequate. May need improvement in the longer term.**

B. Notification of the affected Party

47. There is no explicitly defined mechanism to notify the affected Party according to the requirements of the Convention. The legal provisions do not contain answers to the following questions:

- (a) In which cases will the affected Party be notified?
- (b) Who will notify the affected Party?
- (c) When will such a notification be sent?
- (d) What will such a notification contain?

48. A legally clear answer to question (a) would require the existence of clear criteria by which activities requiring notification can be identified. It would not be reasonable for all activities requiring EIA to also require notification. The list of environmentally hazardous activities includes “facilities causing transboundary impacts” (item 22), which is further clarified by a letter of the Ministry of Environmental Protection¹². However, while the list of activities helps to trigger an EIA procedure for activities with transboundary significance, it does not necessarily require notification of the affected Party in case of such activities.

49. A logical answer to question (b) would be that a notification should be sent by the competent authority, but Ukraine does not clearly identify its competent authority. Though it may be assumed from observing current practice that the Ministry of Environmental Protection is the competent authority, there are no specific responsibilities and procedures for notification in the Ministry.

50. The answer to question (c) may be found in the Convention: the notification should be done at the latest when the public of the Party of origin is notified (art. 3.1). According to the Construction Standard, notification should occur at stage 1 (see table 1) when the declaration of intent is issued. This presents a potential problem of timing and responsibilities, since at stage 1 the competent authority (the Ministry of Environmental Protection) may not be aware of the planned activity or its potential impact.

¹² Letter No. 5071/11-8, dated 7 May 2007.

51. Finally, article 3, paragraph 2, of the Convention also addresses question (d) by specifying the content of the notification, but this is not reflected in Ukrainian legislation. Decision I/4 of the Meeting of the Parties (in ECE/MP.EIA/2) elaborates on this provision.

52. **Overall assessment: Inadequate. Needs to be addressed immediately.**

C. Opportunity for the affected Party to participate in scoping

53. The EIA procedure has a basic scoping stage when the terms of reference for EIA are defined. According to article 2, paragraph 11, of the Convention², the affected Party should be able to take part in discussions on the scope. This is not reflected in Ukrainian legislation. However, this might be considered a fine-tuning criterion, since scoping, especially in a transboundary process, is a good practice not necessarily attainable at the early stages of developing national EIA systems.

54. **Overall assessment: Inadequate. Needs to be addressed in the longer term.**

D. Provision of information to the affected Party

55. The Convention requires timely provision of information to the affected Party, including of the EIA documentation and the final decision (arts. 3.5, 4.2, 6.2 and 6.3). In the Ukrainian context, the EIA documentation may be interpreted narrowly as only the environmental impact statement (stage 5 of the EIA procedure in table 1) or broadly as all other EIA documentation (including the OVNS materials, the declaration of intent and the terms of reference).

56. The content of an environmental impact statement, as defined by the Ukrainian legislation, is narrower in scope than the content of the EIA documentation as defined by the Convention (table 2). The requirement for an environmental impact statement to be published (i.e. in a newspaper or similar) imposes certain restrictions on how much could be included. Thus, a mechanism for providing more complete EIA documentation (e.g. the OVNS materials) needs to be considered.

57. **Overall assessment: Inadequate. Needs to be addressed immediately.**

E. Participation of the public of the affected Party

58. Several of the Convention's provisions (notably art. 3.8) stipulate that the public of the affected Party should be provided with the information (including the EIA documentation) and the opportunity to comment and to participate in consultations. Ukraine has rather extensive legal provisions for its own public participation in environmental decision-making, but no specific legal provision for the participation of the public of the affected Party.

59. **Overall assessment: Inadequate. Needs to be addressed immediately.**

F. Consultation and final decision

60. Article 5 of the Convention requires that there is a possibility for consultation with the affected Party concerning the EIA documentation. As with some other provisions, the authors failed to identify specific procedures and responsibilities for such consultations.

61. The final decision can be interpreted in many ways. However, in the spirit of the Convention, it would be logical to consider the SER resolution as the final decision. The convenience of this approach is that such a resolution is prepared by the Ministry of Environmental Protection – potentially the Convention’s competent authority – and thus is already in the “right hands” to be passed on to the affected Party.

62. The Ukrainian legislation does not specify procedures, responsibilities and timing for providing such information. This is a fundamental requirement that should be addressed immediately.

63. **Overall assessment: Inadequate. Needs to be addressed immediately.**

Table 2. Content of an environmental impact statement in Ukraine and the EIA documentation according to the Convention

(requirements in the Convention not addressed in Ukraine are highlighted in bold)

Environmental impact statement in Ukraine	EIA documentation (appendix II to the Convention)
<p>Data on the proposed activity, its objectives and implementation plans; significant factors that may affect the state of the environment (including environmental accidents).</p> <p>Quantitative and qualitative indicators of environmental hazards and threats to public health and safety associated with the proposed activities, and measures to be taken to ensure environmental compliance.</p> <p>List of residual impacts.</p> <p>Measures taken to inform the broader public about proposed activities, its objectives and implementation plans; obligations of the contracting party to ensure that project solutions comply with environmental protection and environmental safety regulations in all stages of construction activities and operations.</p>	<p>(a) A description of the proposed activity and its purpose;</p> <p>(b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;</p> <p>(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;</p> <p>(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;</p> <p>(e) A description of mitigation measures to keep adverse environmental impact to a minimum;</p> <p>(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;</p> <p>(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;</p> <p>(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and</p> <p>(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).</p>

IV. RECOMMENDATIONS AND ISSUES FOR FURTHER ANALYSIS

64. It is relatively easy to imagine a perfect legal system. It is much more difficult to see it enacted and it is improbable that such a system would work in practice. The authors' experience of participating in EIA system reforms in many countries with economies in transition has taught them that external recommendations are almost always useless unless they connect to driving forces coming from within the system. Effective reforms can only be implemented by practitioners intimately familiar with: (a) the functioning of existing mechanisms and procedures; (b) the interests and capacities of domestic actors; and (c) the complex context in which EIA systems function.

65. The authors do not have such detailed knowledge, experience and intuition and therefore approach very carefully the recommending of changes to the system. Firstly, two crucial questions are asked that Ukrainian policymakers should answer before proceeding with the reform. Secondly, a broad vision of a Convention-compliant EIA system in Ukraine is outlined, and specific options for moving towards this vision are pointed out. Finally, potential strategies for implementing these solutions are discussed.

66. The two questions and the vision can be used as benchmarks against which to evaluate Ukraine's expected strategy to implement the provisions of the Convention.

A. Two key questions

67. In order to meet the Convention requirements in Ukraine, two overarching questions need to be answered:

(a) Which will be the designated authority overseeing the implementation of the Convention and how will this authority accrue the necessary administrative powers and resources to fulfil its task?

(b) Will there be a separate track or procedure for activities with transboundary environmental impact or will there be an attempt to reform the system as a whole so that it is more compatible with the Convention's requirements?

68. An advantage of a specific regulation on EIA in a transboundary context would be that it would focus on the Convention's specific requirements and be able to express them in clear and actionable terms. It would cover only a small set of activities and thus be easier to pass and implement. It would also cut through the complexities of the current EIA and related regulations and thus be understandable, appealing and attractive to international observers and partners.

69. The advantages of a broader strategy would be that it would be more integrated and would probably (though not necessary) lead to general improvements in the system.

B. The vision: a Convention-compliant environmental impact assessment system in Ukraine

70. The following paragraphs set out the vision in **bold**, each element being followed by possible details and considerations:

71. **Ukraine has one or more designated authorities responsible for implementing the Convention (as required by art. 1(ix) and other articles of the Convention), both as a Party of origin and as an affected Party. This authority has clearly-defined responsibilities, mandate and resources to implement the Convention. There is a dedicated unit working with the provisions of the Convention in close contact with a political body such as the Intergovernmental Coordination Council on the Implementation of the Espoo Convention in Ukraine.**

72. Possible details and considerations:

(a) The competent authority might be defined by amending the List of Activities and Objects Prone to Causing Higher Environmental Risks, as well as the Statute of the Ministry of Environmental Protection of Ukraine and the Regulations on the Intergovernmental Coordination Council on the Implementation of the Espoo Convention in Ukraine;

(b) Contacts in the framework of the Convention might occur through either the competent authority, e.g. the environmental authority, or through the Ministry of Foreign Affairs.

73. **All planned activities with potentially significant transboundary effects appear “on the radar” of the competent authority early in the planning process (e.g. when the declaration of intent is prepared). The authority has the capacity to decide which of these activities should be the subject of notification to potentially affected Parties, and should effectively and efficiently serve such notifications.**

74. Possible details and considerations:

(a) Declarations of intent might be collected into a single screening system accessible to the competent authority;

(b) There might be a clear set of criteria used for making a decision about whether a notification should be sent;

(c) To facilitate this process, developers might be legally required to declare whether their projects are likely to have transboundary impacts. A simple checkbox in the declaration of intent might suffice.

75. **In the case that a transboundary EIA is initiated, the competent authority is able to trigger a special transboundary EIA procedure that contains some specific stages, mechanisms, procedures and responsibilities meeting the requirements of the Convention as well as national legislation.**

76. **This procedure ensures timely and adequate provision of information for consultation with and public participation in the affected Party, fully in line with the provisions of the Convention** outlined in this review and summarized below:

- (a) Translation of information and its provision to the affected Party (art. 3.5);
- (b) Arrangement of the participation of the public of the affected Party in preparing the terms of reference for EIA (art. 3.8);
- (c) Translation of the environmental impact statement and its provision to the affected Party, while also making sure that the content of the environmental impact statement is in line with appendix II to the Convention);
- (d) Arrangement for the authorities and the public of the affected Party to submit comments (art. 4.2);
- (e) Consultation (art. 5);
- (f) Taking into account the outcomes of the transboundary procedure in the final decision (art. 6.1);
- (g) Providing the final decision to the affected Party (art. 6.2).

77. There might be a document outlining a transboundary EIA procedure and highlighting the following elements:

- (a) The oversight role of the competent authority;
- (b) Exchange of information with the affected Party, including at the scoping stage and at the stage when the environmental impact statement is produced;
- (c) Public participation in a transboundary context, as defined by the Convention's guidance on public participation in EIA in a transboundary context (ECE/MP.EIA/7);
- (d) Public participation might be further regulated through implementation of the Resolution of the Cabinet of Ministers of Ukraine on the Endorsement of the Action Plan for the Implementation of the Decision of Parties to Aarhus Convention¹³ III/6f;
- (e) Formatting and dissemination of the SER resolution or the construction activities permit as the final decision in accordance with the Convention (art. 6).

¹³ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998).

78. The competent authority is also capable of organizing joint EIA procedures, participating in bilateral and multilateral negotiations, contributing to the strengthening of the Convention's regime in the international arena and performing a variety of other functions related to the Convention.

79. The designated competent authority might assume responsibility for ensuring that Ukraine adequately uses its rights as an affected Party under the Convention, including:

- (a) Responding to notification (art. 3.3);
- (b) Providing the Party of origin with information on the potentially affected environment (art. 3.6);
- (c) Ensuring the participation of its own public and authorities potentially concerned with transboundary environmental impact (arts. 3.8, 4.2);
- (d) Engaging in post-project analysis and monitoring (art. 7.2).

80. The funding of EIA and other relevant issues are resolved.

81. Possible details and considerations:

(a) Funding of OVNS. In accordance with the Construction Standard (item 1.2), OVNS materials are prepared as a part of the project documentation and the proponent bears all the costs defined by a special item in the summary (item 1.5). An indication that a proponent may also need to cover the costs of a transboundary EIA is given by a statement that “in case of projects with significant transboundary consequences, the provisions of the Espoo Convention should apply”, but it has to be made more clear and specific to proponents to ensure that they are prepared to bear the costs;

(b) A similar complication relates to funding public participation in general. The roles of the proponent vis-à-vis other actors (e.g. local authorities) are defined rather vaguely (Construction Standard, item 1.6), which leaves uncertainty regarding costs;

(c) Funding of SER. According to the Law on Environmental Review (arts. 47–49), SER is funded by the proponent. SER of State-funded activities is funded from the State budget. There are special standards defining the level of this funding, which would in effect be a fee for conducting SER. In principle, such fees may include specific expenses incurred in connection with transboundary EIA or SER;

(d) If a special legal document (e.g. a decree) on transboundary EIA were to be passed, it could specifically deal with costs of both EIA and SER in such cases, including cost-sharing between the affected Party and the Party of origin, as is allowed in the Convention.

C. Strategy: law-making and capacity-building

82. In principle, it is possible to implement the Convention through modifications to the Construction Standard's provisions on OVNS, the Law on Environmental Review or a number of other laws and regulations. However, it may be more productive to pass a specific Cabinet resolution on EIA (or more narrowly on EIA in a transboundary context). This might ensure that it would have a sufficiently high status (higher than a technical standard) and still avoid the high-level political debates associated with full-scale law-making. The Russian Federation has followed this route relatively successfully with its EIA regulations, adopted in 2000.

83. Law-making should be supplemented by capacity-building, with capacity-building efforts focused on:

(a) Creating domestic practice and policy networks on EIA (bridging various sectors) and linking them with international EIA networks;

(b) Enabling analysis of and critical reflection on the domestic system (monitoring, evaluation of EIA and SER, etc.);

(c) Enabling internally-driven processes of transformation of EIA systems, and fostering domestic solutions informed by international experience.

84. In light of these observations, support for a strategy to achieve compliance with the Convention would be a good measure, provided that the strategy were developed through a well-informed, consultative, open, transparent and well-timed (i.e. neither rushed nor unhurried) process.

Appendix

Legislation and guidance

Law on Environmental Review, No. 45/95-VR, 9 February 1995, with amendments in No. 1642-III of 06.04.2000 and No. 254-IV of 28.11.2002.

Law on Environmental Protection, No. 1264-XII, of 25 June 1991.

Law on International Agreements of Ukraine, No. 1906-IV, 29 June 2004.

Law on Investment Activity, No. 1560-XII, of 18 September 1991.

Law on the Planning and Development of Territories, No. 1699-III, 20 April 2000, with amendments.

Law on the Principles of Regulatory Policy in Economic Activity, No. 1160-IV, 11 September 2003, with amendments.

Law on the Ratification of the Convention on Environmental Impact Assessment in a Transboundary Context, No. 534-XIV, 19 March 1999.

Decree of the Cabinet of Ministers on Confirming the Statute of the Ministry of Environmental Protection of Ukraine, No. 1524, 2 November 2006.

Resolution of the Cabinet of Ministers on the Procedure for Participation of the Central Authorities in the Activities of the International Organisations in which Ukraine Participates, No.1371, 13 September 2002.

Resolution of the Cabinet of Ministers on List of Activities and Objects Prone to Causing Higher Environmental Risks, No. 554, 27 July 1995, with amendments in No. 142 of 14.02.2001.

Resolution of the Cabinet of Ministers on Regulations on the Intergovernmental Coordination Council on the Implementation of the Espoo Convention in Ukraine, No. 295, 2 April 2008.

Resolution of the Cabinet of Ministers on the Endorsement of the Action Plan for the Implementation of the Decision of Parties to Aarhus Convention III/6f, No. 1626-I, 27 December 2008.

State Construction Standard DBN A.2.2.-1-2003 on Structure and Contents of the Materials on Assessment of Impacts on the Environment (OVNS) for Designing and Construction of Production Facilities, Buildings and Structures, No. 214, 15.12.2003.

Order of the Ministry of Environmental Protection on Approval of the Regulations on Public Participation in Decision-making in Environmental Matters, No. 168, 18.12.2003.

Order of the Ministry of Environmental Protection on Approval of the Procedure for the Participation of Representatives of the Ministry of Environmental Protection in the Bodies of Conventions and Agreements in which Ukraine Participates, No. 29, 24.01.2009.

Scientific and Practical Comments on the Law on Environmental Protection, Kharkiv (2006).

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