

Ukraine

Harmonisation of Ukrainian Waste Treatment Laws with EU Legislation

by Anatolii P. Getman* and Viacheslav I. Lozo**

A significant factor in the growing environmental crisis is the multifaceted problem of waste. Near space contains about 3,000 obsolete satellites¹ and over 5,000 tons of used materials, which have produced millions of fragments orbiting the planet.² Millions of tons of toxic waste such as sulphur dioxide and nitric oxide are discharged into the atmosphere. The soils, especially those in urban and industrial localities, are polluted with wastes that contain pesticides, heavy metals, radioactive substances, and other toxic components.³ Fresh and sea water is contaminated with waste from wrecked ships⁴ and scores of cubic kilometres of poorly treated sewage.

The scale of the challenge has increased due to a tripling of the global population in the 20th century, coupled with rapid industrialisation. In addition, the aggregate raw material production has grown, its output exceeding that of all human history, and four fifths of this growth has taken place since the middle of the previous century. The fast-growing impact of humans on terrestrial life, including discharge of waste, has resulted in a situation where the environment is no longer a stable fundamental development factor. The balance between material-and-energy and information exchange is disrupted, due to the planet's population essentially forming an increasingly complicated artificial environment, to fulfil a seemingly unlimited view of what they need to acquire. According to the US National Commission on Materials Policy, over the period 1940–1970, the total volume of raw material lost by the country's economy through turning it into waste exceeded 20 billion tons. The speed of waste generation is incommensurable with the industrial backward recovery of extracted useful materials.⁵ But this phenomenon is not natural. For instance, ants cause no problems for the environment, although their total mass is four times that of the human population of the planet, and they consume as many calories as 30 billion people. However, unlike human beings, these insects do not pollute the environment; on the contrary, they enrich it with vital matter.⁶ A non-waste closed cycle – biological and technical – could be organised, if desired, by the population of the planet. Meanwhile, most consumed resources are spent in maintaining a huge cost-consuming technogenic system which is straightforwardly damaging to the natural environment.⁷ As a result, several decades

of this industrial development model have raised the issue of human survival.

Historical Background

By the 1970s, awareness had grown that, over the next few decades, the problems affecting the global ecological situation, such as environmental accumulation of toxic chemicals and radioactive waste, would be of a complex nature. For every resident of Dnipropetrovsk, for example, there are over 2,000 tons of hazardous waste.⁸ Detection of such chemicals as DDT even in the animal organisms of Antarctic has shown that there are no pollution-free areas on the planet. Non-degradable toxic wastes are capable of penetrating the water-bearing strata of the Earth, accumulating in human bodies in lethal concentration. Radioactive wastes, particularly those with a long half-life period, are especially hazardous.⁹ The lack of security as regards their burial poses a continuous threat of large-scale catastrophes.¹⁰

Nature protection is complicated by inertia – the apparent rigidity of ideological mindsets – as well as strong international competition and government funding deficits. A constant increase in waste generation has become a negative by-product of economic development and expanding consumption. That is why even the European Union (EU) has not fully coped with the trends detrimental to the environment. In 1985, every European resident produced annually (on the average) 300 kg of domestic waste; in 1995–1997, this had risen to 400 kg; and in 1998–2000, as much as 500 kg. However, increasingly, more waste was treated (an average of 25 percent over 1998–2000) or recycled. The EU laws require that at least 45 percent of used packaging material is recycled. In practice, 50 percent of broken glass, 60 percent of paper litter, and about 50 percent of metal are recycled. Relatively large quantities of plastics are a challenge: the equivalent figure only slightly exceeds 20 percent.¹¹

Current State of EU Legislation and Ukrainian Waste Laws

The EU's political approaches to this issue are basically stated in the Community's Waste Management Strategy¹² and recognised legislatively by the EU Waste Framework Directive 75/442/EEC, which is supplemented by the Council Directive 91/689/EEC on hazardous waste,¹³ and Regulation No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.¹⁴ The latter Regulation replaced the Council Regulation No. 259/93 of 1 February 1993 on

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the supervision and control of shipments of waste within, into and out of the European Union. This rational stand of the EU makes Europe a global environmental movement hub. European environmental policy is mostly preventive, aiming not only to solve actual problems, but in the first place to prevent the appearance of new ones. Environmental priorities underlie practically all the components and lines of the EU's activity, being embodied in regional, scientific and technical, agricultural, transport and trade policies. Since the 1990s, the Community's programmes have been directed to address complex issues of the man-nature interaction. Application of their guidelines by advanced industrial countries in the 21st century could mark the beginning of solving global environmental problems.

The ecological situation in Ukraine is characterised by pollution of vast territories with toxic, domestic and other kinds of waste due to the technogenic clutter and unreasonable structure of production and natural resource management. By the time of Ukraine's independence, the overall land area of the republic accounted for less than 3 percent of the former Soviet Union's territory. However, it accommodated one quarter of all the production potential, which means that Ukraine was responsible for about 25 percent of the natural environment's pollution. This disproportion resulted in the country's technogenic impact on nature exceeding that of advanced countries by 4–5 times. In 1991, Ukraine accumulated 17 billion tons of waste in an area of 53,000 ha (mostly in the Donetsk and Dnipropetrovsk regions). The waste recirculation rate was very low, and waste management problems were hardly addressed.

For all that, the CIS countries (with few exceptions)¹⁵ have virtually no specialised research on waste legislation. Individual subject-related opinions do not provide a holistic picture of this legislative aspect which necessitates exploration and development of the said State legal activity.

How to Adapt

Ukraine's aspiration to harmonise its environmental legislation with the norms of the EU is stipulated by the country's "European choice". The EU is a strategic guide, and the recent candidates for membership from Central and Eastern Europe have set a practical example of that kind of approximation. A common frontier between Ukraine and the EU provides an additional impetus for the country to act in line with the updated agreements on partnership and cooperation. Setting priorities and working on reforms will facilitate implementation of projects in the field, formation of incentives, financial resources and institutional potential for harmonisation of the national regulatory framework with the normative legal requirements of the EU in the short and medium term. Notably, the alignment should be aimed not at a direct transfer of EU directives into the national legislation of our State, as occurs with EU membership candidates, but rather at a gradual adaptation to the key regulatory requirements of the EU with a parallel strengthening of the institutional basis necessary

for its implementation. This approach would ensure maximum efficiency of efforts directed to achieve the strategic priorities.

Alignment means integrating the fundamental principles of one regulatory environment into another legislative framework without full conformity. The following processes need to be undertaken to achieve this:

- researching the EU regulatory acts in order to identify their main principles and specific features;
- analysing certain parts of the national regulatory framework and institutional structure to find out whether they contain the relevant principles and specificity of the EU laws;
- modifying national legislation or elaborating acts to introduce the basic principles of the EU legislation; and
- adapting the institutional structure to allow for application of the modified national laws in practice.

The EU legal system is guided by the principle of regulating by setting standards and making efforts to motivate their observance. It performs this function through regulatory permitting. By contrast, in Ukraine, the regulatory approach is still based on command, backed up by administrative-enforcement actions. Therefore, aligning the two systems will call for identification of instruments or legislative provisions, facilitating the society's and institutional structures' change-over to more up-to-date approaches, oriented towards ensuring law observance through economic incentives.

When determining the potential positive effects of aligning the two legal systems, it should be noted that the major inducements are an expected positive environmental result and investment volume growth, such as occurred in the Central and Eastern European countries. The advantages of introducing the sustainable development concept far outweigh its costs. Even with approximate calculations, the profit from introducing EU environmental standards is 50 percent higher than its estimated costs.¹⁶ It is planned to reduce production and maintenance costs due to the availability of pure water (thereby cutting primary water-treatment costs), and the reduction of raw material consumption due to the effective use and expansion of material recovery and processing. A positive result is also expected in the social sphere with public participation in the decision-making process and development of a responsible attitude to environmental protection (*e.g.*, getting people involved in separate waste collection and processing).

As the experience of the new EU member States proves, introduction of market methods of pricing and production is likely to affect positively the emission densities in Ukraine. It is also supposed to release disposable funds for new investments, since a rise in resource efficiency brings savings to the production enterprises. According to a number of research investigations conducted in the EU member States, tightening of economic policy does not hinder economic

growth, although it can require considerable restructuring of certain industries (in particular, energy-intensive ones). The methods and means to implement a new economic policy in Ukraine, as well as terms of the necessary investment, can be determined in relation to the pace of general economic transformation.

Our country's commitment to aligning its environmental standards with the EU is clearly stated in the draft Partnership and Cooperation Agreement (PCA), which has been proposed to replace the 1994 PCA.¹⁷ The key environmental aspect of the new PCA, along with a general furtherance of harmonious and stable development, is reduced waste generation. Alignment provisions are included in the national programme of adapting Ukrainian legislation to the legal environment of the EU, adopted by the Law of Ukraine on 18 March 2004; and the Concept of the National Environmental Policy of Ukraine for the period until 2020, approved by Ordinance of the Cabinet of Ministers of Ukraine No. 880-p dated 17 October 2007.

At the moment, it is necessary to specify: a) exactly which waste management acts of the EU could become the most appropriate guides for Ukraine; and b) which of its regulatory acts offer concepts and approaches that would help reform the key environmental policy instruments aimed at ensuring an effective solution of the country's most acute ecological problems, outlined in government political documents. Attention should be focused on the EU environment management mechanisms and principles, which could help in forming the legal framework of reforms in the State. It is important to direct the suggested mechanisms towards resolving the issues that have been prioritised by the government of Ukraine, and not by the EU government or other countries. Then the Ukrainian government is likely to make efforts and allocate resources for solving the specified problems.

Consequently, it is important to find answers to the following questions:

- Which of the political instruments and legislative acts of Ukraine need to be reformed first, in order to solve the country's key ecological problems?
- Which of the branches of EU law can help to solve the problems most efficiently?
- Are there any evident barriers to the legislation alignment?
- What are the main institutional problems and financial issues that might arise during the alignment?

From the standpoint of the environmental authorities of Ukraine,¹⁸ the key causes of the waste problems are as follows:

- outdated, resource-consuming or polluting technologies;
- low public environmental awareness and lack of effective economic mechanisms and incentives to promote commitment to nature conservation;
- absence of continuous environmental monitoring of waste locations;
- insufficient financing of environmental activity "with whatever funds remain"; and

- lack of an effective waste management system (separate collection, storage and dumping).

Current Gaps and Drawbacks of Ukrainian Waste Law

The main drawbacks of the Ukrainian political instruments and legislative acts include a discrepancy between the theoretical environmental standard provisions, which are lengthy and very detailed, and the system of their practical implementation. As a result, the regulatory authorities are unable to monitor or ensure the standard compliance in full. For the same reason, the regulating entities believe that to meet the standards is not feasible technically or entails excessive expenditure. Accordingly, they are not so eager to abide by the standards, which they regard as unjustified and burdensome. Neither the technical nor economic aspects of enterprise activity are taken into consideration. Moreover, lack of flexibility in the permitted waste system severely restricts the gradual introduction of waste-minimising or waste-elimination techniques. In practice, they use coordinated permissions – temporary, though regularly extended – to discharge waste in quantities that exceed the set standards. The permissions are issued on an individual basis by regulatory authorities with broad powers to set up permission terms at their own discretion and hence, they are prone to corruption.

The mechanisms for ecological monitoring and reporting in Ukraine are characterised by key functions dispersed among different agencies which causes inefficiency (as some data can be duplicated, and databases of different authorities are uncoordinated) and absence of transparency, complicating the use of a complex approach to management of environmental activity.

When characterising the system for standards enforcement, a non-realistic list of standardised parameters and the complexity of the system regulating environmental activity result in a situation where those entities being regulated will inevitably break the law. Consequently, the controlling authorities, whose duty is to ensure compliance with legislative acts, face an impossible task. The difficulties are further complicated by a deficit of the resources that the authorities need in order to fulfil their functions: low salaries cause a drain of qualified staff (in particular, environmental law experts), and lack of the simplest facilities prevents the experts from properly discharging their responsibilities.

The efficiency of mechanisms for ensuring compliance with existing legislation is still more impaired due to the controlling authorities' scarce resources that are not enough to employ economic incentive mechanisms for observance of the requirements or to apply sanctions against law breakers. The agencies tasked with environmental control duties are often at a disadvantage compared to local authorities and industrial enterprises, as they do not get adequate support from the judicial system, which is ineffectual as regards environmental cases. Trivial offenders are often fined, while the worst

wrongdoers go unpunished due to political or economic pressure on the controlling bodies. In all events, the size of fines is usually too small to serve as a deterrent.

It is also essential to identify potential problems and legal barriers obstructing efforts to align waste management legislation. The legal barriers may include:

- contradictions contained in various national legislative acts. The profusion of new laws made over the recent 15 years has been, to a great extent, unmethodical, causing legislation gaps and collisions between new laws, decrees, and by-laws. As a consequence, it is not always clear which regulatory acts apply in specific cases. Many important parts of the legislation need revision and coordination with other branches of the national legislation;
- unclear distribution of duties or powers among different agencies in regulatory acts which often makes introduction of new legislation unfeasible;
- the framework legislation of Ukraine rarely contains implementation procedures for new laws, which should be formulated during the alignment in subsidiary legislative acts as part of active environmental legislation;
- if a decision is made to align only a certain part of the legislation, rather than the entire legislative framework, it can lead to even greater legislative discrepancies;
- reclamation of the historically accumulated waste involves considerable expenditure and creates difficulties for setting target environment quality values, whereas stringent requirements challenge politically the application of more pragmatic and feasible standards;
- absence of a tradition of public participation in decision making and the introduction of new legal norms. Although the relevant regulatory acts have appeared in present-day Ukraine, getting the public profoundly engaged is going to involve radical changes;
- scarcity of legal resources, necessary to make large companies pay fines for non-observance of the requirements of environmental legislation.

The outcome of law enforcement efforts in Ukraine is not evaluated in terms of their ultimate impact on the environment. Instead, the major focus is placed on activity indices (number of inspections *etc.*), depriving inspectors of any motivation to demand that companies abide by the law.

The framework EU directives on the quality of natural air and water resources, as well as those on waste management,¹⁹ comprise many useful concepts and approaches. Generally speaking, they suggest a balance between environmental priorities and the potential for enforcement. Instead of directly copying the EU environmental quality standards, however, it is recommended to use them as a helpful guide, attempting to set a balance between the desired ecological result and a realistic opportunity to enforce the standards, taking into account the current specific situation in Ukraine.

Conclusions

In summary, one of the main tasks in adapting Ukrainian waste laws to EU principles and standards is to specify the legal aspects and methods of introducing new principles and concepts into existing legislation. This should be accomplished with due regard to discrepancies in the national law, lack of practical procedures to transpose new legal provisions, and the risk of inconsistencies that are likely to appear in the legal framework due to introduction of the new rules. A necessary step towards resolution of these issues would be a comprehensive analysis of gaps in the legislation by way of comparing the environmental laws selected by Ukraine for alignment, with those of the EU. Based on such a survey, it would be possible to identify the lines of future reform of the national legislative framework and adaptation of the EU legal provisions to the laws of Ukraine.

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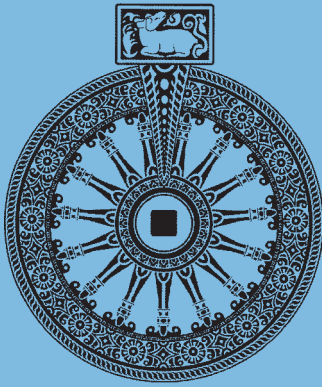
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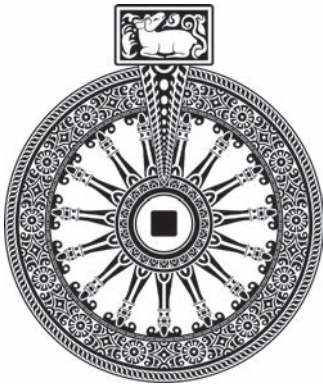
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Ivory Trade Continues to Threaten Elephants





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EDITORIAL

This issue finds *Environmental Policy and Law* in the middle of a transition from our late founder and Editor-in-Chief, our beloved Wolfgang Burhenne, to his own hand-picked successor, Achim Steiner, former Executive Director of the UN Environment Programme, soon to head up the UN Development Programme, currently Director of the Oxford Martin School and Professorial Fellow at Balliol College, University of Oxford, UK. As such it provides the undersigned, as Managing Editor of *EPL*, a rare opportunity to move out from “behind the scenes” and share a bit of insight into the new changes to the journal and recent developments in the world of environment.

On behalf of the staff of *EPL*, I am thus able to thank the directors and staff of our publisher, IOS Press, for their support to all of us (and their patience) during this challenging time. We would also like to reassure our readers of our continuing commitment to the goals of our founder, including providing insights from professionals in all countries and all environmental specialty areas.

In keeping with past practices, we also wish to congratulate Cristiana Pașca Palmer, formerly Romania’s Minister for Environment, Waters and Forests who has stepped in as the new Executive Secretary of the Convention on Biological Diversity. We wish her well in this important task.

As difficult times appear to be ahead, particularly with regard to our planetary environment, it is important to remember the duty of all of the planet’s current residents, as stewards of the environment we have inherited. To quote an internationally known author (and a great wizard), “The rule of no realm is mine, ... great or small. But all worthy things that are in peril as the world now stands, those are my care. And for my part, I shall not wholly fail of my task, though [all] should perish, if anything passes through this night that can still grow fair or bear fruit and flower again in days to come. For I also am a steward. Did you not know?” (J.R.R. Tolkien.)

Tomme R. Young
Editor