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Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context

Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context serving as the Meeting of the Parties to the Protocol on Strategic Environmental Assessment

Working Group on Environmental Impact Assessment and Strategic Environmental Assessment

Second meeting
Geneva, 27–30 May 2013
Item 3 of the provisional agenda
Compliance and implementation

Draft general guidance on resolving a possible systemic inconsistency between the Convention and environmental assessment within State ecological expertise

Note by the consultants

I. Legal basis and purpose

1. The Espoo Implementation Committee, as a result of its deliberations on the information received regarding the situation in some countries in Eastern Europe, the Caucasus and Central-Asia and specific opinions expressed in this respect, observed that "that might be a reflection of a more general systemic inconsistency between the Convention and environmental assessment within the framework of State ecological expertise systems" (ECE/MP.EIA/2011/4, para. 18). Following this, the Implementation Committee in its Report to MOP-5 proposed to include in the new workplan the development of general guidance on resolving a possible systemic inconsistency between the Convention and environmental assessment within the framework of State ecological expertise systems" (ECE/MP.EIA/2011/4, para. 73).

2. The Meeting of the Parties to the Espoo Convention at its fifth session endorsed relevant specific opinions and observations of the Implementation Committee (ECE/MP.EIA/15), and included development of the proposed general guidance into the Work Plan of the Convention (Decision V/9, ECE/MP.EIA/SEA/2).

3. Thus the purpose of this guidance document is to assist Parties to the Convention in Eastern Europe, the Caucasus and Central-Asia in their compliance with their obligations, noting that "compliance concerns both legal implementation and practical application" (ECE/MP.EIA/10, decision IV/2 (review of compliance), annex II1, para. 24).

4. The document is largely based on the opinions and recommendations of the Implementation Committee as expressed in the reports of its sessions, in its reports to the Meeting of the Parties and in its findings and recommendations subsequent to either a submission or a Committee

initiative. To some extent, with respect to the issues related to public participation, it also draws on the respective opinions and recommendations of the Aarhus Compliance Committee.

II. Introduction – description of the OVOS/expertiza system and specific problematic issuesA. Description of the OVOS/expertiza system

A. Description of the OVOS/expertiza system

5. The regulatory framework for development control system in most of the countries in Eastern Europe, the Caucasus and Central-Asia is based on the system of “expertiza” whereby the decision-making process involves the review of planned activities (mostly concrete development projects but also plans, programs etc.) by special expert committees/experts ("ekspertizas"). The expert committees/experts are affiliated to various governmental bodies. Its environmental part is usually named as State Ecological Expertiza (or sometimes referred to as State Environmental Review -SER) and is usually subject to separate laws.

6. Thus planned activities which have potential impact on the environment are subject to State Ecological Expertiza conducted by the competent environmental authorities or by the external experts nominated by the competent environmental authorities. The procedure is finalised with the so-called “expertiza conclusion”. The activity can be implemented only if the conclusion is positive.

7. Additionally, the activities that are considered to have significant potential impact on the environment are subject to OVOS, an acronym whose terms, in direct translation, can be rendered as “assessment of impact upon the environment”. There is usually a list of activities which always require OVOS but conducting the OVOS may also be required by environmental authorities in case of any other activity subject to State Ecological Expertiza.

8. The OVOS is the procedure during which the proponent (developer) collects all necessary information concerning impact of the project on the environment and compiles the relevant impact assessment documentation. The OVOS procedure is not of permitting nature and is closely connected to the developing of the overall project documentation: the proponent (developer) or the consultant hired by the developer, conducts necessary investigation and studies, and prepares draft OVOS materials. Such materials may take a form of a standalone document (which is usually called OVOS Report) or be just one of the chapters of the overall project documentation.

9. Additionally, in some countries, the developer is responsible for preparing also a document called OVOS Statement (or Statement on Environmental Impact) which in abbreviated manner gives basic information about the project and its potential environmental impact. It serves as a basis for public consultation and therefore in some countries the OVOS Statement should be published in its entirety. This is the proponent (developer) who is responsible for notifying the public, provision of respective information to the public and conducting of public consultations, including public hearings (although in some countries the latter is formally done in co-operation with the competent authorities). Once the consultations are completed the proponent (developer) is responsible for completing the OVOS document meant to summarise the results of OVOS procedure.

10. The OVOS Report, along with the other required documentation, is submitted by the proponent (developer) to the relevant authorities for State Ecological Expertiza. At the Expertiza phase, the authorities (or the external experts nominated by them) examine the compliance of the submitted documentation, including the information on public participation, with the requirements set by law. The State Ecological Expertiza procedure is finalised with the “expertiza conclusion”. The project in question can be implemented only if the authorities issue positive conclusion.

11. The regulatory framework of respective countries usually gives more prominence to the procedure of State Ecological Expertiza which is usually defined in laws adopted by the Parliament (usually a specific law on State Ecological Expertiza or general Environmental

Protection Law). In contrast the OVOS procedure is usually regulated by a low level act, sometimes in form of instruction or in form of State Construction Standard, which often cannot be enforced at courts.

12. State Ecological Expertiza and OVOS are two closely interlinked procedures whereby OVOS precedes Expertiza. In most countries they are required at the stage of the developing a feasibility study for the project and at the stage of developing a construction design of the project.

13. Bearing the above in mind the OVOS procedure, despite its name, should be distinguished from what is generally understood as an environmental impact assessment (EIA) procedure. The two terms are not exactly synonymous because they reflect slightly different institutions. Both have similar objectives but slightly different features which are important from the point of view of the Espoo Convention.

14. Therefore for the purposes of the Espoo Convention (and also for the Aarhus Convention) the OVOS and State Ecological Expertiza are normally considered as a decision-making process constituting jointly a form of an EIA procedure finalised with the conclusions of the State Ecological Expertiza. The decision-making procedure in the regulatory framework for development control based on OVOS/expertiza system starts in some countries (in some countries this early stage does not exist) with the developer submitting to the competent authorities the "declaration of intent" , then involves the development of the OVOS documentation and the carrying out of the public participation process , then submitting the entire documentation to expertiza and finally ends with the issuance of the expertiza conclusions by the competent environmental authorities. After the expertiza conclusions there is normally also a construction permit granted by competent construction authorities and sometimes additionally also another decision of a permitting nature, in case of some activities even a decision of the highest national authorities.

15. The respective situation in particular countries having regulatory framework for development control based on OVOS/expertiza system may differ in details and not all general features described above and specific features described below may apply to all countries in Eastern Europe, the Caucasus and Central-Asia. Some of them have recently significantly changed their frameworks, in particular those who have been prompted to do so as a result of opinions of the Espoo Convention Implementation Committee or Aarhus Convention Compliance Committee. The experience gained in this respect shows that there are some features of the traditional OVOS/expertiza system which can give raise to problems with fulfilling the obligations stemming from the Espoo Convention and which could be successfully resolved.

16. There are a number of differences, both conceptual[1] and methodological[2], between the above described traditional OVOS/expertiza system still in existence in many countries in Eastern Europe, the Caucasus and Central-Asia and the EIA procedure as internationally known. The very existence of such differences is perfectly legitimate and stems from the sovereign right of each Party to the Espoo Convention to develop its own national framework for development control. However, such national framework must be consistent with the Convention and allow the Party to fulfil its obligations under the Convention.

17. Bearing this in mind and following the experience of the countries that have recently changed their national frameworks to meet their obligations under the Espoo Convention, it is worthwhile to assist the other countries in Eastern Europe, the Caucasus and Central-Asia which would also like to do so, by describing some specific features of the traditional OVOS/expertiza system which can give raise to problems with fulfilling the obligations stemming from the Espoo Convention and on that basis to provide some guidance how to resolve the possible problems.

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[1] See for example S.Stec, EIA and EE in CEE and CIS:Convergence or Evolution? (in:) A World Survey of Environmental Law, Rivista Juridica dell Ambiente 1986-1996, ed, Stefano Nespor, Milano 1996, pp343- 358 or

[2] A.Cherp and A.Antypas, Dealing with Continuous Reform: Towards Adaptive EA Policy Systems in Countries in Transition, Journal of Environmental Assessment Policy and ManagementVol. 5, No. 4 (December 2003) pp. 455–476

B. Description of the specific problematic issues

1. Scope of activities covered

18. The scope of activities covered by the traditional OVOS/expertiza system is usually delimited by a general list of activities subjected to state environmental expertiza supplemented by a more narrow list of activities that are recognized as environmentally hazardous and therefore require OVOS. The former list is usually very extensive, while the latter list is much more narrow and usually broadly comparable with the list of activities in appendix I to the Convention. However, since traditionally activities that do not necessarily involve construction are not subjected to expertiza, also the list of activities subjected to OVOS usually includes only activities where construction is involved and do not include activities such as, for example, deforestation of large areas or intensive rearing of poultry or pigs.

19. Some countries do not have a formal list of activities subjected to OVOS but just general legal requirements to prepare OVOS on activities that potentially may have environmental impact. This gives a wide discretion for developer or environmental authorities and in some cases also causes overloading the authorities with small and low impact projects.

2. Scope of assessment and content of EIA documentation

20. Most of the traditional OVOS/expertiza systems do not envisage scoping proces as a specific procedural step. Instead there are quite detailed requirements as to the content of the OVOS documentation included in legal acts regulating the procedure. These requirements are often differentiated according to the stage of the regulatory control of the development of the project (usually slightly different at the stage of the developing a feasibility study for the project and at the stage of developing a construction design of the project), but most often without regard to the particular features of the project in question, in particular the size and location of the project.

21. Furthermore, there is not always a clear requirement for all elements of the EIA documentation as required in the appendix II to the Espoo Convention. For example, quite often there is no clear requirement for “identification of gaps in knowledge and uncertainties” and no clear requirement regarding reasonable alternatives to be described.

3. Public participation

22. In the traditional OVOS/expertiza system, public participation as a mandatory element of the procedure is envisaged basically only at the OVOS stage (if there is at all any formal procedure for OVOS – because in some countries the procedurę for OVOS is not regulated formally). At the expertiza stage usually the only possibility for public participation is provided through so called public ecological expertiza. The latter is not a mandatory element of the expertiza procedure and in practice is rarely only conducted. Therefore the Aarhus Compliance Committee found that it should not be considered as a primary tool to assure implementation with the provisions of Article 6 of the Aarhus Convention but only as additional measure to complement the public participation procedure required as a mandatory part of the decision-making (ECE/MP.PP/C.1/2010/6/Add.4 para 76).

23. As already indicated public participation is a mandatory part at most only at the OVOS stage and in the traditional OVOS/expertiza system this is usually the proponent (developer) who is responsible for organizing public participation, including for notifying the public and making available the relevant information and for conducting public hearing and collecting the comments.

24. Such a reliance on the proponent (developer) in providing for public participation during the OVOS stage is in line with the role of OVOS in the traditional OVOS/expertiza system, but is not in line with the Espoo Convention in which it is implicit in provisions of article 3.8 and art.4.2 Convention that comments should be submitted to the relevant 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)).

25. Similar opinion was made by the Aarhus 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 out that "reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention" (ACC/C/16 para 78ECE/MP.PP/2008/5/Add.6 and ACCC/C/2009/37 ECE/MP.PP/C.1/2010/6/Add.4 para 77).

26. Another feature of the traditional OVOS/expertiza system is that usually public participation procedure is not clearly and precisely regulated by law. In most countries there are general declarations on public participation included into the legal framework but quite often thera are no clear provisions regarding time and content of notification on proposed activity, availability of information for public inspection, forms of public participation as well as no clear obligation to take public comments into account.

27. In legal frameworks that attempt to regulate some elements of public participation quite often there is a requirement that comments from the public are "reasoned". The public usually is clearly granted only access to the limited part of documentation (OVOS Statement), while access to the entire relevant documentation is often heavily restricted. The restrictions include different alleged reasons: quite often are restrictions related to ownership of information and copy-right protection, sometimes there are restrictions related to the volume of information to be made accessible.

4. Final decision

28. As already indicated, after the expertiza conclusions there is normally also a construction permit granted by competent construction authorities and sometimes additionally also another decision of a permitting nature. In most countries however there is no clear indication which of these decisions finally permits the activity to take place. Sometimes also the legal nature of such a decisions is not specified.

29. Furthermore, usually there is no clear requirement that in the permitting decision due account is taken of the outcome of OVOS. In fact such a permitting decision normally do not set environmental conditions of the activity. Such conditions are deemed to be approved by the preceding expertiza conclusions, which itself also do not include clear conditions but usually are limited to merely approving the documentation, including the OVOS materials, submitted by the proponent (developer). However, there is no clear legal mechanism to assure that the environmental conditions of the activity approved in such an indirect way cannot be altered factually by a change of technical details as approved by subsequent permitting decisions.

30. Not always the expertiza conclusions and permitting decisions are required to provide reasons and considerations on which they are based and even if this is the case they are not always publicly accessible. Finally, there is no clear requirement that they are being publicly announced. Furthermore usually there are no clear requirements that authorities issuing expertiza conclusions and authorities issuing subsequent permitting decisions keep the records of the respective proceedings, including the copies of actual expertiza conclusions, decisions and documentation. Usually the proponents (developers) are required to keep them.

5. Transboundary procedure

31. Very few countries within traditional OVOS/expertiza system envisage clear provisions regarding transboundary procedure. Usually it is assumed to be regulated by the Convention itself, which – bearing in mind its general nature, means that in practice there is absolute lack of clarity in this respect and issues are handled on ad hoc basis. Therefore the provision in the Constitution to directly apply international agreements is considered by the Implementation Committee as being insufficient for proper implementation of the Convention without more detailed provisions in the legislation (decision IV/2, annex I, para. 64).

32. The very nature of the traditional OVOS/expertiza system whereby public authorities get involved into the process usually quite late, i.e. as a rule only after the OVOS documentation is prepared and after the public has been consulted, significantly hinders the possibility to follow the obligations under the Espoo Convention.

33. The first problem is timely notification: late involvement of the authorities combined with the lack of any effective screening mechanism for the project likely to have transboundary effect, make it impossible in practice to fulfil the obligation under article 3 .1 of the Convention to notify potentially affected Parties "no later than when informing its own public about the proposed activity". Project proponent (developer) is usually not under obligation, before informing the public – either to notify itself the potentially affected Party or to inform public authorities about the likelihood of transboundary effect. The first option would not be a solution because, as indicated by the Implementation Committee "entrusting the proponent of an activity with the carrying out of the procedure for transboundary environmental impact assessment would not be adequate, unless the proponent was the State" (ECE/MP.EIA/IC/2010/2, para. 36). Also the second option would not be a solution unless there is effective screening mechanisms to ensure that developers follow this obligation.

34. Another issue is the fact that – following the above described problems with the timing of notification - in the traditional OVOS/expertiza system the actual transboundary procedure may be initiated only when the process of developing the documentation, including the OVOS materials together with the related public participation procedure are both in principle already completed and the final documentation, including the outcomes of public participation, is submitted by the proponent (developer) to the competent authority. However, as a result of transboundary procedure under Articles 3 and 4 as well as consultations under article 5, the entire project documentation may well be revised which would merit assuring possibility of the domestic public to participate again.

35. Conducting transboundary procedure is often hindered by already mentioned approach to transparency whereby access is clearly granted only to the limited part of documentation (OVOS Statement), while access to the entire relevant documentation is heavily restricted. Also the fact that providing possibilities for the participation of the domestic public is as a rule the responsibility of the project proponent (developer) and not of the public authorities - does not facilitate smooth running of transboundary public participation procedure. As indicated by the Implementation Committee while generally "the organization of public participation under the Convention was the responsibility of the competent authority and not of the proponent" (ECE/MP.EIA/IC/2010/4, para. 19(b) in case of transbundary public participation "[t]he concerned Parties had a common responsibility for providing equivalent opportunities for public participation in the affected Party, including accurate and effective notification of the public." (ECE/MP.EIA/IC/2010/4, para. 19(c)).This means that public authorities which are not necessarily familiar with the practice of public participation would need to undertake this task.

36. Finally, the design of the decision-making scheme in which it is difficult to identify the final decision authorising the activity as well as conditions attached to it, creates a problem with fulfilling the obligations stemming from article 6 of the Convention.

37. Even more fundamental problems arise with fulfilling the obligations as "affected Party". The traditional OVOS/expertiza system is not designed with a view to accommodate such situations. The major problem here is not only lack of clear procedures and practical experience but also lack of even generally described competences and powers as well as sufficient legal basis to use resources to provide public participation together with the Party of origin.

III. Recommendations

A. General recommendations

1. Need for a national framework

38. As stipulated in Article 2 .2 of the Convention each Party shall take the necessary legal, administrative or other measures to implement the provisions of the Convention including establishment of an environmental impact assessment procedure that:

(a) Involves public participation;

(b) Requires preparation of the environmental impact assessment documentation described in Appendix II to the Convention;

(c) Covers all proposed activities listed in Appendix I to the Convention.

39. The mere provision in the Constitution to directly apply international agreements is insufficient for proper implementation of the Convention without more detailed provisions in the legislation (decision IV/2, annex II, para. 28).

40. While establishment of an environmental impact assessment procedure is one of the core obligations under the Convention ((MP.EIA/WG.1/2003/3, para. 9) a proper domestic framework for authorising and assessing proposed activities likely to have significant environmental impact is necessary for implementation of the Convention, especially with respect to public participation (report of nineteenth session, ECE/MP.EIA/IC/2010/4, para. 19(a)).

41. The national framework should clearly indicate not only details of domestic procedure but also details of transboundary procedure in particular:

(a) Where in the decision-making process there is a place for a transboundary EIA procedure;

(b) Who is responsible for carrying it out;

(c) By which means (decision IV/2, annex I, para. 64).

42. When establishing their national regulatory framework with respect to public participation Parties to the Convention which are also parties to the Aarhus Convention should fully observe also the respective obligations under the Aarhus Convention.

2. Modalities for the legal framework and legal technique

43. In order to follow the Recommendation and assure full compliance with the Convention, Parties in Eastern Europe, the Caucasus and Central-Asia may want to introduce necessary changes to the existing OVOS/expertiza system or to establish a brand new legal framework which may include either a modern EIA law based on the model applied in the rest of UNECE or their own specific model.

44. While according to the Implementation Committee the details of the EIA procedure, for example regarding public participation, should rather be included in the legislation than left for implementing regulations (decision IV/2, annex II, para. 32) the technical aspects, for example the list of activities or specific requirements as to the environmental impact assessment documentation, may be included in the implementing regulations.

45. When a Party choses to establish a brand new legal framework it may consider doing this by way of a separate standalone EIA law or alternatively by introducing respective legal provisions into the general act on environmental protection.

3. Principles

46. The main principles of the national framework shall be as follows:

(a) National framework shall ensure:

i. full compliance with the Espoo Convention;

ii. ability to implement the Convention in practice.

(b) National framework shall be compatible and integrated with the overall development

control legislation.

(c) National framework shall ensure compliance with the respective requirements regarding public participation under the Aarhus Convention.

(d) National framework shall ensure:

i. proper role of public authorities and their involvement into the procedure at the early stage;

ii. early identification of the activities with potential transboundary impact;

iii. effective public participation.

47. Proper role of public authorities shall include:

(a) Ultimate responsibility for conducting

i. public participation

ii. transboundary procedure (including notification)

(b) Obligation to maintain

i. environmental information relevant to their competences and functions, including those competences on which they base their decisions;

ii. all the relevant documents, including the application, EIA documentation and final decision) in publicly accessible data-basis or registers (possibly electronicly accessible) (ECE/MP.PP/C.1/2009/2 para 10 (a)).

48. National framework should be designed in a way to prevent the use of short cuts in the decision-making procedure, i.e. parts of EIA being provided for evaluation and approval by the decision-making authority prior to any information being made publicly available; (ECE/MP.PP/C.1/2009/2 para 10 (f)).

49. Whatever is the model chosen by a Party it should be based on the above principles and follow also the specific recommendations set out below which provide a list of must-have requirements for a national framework to be able to fully implement the Espoo Convention.

B. Specific recommendations

1. Activities

50. The national framework for environmental impact assessment as a tool to implement both Espoo and Aarhus Conventions should cover all proposed activities listed in Appendix I to the Espoo Convention and in Annex I to Aarhus Convention, including for example “nuclear power stations” and also “intensive rearing of pigs” or “opencast mining” or “deforestation” or “offshore hydrocarbon production” or “groundwater abstraction” (art. 2.2 of the Espoo Convention + art. 6.1 (a) of the Aarhus Convention).

51. When designing the national framework it should be borne in mind that:

(a) Article 1, item (v) of the Convention, defines a ‘proposed activity’ to mean ‘any activity or any major change to an activity…’, thus, for example, including the modernization of motorways and express roads (ECE/MP.EIA/IC/2009/2, para. 30);

(b) The list of activities under both Conventions include not only activities involving construction, for example for the purposes of the Convention activity called “navigation channel” includes not only construction but also operation and maintenance works” (decision IV/2, annex I2, para. 41).

2. Scope of assessment and content of EIA documentation

52. When designing the national framework it should be borne in mind that while the Convention lists in Appendix II some mandatory elements of the content of the EIA documentation, a case-by-case determination of the scope of information to be included into these elements of the EIA documentation (‘scoping’) is an effective method for streamlining the assessment and reducing its costs. Furthermore, involving the affected Party in such a case-by-case determination is recommended by the Implementation Committee (ECE/MP.EIA/IC/2009/4, para. 26).

53. Parties may make a case-by-case determination of the scope of information to be included into the content of the EIA documentation a mandatory part of the procedure or make it obligatory only in case of conducting transboundary procedure. As a minimum it is recommended that if the proponent (developer) so requests before submitting an application for development consent, the competent authority shall give an opinion on the scope of information to be included into the content of the EIA documentation.

54. When establishing the requirements for the mandatory elements of the content of the EIA documentation it should be borne in mind that:

(a) The Convention's provision requiring that the EIA documentation includes a description, where appropriate, of reasonable alternatives (appendix II, item (b)) is mandatory for the legal implementation of the Convention by a Party (ECE/MP.EIA/IC/2009/2, para. 39);

(b) It is important that the no-action alternative should be addressed fully so that the evolution of the environment in the absence of the project could be considered (ECE/MP.EIA/IC/2010/2, para. 33);

(c) The non-technical summary is a mandatory element of the EIA documentation and it should outline in nontechnical language the findings included in each of the earlier chapters corresponding to items (a)–(h) of appendix II , including visual presentations as appropriate (maps, graphs etc) (ECE/MP.EIA/IC/2009/2, para.16);

(d) Identification of gaps in knowledge and uncertainties encountered in compiling the required information is also a mandatory element of the EIA documentation.

3. Public participation

55. When designing the national framework it should be borne in mind that organization of public participation under the Convention is the responsibility of the competent authority and not of the proponent (developer). 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)) Thus, these observations regarding the role of the developers (project proponents) shall not be read as excluding their involvement, under the control of the public authorities, into the organization of the public participation procedure (for example conducting public hearings) or imposing on them special fees to cover the costs related to public participation (ECE/MP.PP/C.1/2010/6/Add.4 para 81.

56. To ensure proper conduct of the public participation procedure, the administrative functions related to its organization may be delegated to bodies or persons which are specializing in public participation or mediation, are impartial and do not represent any interests related to the proposed activity being subject to the decision-making.(ECE/MP.PP/C.1/2010/6/Add.4 para 79).

57. The public shall be informed promptly and properly not only about initiation of the procedure and possibilities to participate but also of the issuing of the final decision (permit) (art. 6.2 and 6.9 of the Aarhus Convention).

58. National framework shall contain detailed requirements for informing the public, as required under article 6, paragraph 2, of the Convention, about the initiation of the procedure and possibilities for the public to participate. In particular there should be a clear requirement:

(a) That the public is informed in a adequate, timely and effective manner;

(b) Specifying the mandatory forms of the public notice, including a notice in the vicinity of the venue of proposed activity and on the web-site of the public authority competent for decision-making;

(c) Specifying mandatory contents of the public notice (as compared with the requirements specified in para. 2 (a)-(d) of art. 6 of the Aarhus Convention).

59. If the main means of informing the public is via Internet:

(a) It must be clearly required that all documents, including the application, EIA documentation etc. must be submitted by developers also in electronic form;

(b) That the info is available on the specially designated and easily recognisable Internet websites of the authorities and not only on websites of (proponents/developers).

60. Specific timeframes for the public participation process shall be set, including in particular sufficient time-frames:

(a) For the public to examine available information and documents and to prepare to participate effectively;

(b) For the public to prepare and submit the comments; ((ECE/MP.PP/C.1/2009/2 para 10 (d);

(c) For the public officials to take any comments into account in a meaningful way (ECE/MP.PP/C.1/2009/2 para 10 (e)).

61. In relation to access to information relevant to decision-making:

(a) The provision of information should not be limited only to selected parts of EIA documentation (ECE/MP.PP/C.1/2009/2 para 10 (g);

(b) Copyright protection should not be considered as allowing for the prevention of the public availability of the full environmental impact assessment documentation" (ECE/MP.EIA/IC/2010/4, para. 20);

(c) There shall be a clear requirement that

i. information is provided regardles of its volume (ECE/MP.PP/C.1/2009/2 para 10 (b)

ii. information required to be provided by proponents (developers) is not generally exempted from disclosure (ECE/MP.PP/C.1/2009/2 para 10 (h)).

62. In addition to public hearing, the public should have the possibility to submit in writing

(a) Any comments related to the respective decision-making without the requirement that these comments are reasoned;

(b) During the entire commenting period (art. 6.7 of the Aarhus Convention).

63. When designing a national framework it should be borne in mind that the organization of discussions on the proposed project in the newspapers and through TV programmes is not a sufficient way to assure public participation in compliance with article 6, paragraph 7, of the Aarhus Convention (ECE/MP.PP/C.1/2010/6/Add.4 para 95).

64. There should be a clear requirement that in the decision due account is taken of the outcome of public participation (article 6.1 of the Espoo Convention and article 6.8 of the Aarhus Convention).

4. Final decision

65. National framework should clearly indicate which of the decisions for approving the activities should be considered the final decision for the purpose of satisfying the requirements of the Convention (decision IV/2, annex I).

66. While the Parties are free to decide which of the multitude of decisions required within their regulatory framework should be considered final for the purpose of the Convention, their discretion in this respect is limited to those decisions that in real terms set the environmental conditions for implementing the activity (ECE/MP.EIA/10, decision IV/2, annex I, para. 61) and which embrace all the basic parameters and main environmental implications of the proposed activity in question (ECE/MP.PP/2008/5/Add.10 para 43).

67. National framework should be designed in such a way that in case of each of the decisions considered to be final in relation to given activity there is clarity what are the authorised basic parameters of the proposed activity and the respective environmental conditions for implementing this activity. 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). The same applies if the other decision is capable of significantly changing the above basic parameters or addressing significant environmental aspects of the activity not already covered (ECE/MP.PP/2008/5/Add.10 para 43).

68. There should be a clear requirement that:

(a) The final decision shall be accompanied with the statement of reasons and

considerations on which it is based (art. 6 of the Espoo Convention and art. 6.9 of the Aarhus Convention);

(b) Texts of decisions, along with the reasons and considerations on which they are based, are publicly available. (ECE/MP.PP/C.1/2009/2 para 10 (j));

(c) Public authorities:

i. inform promptly the public of the decisions they have taken and of how the decisions along with the reasons and considerations on which they are based, can be accessed;

ii. maintain and make accessible to the public, through publicly available lists or registers, copies of the decisions they take, along with the reasons and considerations on which they are based and other information relevant to the decision-making, including the evidence of fulfilling the obligation for having informed the public and provided it with opportunities to submit comments.

69. It is recommended that the final decisions when applying the Convention include:

(a) Monitoring conditions" (ECE/MP.EIA/IC/2010/2, para. 18);

(b) Information about possibilities to appeal ((ECE/MP.EIA/IC/2009/2, para. 26).

70. When designing national framework theer should be borne in mind that in the light of article 3, paragraph 8 there is an obligation to inform the public concerned in the affected Party of the final decision" (ECE/MP.EIA/IC/2009/2, para. 27).

71. The final decision should provide a summary of the comments received pursuant to article 3, paragraph 8, and article 4, paragraph 2, and the outcome of the consultations as referred to in article 5, and should describe how they and the outcome of the environmental impact assessment had been incorporated or otherwise addressed in the final decision, in the light of the reasonable alternatives described in the environmental impact assessment (ECE/MP.EIA/IC/2010/2, para. 40).

5. Transboundary procedure

72. In addition to the general obligation to clearly indicate in the national framework where in the decision-making process there is a place for a transboundary EIA procedure and who is responsible for carrying it out and by which means (decision IV/2, annex I, para. 64) the national framework should provide also other necessary details of the transboundary procedure both in respect of acting as "the Party of origin" and as "affected Party".

73. Necessary condition for conducting transboundary procedure is early involvement of environmental authorities, for example by requiring proponents (developers) to submit a "declaration of intent" to such authorities, which in turn could decide of there is likelihood of transboundary impact and initiate the process of transboundary notification. This should be complemented with obligatory scoping in case of finding likelihood of transboundary impact. As an additional tool for successful screening of activities likely to cause significant adverse transboundary effect the Parties, either individually or through bilateral or multilateral agreements or other arrangements, might find useful to establish a list of activities, with thresholds if appropriate, that should automatically be subject to notification (ECE/MP.EIA/IC/2010/2, para. 21).

74. When designing a national framework it should be borne in mind that:

(a) There is a common responsibility of the concerned Parties for providing equivalent opportunities for public participation in the affected Party, including accurate and effective notification of the public. In that context, while recognizing the lack of administrative powers of the Party of origin's competent authority on the territory of the affected Party, at a minimum it had to provide the possibility for the public of the affected Party to participate in the procedure of the Party of origin (ECE/MP.EIA/IC/2010/2, para. 37);

(b) The concerned Parties should share the responsibility for ensuring that the opportunity provided to the public of the affected Party was equivalent to that provided to the public of the Party of origin, including access to at least relevant parts of the documentation in a language the public could understand, as set out in article 2, paragraph 6; article 3, paragraph 8; and article 4, paragraph 2 of the Convention (ECE/MP.EIA/IC/2010/2, para. 35);

(c) The Party of origin's competent authority should furthermore support the affected Party's competent authority in providing effective participation for the public of the affected Party in the procedure for transboundary environmental impact assessment" (ECE/MP.EIA/IC/2010/4, para. 19 (c));

(d) Environmental impact assessment documentation should include a separate chapter on transboundary impact to facilitate translation (ECE/MP.EIA/IC/2010/2, para. 35);

(e) Entrusting the proponent of an activity with the carrying out of the procedure for transboundary environmental impact assessment would not be adequate, unless the proponent was the State" (ECE/MP.EIA/IC/2010/2, para. 36);

(f) Consultations under article 5 are bilateral or multilateral discussions between authorities that have been authorized by the concerned Parties, and should not be confused with public participation under article 3, paragraph 8, and article 4, paragraph 2, or with consultation of the authorities under article 4, paragraph 2, in the areas likely to be affected" (ECE/MP.EIA/IC/2010/2, para. 39).

75. When designing a national framework it should be ensured that:

(a) There is a legal mechanism that comments under article 3.8 and 4.2 of the Espoo Convention of foreign authorities and the public regarding information in the EIA materials are taken into account so that transboundary impact is properly addressed (art. 6.1 of the Espoo Convention);

(b) There is a legal mechanism assuring that results of consultations with foreign authorities under article 5 of the Espoo Convention are binding upon authorities issuing final decision (art. 6.1 of the Espoo Convention);

(c) There is a legal and financial mechanism allowing public authorities to undertake their duties related to provide public participation in case of transboundary procedure.

76. Parties should bear in mind that bilateral agreement could:

(a) Be an effective mechanism to address communication between concerned Parties and the sending of information" (ECE/MP.EIA/IC/2010/4, para.29);

(b) Resolve many issues relating to public participation, as foreseen by the Convention" (ECE/MP.EIA/IC/2010/4, para. 19 (f)).

IV. Elements that should be considered when negotiating a bilateral agreement involving a country with an OVOS/expertiza system

A. Introduction

77. The Espoo Convention envisages in Article 8 that Parties may continue existing or enter into new bilateral or multilateral agreements or other arrangements in order to implement their obligations under the Convention.

78. The Convention provides in Appendix VI a list of elements that can be included in any such agreement, whether with a Party to the Convention or with any other country. The list is neither mandatory (i.e. not all elements listed in Appendix VI have to be included in such agreements) nor it is exhaustive. There is a number of other specific elements that should be considered for inclusion into such an agreement.

79. The more details are being clearly regulated in such an agreement with given country the less problems of procedural nature will need to be handled when entering into the procedure concerning a concrete activity and therefore any such procedure could be faster and more efficient and be focused on substantive issues related to the actual transboundary impact of given activity.

80. Starting negotiations with a draft agreement proposed unilaterally by one partner may be risky for another partner because it puts the partner who proposed the draft into a bit privileged situation.

81. Much more advisable is starting negotiations with an initial meeting (could be at an expert level) during which the partners would:

(a) Present each other their own legal and institutional framework for national and

transboundary procedure;

(b) Agree upon the tentative list of issues to be regulated in a bilateral agreement (i.e. a general scope of the agreement);

(c) Agree upon the level, venue and procedure of further negotiations.

82. Thus, when entering into negotiations concerning a bilateral agreement it is worthwhile to prepare and propose initially a list of issues to be regulated in such an agreement i.e. to propose a general scope of such an agreement.

83. The list of issues to be regulated (i.e. the scope of a bilateral agreement) may vary a bit depending on the country with which an agreement is to be negotiated. There are two obvious factors that may have influence on the bilateral agreement:

(a) Whether a partner country have an OVOS/expertiza system (in which developer is responsible for OVOS) or whether a partner country has a Western-style EIA system where the responsibility for EIA procedure, including for public participation, is put on public authorities;

(b) Whether a partner country have a scoping phase in its national EIA procedure.

84. It is advisable, before starting any negotiations concerning bilateral agreement, to do some initial preparations including a research related to the existing obligations of the partner country under multilateral or bilateral environmental (or other) agreements, as well as legal and institutional framework for national and transboundary procedure in the partner country. Worthwhile would be also looking at existing bilateral agreements, in particular at examples - if any- of agreements of this country with other countries. Useful in this respect might be consulting the dedicated UNECE website (http://www org env/eia/resources/agreements.html).

B. Specific elements to be considered

1. Mandatory notification

85. Bearing in mind the problems in the countries having an OVOS/expertiza system with early screening of activities likely to have transboundary effect as well as the recent recommendation of the Espoo Implementation Committee (ece.mp.eia.ic.2010.2) it may be advisable to consider introducing to the bilateral agreement a list of activities (with thresholds, as appropriate) that should automatically be subject to notification between the two countries subject to the bilateral agreement. The list may include for example activities depending on their type (for example: all nuclear energy facilities) or on their location (for example: all activities on the common natural resource/s). The list can be different in agreements with different countries.
Having a list of activities that should automatically be subject to transboundary notification may be of special value for countries whereby it is not necessarily Environment Ministry responsible for authorising activities subject to domestic EIA/OVOS procedure. However in such countries the list will solve the problem with screening only insofar when the list is well known by the developers and all authorities involved in domestic permitting procedures.

2. Language

86. It is necessary to clearly regulate in the agreement the language as to certain documents, in particular:

(a) Of notification;

(b) Of EIA documentation;

(c) Of the final decision;

(d) Other information (for example - from monitoring).

87. The language may not necessarily be the same for all documents (for example: certain documents might be agreed to be transmitted only in national language or only in an international language like Russian or English). In this respect the Parties to the Convention in Eastern Europe, the Caucasus and Central-Asia have certain advantage because Russian is still widely spoken there so it may well serve as the common language of transboundary procedure between these countries.

3. Translation and interpretation

88. Regardless of what language for what document is required under the agreement, there must be clearly solved other issues related to the translation and interpretation, in particular who is responsible for translation of which documents, and interpretation of which events (meetings or public hearings), and - if different - who pays for it.

89. It could also be useful to provide a procedure for monitoring accuracy of the translation and for settlement of possible disputes related to the translation. The usual practice in the bilateral agreements is that the Party of origin is responsible for translation of the documents into the language of the affected Party. This solution has clear disadvantage because translation into foreign language is more difficult therefore the translation of documents submitted is usually less accurate. Sometimes documents submitted are clearly illegible - therefore in particular in case of this option it is indispensable to have also all documents submitted in the original language.

4. Contact point for notification and means of notification

90. The agreement should clearly regulate who (on both sides) would serve as authorised contact point(s) for notification as well as what are the means of notification. Identification of who is authorised for notification is of specific importance in case of OVOS/expertiza system whereby usually the developer is responsible for the OVOS procedure, sometimes including for notification. In such case there must be clear arrangements for both sides regulated in the bilateral agreement how the notification is to be handled.

91. As for the means of notification - all means are possible under the Convention provided that both countries have a clear understanding of their role. In some countries there are very informal means (by email between authorities of both countries involved) while in some other countries very formal means are being used (via Foreign Affairs Ministries). Informal means are usually used between countries where authorities has had a long tradition of co-operation and mutual trust.

5. Initial consultations about the timing

92. It may be useful to envisage in the agreement that following positive response to the notification, each individual transboundary procedure starts with initial consultations setting the details of the further procedure, including setting the time-frames for consecutive steps.

6. Public participation

93. The agreement should clearly regulate who is responsible for public participation. In particular it should be clear responsibility for:

(a) Identification of the public concerned and local authorities in the areas affected;

(b) Informing the public concerned and local authorities in the areas affected about possibility to participate (including by what means they should be informed);

(c) Providing the public concerned and local authorities in the areas affected with access to necessary information and documents;

(d) Providing the public concerned and local authorities in the areas affected with possibility to submit comments (by written submissions or at a hearing);

(e) Providing the public concerned and local authorities in the areas affected with the information about the final decision and possibilities to have access to such decision.

94. Bearing in mind a special role in the countries having an OVOS/expertiza system of proponents (developers) a bilateral agreement may introduce here quite a significant role of developers provided that they would act under control of competent authorities and their role is clearly identified and commonly accepted.

95. Providing a role for proponents (developers) in the bilateral agreement could solve problems

with financial resources needed for transboundary procedure in case of a Party of origin.

7. Consultations under Article 5

96. The agreement may address the details regarding any future consultations under Article 5 of the Convention, in particular the level, venue and timing of initiation of such consultations. Again, bearing in mind the role of proponents (developers) in the OVOS/expertiza system Parties may agree to include them into the consultations. Apart from this, Parties may also agree on the involvement of other stakeholders, like for example local authorities or representatives of the public.

97. Worth addressing in this respect may also be the procedure for settlement of potential disputes related to issues under consultations.

8. Final decision

98. The agreement may also address the details of the final decision under Article 6 of the Convention, in particular which decisions in each country should be considered as “final decision” for the purpose of triggering requirements of Article 6 of the Convention. This issue is of special importance in relation to countries having an OVOS/expertiza system whereby a careful examination is needed in order to identify the proper decision setting in real terms the conditions for the activity.