UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

ECE/MP.EIA/2008/6
27 February 2008

Original: ENGLISH

ECONOMIC COMMISSION FOR EUROPE

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

Fourth meeting
Bucharest, 19–21 May 2008
Item 8(b) of the provisional agenda

REVIEW OF THE WORK DONE BY THE WORKING GROUP ON ENVIRONMENTAL IMPACT ASSESSMENT AND ADOPTION OF DECISIONS

REVIEW OF COMPLIANCE WITH THE CONVENTION

Findings and recommendations further to a submission by Romania regarding Ukraine (EIA/IC/S/1)

Report by the Implementation Committee

Summary

These findings and recommendations were prepared by the Convention's Implementation Committee on 17 January 2008 further to decision III/2 on the review of compliance (ECE/MP.EIA/6, annex II) and to a submission by the Government of Romania on 23 January 2007 expressing concerns about Ukraine's compliance with its obligations under the Convention with respect to the Danube-Black Sea Deep-Water Navigation Canal in the Ukrainian sector of the Danube Delta ("Bystroe Canal Project"). The Committee found that Ukraine had been in non-compliance with its obligations under the Convention, in particular Articles 2, 3 and 4. The Committee made a number of recommendations to the Meeting of the Parties further to the submission.

GE.08-21381

CONTENTS

		Paragraphs	*Page*
I.	INTRODUCTION – SUBMISSION AND THE COMMITTEE'S PROCEDURE	1–18	2
II.	SUMMARY OF FACTS, INFORMATION AND ISSUES	19–30	5
	A. Project	19–20	5
	B. Phase I	21–25	5
	C. Phase II	26–30	6
III.	CONSIDERATION AND EVALUATION	31–57	6
	A. General observations	31–34	6
	B. Legal basis	35–42	7
	C. Phase I	43–51	8
	D. Phase II	52–57	10
IV.	FINDINGS	58–65	11
V.	RECOMMENDATIONS	66	13

I. INTRODUCTION – SUBMISSION AND THE COMMITTEE'S PROCEDURE

1. On 26 May 2004, the Government of Romania made a submission to the Implementation Committee expressing concerns about Ukraine's compliance with its obligations under the Convention with respect to the Danube-Black Sea Deep-Water Navigation Canal in the Ukrainian Sector of the Danube Delta (the "Bystroe Canal Project").[1] The submission also made reference to paragraph 5(a) of the appendix to decision III/2.

2. On 19 August 2004, the Government of Romania requested the establishment of an inquiry commission under Article 3, paragraph 7, of the Convention, with respect to the same project.[2]

[1] A summary of the submission is available at:http://www.unece.org/env/eia/implementation_committee_matters.htm.
[2] A description of the inquiry procedure and of the work of the Inquiry Commission is available at: http://www.unece.org/env/eia/inquiry.htm.

3. At its sixth meeting (3–5 November 2004), the Committee noted paragraph 15 of the appendix to decision III/2, which stipulates that where a matter is being considered under an inquiry procedure it may not be the subject of a submission. Thus, the Committee decided that it was not in a position to consider the submission of Romania (MP.EIA/WG.1/2005/3, para. 14).

4. The Inquiry Commission completed its work on 10 July 2006 and handed over its final opinion on the environmental impact of the project to the Ambassadors of Romania and Ukraine in Geneva and to the Executive Secretary of UNECE. The Commission's unanimous opinion was that the project was likely to have a significant adverse transboundary impact on the environment.[3]

5. Following the final opinion of the Inquiry Commission, Romania sent five notes (of 10 July 2006, 3 and 26 October 2006, 13 November and 8 December 2006) expressing its desire to participate in the environmental impact assessment (EIA) procedure for the project and its availability to assist in conducting public consultations in Romania. Ukraine stated in a letter to the Executive Secretary of UNECE, received on 30 May 2007, that it was studying further the issues raised in the final opinion of the Inquiry Commission.

6. On 23 January 2007, the Government of Romania made a second submission expressing concerns about Ukraine's compliance with its obligations under the Convention, with respect to the Bystroe Canal Project, and in the light of the final opinion of the Inquiry Commission on the environmental impact of the project.[4] The submission alleged that, in spite of repeated démarches, Ukraine did not indicate that it was considering applying the relevant provisions of the Convention and in particular that no EIA documentation had been made available to Romania.

7. On 23 January 2007, the secretariat, further to paragraph 5 (a) of the appendix to decision III/2, forwarded a copy of the submission to the Convention's focal point in Ukraine requesting that Ukraine send any reply and information in support thereof to the secretariat and to the focal point in Romania within three months (i.e. before 23 April 2007).

8. At its eleventh meeting (13–14 February 2007), the Committee agreed that the second submission by Romania superseded Romania's first submission, which was considered closed (ECE/MP.EIA/WG.1/2007/4, para. 23). The Committee also agreed to consider the second submission, with the participation of representatives of the two Parties concerned, at its twelfth meeting (26–28 June 2007).

9. The secretariat received information on 19 April 2007 from the Permanent Mission of Ukraine to the United Nations Office and the other international organizations in Geneva. This information included, inter alia, a notification, without date or signature. The secretariat requested on 20 April 2007 a clarification from the Convention's focal point in Ukraine as to whether this information was the reply to the submission by the Government of Romania.

---

[3] The Inquiry Commission's opinion is set out in its report, also available at: http://www.unece.org/env/eia/inquiry.htm.

[4] A summary of the submission is available at: http://www.unece.org/env/eia/implementation_committee_matters.htm.

10. On 11 May 2007, the secretariat received the following information from the Convention's focal point in Ukraine:

> "Let me inform you that Ukraine presented to the Romanian Party the following documents in accordance with Article 3 of the EIA Convention:
> 1. Notification for the Project on the Deep-Water Navigable Canal in Danube Delta with cover[ing] letter of 18 April 2007, No. 4430/11-7 signed by Minister V. Dzharty.
> 2. Analytical material and EIA report on CD[-ROM].
> Please note that these documents should be considered as the reply to the submission of Romania from 23 January 2007."

11. The above-mentioned analytical information and CD-ROM were submitted to the secretariat on 31 May 2007 together with the original and an unofficial translation of a letter from the Minister of the Environment of Ukraine to the Executive Secretary of UNECE dated 18 April 2007.

12. Some additional views were presented by the Government of Romania (in a letter dated 20 June 2007) and by the Government of Ukraine (in a letter dated 22 June 2007).

13. At its twelfth meeting, the Committee considered the matter of the submission, first inviting the Romanian delegation and thereafter the Ukrainian delegation to present the submission and the reply, respectively, and then to respond to the other Party's presentation. The two delegations also replied to questions posed by members of the Committee.

14. The delegation of Romania presented a written statement summarizing its allegations and responding to some of the views presented by the Government of Ukraine in the above-mentioned letter of 22 June 2007, with the translations of the notes between the Ministries of Foreign Affairs of the two countries being attached. In its oral presentation, the delegation of Romania provided information on the environmental importance of the Danube Delta, indicating that information about the construction of the Bystroe Canal became known in 2002 and that since then the Government of Romania had contacted the Government of Ukraine several times requesting to be properly notified and involved in the transboundary procedure as envisaged under the Convention. The delegation of Romania also indicated that it had submitted this issue to the Committee on 23 January 2007 (see para. 6 above) because no follow-up had been undertaken by Ukraine regarding the final opinion of the Inquiry Commission.

15. The delegation of Ukraine presented a set of materials describing the project.[5] In its oral presentation, the delegation of Ukraine indicated that the works on the Bystroe Canal were aimed at restoring waterway traffic. It also provided information that the outcome of the Inquiry Procedure was reflected in the EIA report. The delegation of Ukraine gave assurances that the entire project would be conducted in line with relevant international obligations.

[5] The materials included a document entitled "Ukraine's Report Materials Regarding Execution of Espoo Convention Provisions; Geneva, 2007".

16. For the preparation of its draft findings and recommendations at its thirteenth meeting (30 October–1 November 2007), the Committee considered the information brought to its attention prior to and during its twelfth meeting.

17. The Committee sent its draft findings and recommendations to the two parties concerned further to paragraph 9 of the appendix to decision III/2. At its fourteenth meeting (15–17 January 2008), the Committee finalized its findings and recommendations taking into account representations received from the two parties.

18. The Committee welcomes the cooperative spirit in which the Governments of Romania and Ukraine worked with the Committee in its deliberations on the matter.

II. SUMMARY OF FACTS, INFORMATION AND ISSUES

A. Project

19. The Bystroe Canal Project was divided into Phases I and II, each being subject to a separate national authorization procedure, including environmental authorization procedure (or "State ecological examination").

20. The delegation of Ukraine indicated at the Committee's twelfth meeting that it had informed its own public about the project in accordance with its national legislation in 2003, 2004 and 2005.

B. Phase I

21. In 2002, the procedure for authorizing Phase I was initiated with a feasibility study and an EIA report being submitted to the competent Ukrainian authorities. The final decision was taken in April 2004 and the works initiated the following month.

22. The Government of Ukraine maintained that it had notified Romania about the project with a number of notes, starting with a note of 18 December 2002, and had in addition provided Romania with the EIA report concerning Phase I on 5 August 2004.

23. The Government of Romania acknowledged receiving the two above-mentioned documents, but maintained that neither of them met the requirements of the Convention. Moreover, the Government of Romania asserted that, despite its démarches, Ukraine failed to undertake all the steps envisaged in the Convention to allow the Romanian authorities and public to participate in the EIA procedure before the decision on Phase I was taken.

24. The Government of Ukraine maintained that while it had informed Romania about the project it did not consider it likely to have a significant adverse transboundary impact and therefore did not consider it necessary to follow in detail the requirements of the Convention.

25. Works concerning the project were suspended in June 2005, but resumed in November 2006.[6]

C. Phase II

26. Work on the design of Phase II commenced in 2004 and, on the basis of an EIA report, an environmental authorization was given in 2006. The precise date and details of the authorization vary in communications from the Government of Ukraine: according to the above-mentioned letter of 18 April 2007, it was the decision No. 345 of 19 April 2006, but according to other information communicated to the Committee, it was the decision No. 116/04 of 26 October 2006.[7]

27. The Government of Romania alleged that the final decision on Phase II was taken when the Cabinet of Ministers of Ukraine approved Phase II on 30 May 2007, whereas the Ukrainian delegation in the Committee's twelfth meeting maintained that the final decision was not the approval by the Cabinet of Ministers but a construction permit to be granted by local authorities, which had not yet been granted. According to a press release by the Ministry of Transport of Ukraine, the official opening of the Canal was celebrated on 2 May 2007.

28. A notification dated 18 April 2007 was submitted to Romania on 24 April 2007. An EIA report was submitted later.

29. On 15 June 2007, Romania responded to the notification from Ukraine, confirming its desire to participate in the procedure, and sent preliminary observations on the information provided by Ukraine. However, the Government of Romania alleged that the notification failed to meet the requirements of the Convention by not indicating "the nature of the possible decision" as required by Article 3, paragraph 2, of the Convention. The Government of Romania also alleged that the EIA report failed to meet the requirements of the Convention on a number of counts, in particular by not sufficiently addressing transboundary issues, by disregarding the report of the Inquiry Commission and by failing to provide a non-technical summary.

30. The Government of Ukraine undertook to organize an event on 18 June 2007 in Vilkove (Ukraine), which Ukraine announced to Romania on 4 June 2007 as constituting "consultations regarding the environmental impact of the project". The event was understood by the Government of Romania as serving public participation purposes, whereas the Government of Ukraine considered it as also serving the purpose of intergovernmental consultations under Article 5 of the Convention. The Committee was not informed of the substantial outcome of the event.

III. CONSIDERATION AND EVALUATION

A. General observations

31. The Committee considers that Ukraine's national regulatory framework for authorizations of projects and EIA seems to be extremely complicated. In particular, it is difficult to identify

[6] "Ukraine's Report Materials", pp. 11–12.
[7] "Ukraine's Report Materials", p. 14.

which of a number of consecutive decision-making procedures should be considered as the final "decision to authorize a proposed activity" as stipulated in Article 2, paragraph 3, of the Convention. Moreover, there seems to be no clear legal framework for transboundary EIA procedures. It is the Committee's understanding that, according to the Constitution of Ukraine, international treaties ratified by Ukraine are integral parts of the national legal system and have supremacy over national laws.

32. The project has been subject to investigations under various international agreements. In particular, the UNECE Aarhus Convention[8] Compliance Committee, and subsequently the Meeting of the Parties to the Aarhus Convention, noted an insufficiently clear regulatory framework for public participation in relation to the project.[9]

33. The lack of a clear national legal framework has had a bearing on the information and documents provided by the Government of Ukraine, which have not always been sufficiently consistent and clear. References to file numbers and dates of certain evidence sometimes differed, and the reasoning and explanations given sometimes differed significantly.

34. The Committee gathered information allowing it to identify in a sufficiently precise manner the main facts and events and to evaluate the application of the Espoo Convention, despite difficulties in grasping all the legal and factual details pertaining to the procedures involved in authorizing the project in Ukraine.

B. Legal basis

35. Romania deposited its instrument of ratification of the Convention on 29 March 2001. Ukraine deposited its instrument of ratification of the Convention on 20 July 1999. Thus, Romania and Ukraine were both Parties to the Convention when the Bystroe Canal Project was initiated.

36. The project is covered by item 9 in Appendix I to the Convention. Although the Bystroe Canal already existed and therefore it could not be considered as a new activity, the Committee is of the opinion that according to the definition of "Proposed activity" (as included in Article 1 (v)) the project falls under the scope of "major change". The Committee is of the opinion that for the purpose of the procedures under the Convention, in particular Article 2, paragraph 3, such an activity includes not only construction but also operation and maintenance works.

37. The final opinion of the Inquiry Commission, in accordance with Article 3, paragraph 7, of the Convention, was that the project is likely to have a significant adverse transboundary impact. In such a situation, the requirements of the Convention do apply to the project and the opinion of the Committee is that Romania should be considered as the "affected Party".

[8] The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

[9] Decision II/5b by the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998). Further information is available at: http://www.unece.org/env/pp.

38. The final opinion of an inquiry commission is a matter of fact and takes effect immediately; in particular the Convention does not provide for the Parties to "study" such an opinion (see para. 5 above). The final opinion of an inquiry commission cannot be challenged and should lead to notification if the opinion is that a significant adverse transboundary impact is likely. The Convention requires notification as early as possible and no later than when informing the public of the Party of origin (Article 3, para. 1). If the public of the Party of origin has already been informed about the proposed activity, the notification should be sent immediately.

39. The likelihood of a significant adverse transboundary impact applies to both Phases I and II, and the Inquiry Commission stated that in some respects the adverse transboundary impact of Phase II could be even greater.[10]

40. Phase I was authorized and largely implemented before the Inquiry Commission concluded that the project was likely to have a significant adverse transboundary impact.

41. The procedure for authorization of Phase II was initiated when establishment of the Inquiry Commission had already been requested.

42. The Committee is of the opinion that the above facts have a bearing on its findings regarding the application of the Convention in relation to Phases I and II.

C. Phase I

43. The information provided shows that in relation to Phase I, Ukraine did not follow the requirements of the Convention in relation to assuring the proper involvement of the Romanian authorities and public in the respective EIA procedures. In particular, Ukraine:

(a) Did not notify Romania as envisaged in Article 3, paragraph 2;

(b) Did not submit information as envisaged in Article 3, paragraph 5(a);

(c) Did not take steps to ensure, together with Romania, that the Romanian public in the areas likely to be affected was informed and provided with possibilities for making comments, as required under Article 3, paragraph 8;

(d) Did not furnish, as envisaged in Article 4, paragraph 2, and Article 2, paragraph 3, the EIA documentation to Romania before the decision was taken (as the decision was taken in April 2004, whereas the EIA documentation was furnished on 5 August 2004);

(e) Did not take steps to arrange, together with Romania, for the distribution of the EIA documentation to the Romanian public as required under Article 4, paragraph 2;

(f) Did not enter into consultations with Romania concerning the potential transboundary impact and measures to reduce or eliminate such impact, as required under

[10] Report of the Inquiry Commission, p.60

Article 5, and did not take steps to agree with Romania on a time frame for such consultations, as also required under Article 5;

(g) Did not ensure that the final decision authorizing implementation of Phase I had taken into account the outcome of the consultations with Romania, as required under Article 6, paragraph 1;

(h) Did not provide Romania with the text of the final decision authorizing implementation of Phase I, along with the reasons and considerations on which it was based, as required under Article 6, paragraph 2.

44. The Government of Ukraine in some of the documents suggested that it was "aiming to fulfil the provisions of the Convention" through the exchange of notes with Romania[11], while at the Committee's twelfth meeting it confirmed that it was not following the Convention due to its initial conviction of the lack of a significant adverse transboundary impact of the project.

45. The Convention does not clearly stipulate what are the legal consequences of the final opinion of the Inquiry Commission, in particular whether it has a retroactive effect (a so-called *ex tunc* effect) or whether the obligations stemming from the Convention apply in such a case only after the Inquiry Commission has found the activity likely to have significant adverse transboundary impacts (a so-called *ex nunc*, or non-retroactive, effect), and whether the request for establishment of the Inquiry Commission has any suspensive effect in relation to an activity.

46. The Committee is of the opinion that, in the absence of clear legal grounds in the Convention for accepting *ex tunc* effect, the final opinion of the Inquiry Commission should be understood as having only *ex nunc* effect.

47. The Convention did not clearly require implementation of Phase I to be immediately suspended as a result of the request for establishment of the Inquiry Commission in August 2004.

48. The immediate suspension of implementation can, however, be invoked from the objective and purpose of the Convention. As set out in the Preamble and in Article 2, paragraph 1, the Convention is based on the principle of prevention, which is well embedded into international environmental law.[12] Therefore, Ukraine should have taken all appropriate and effective measures to, first of all, prevent a significant adverse transboundary environmental impact from the project. Indispensable to the prevention of such effects occurring in the case of activities likely to have a significant adverse transboundary environmental impact is the carrying out the transboundary procedure under the Convention. Bearing in mind that the final opinion of the Inquiry Committee was that the project is likely to have a significant adverse transboundary

[11] "Ukraine's Report Materials" p. 7.

[12] As the International Court of Justice put it "Existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States ... is now part of the corpus of international law" (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, International Court of Justice Reports 1996, para. 29) and "Vigilance and prevention are required on account of often irreversible character of damage to the environment" (Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, International Court of Justice Reports 1997, para. 140).

impact, the Committee is of the opinion that, by continuing the implementation of the project after the matter had been submitted to the inquiry procedure and without carrying out the transboundary procedure, Ukraine defeated the object and purpose of the inquiry procedure and made it impossible to achieve its obligation to prevent significant adverse transboundary environmental impact from Phase I of the project.

49. Article 3, paragraph 1, of the Convention stipulates that Parties shall notify any Party of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact. The Committee is of the opinion that, while the Convention's primary aim, as stipulated in Article 2, paragraph 1, is to "prevent, reduce and control significant adverse transboundary environmental impact from proposed activities", even a low likelihood of such an impact should trigger the obligation to notify affected Parties in accordance with Article 3. This would be in accordance with the *Guidance on the Practical Application of the Espoo Convention*, paragraph 28, as endorsed by decision III/4 (ECE/MP.EIA/6, annex IV). This means that notification is necessary unless a significant adverse transboundary impact can be excluded.

50. Acknowledging the likelihood of a "significant adverse transboundary environmental impact from proposed activities" for the purpose of triggering the Convention's procedures should be treated as willingness to cooperate with the Parties concerned to "prevent, reduce and control" such impact before the activity is authorized. Thus, initiation of the transboundary procedure under the Convention does not prevent the Party of origin from undertaking such proposed activities after having carried out the transboundary procedure, provided that due account is taken of the transboundary procedure's outcome in the final decision (Article 6, para. 1).

51. The information provided shows that after the Inquiry Commission delivered its final opinion, and contrary to the conclusions in the above paragraphs, Ukraine did not notify Romania immediately regarding Phase I, and some works were resumed on Phase I.

D. Phase II

52. The information provided shows that Ukraine sent a formal notification to Romania in April 2007, more than 10 months after the Inquiry Commission delivered it final unanimous opinion in July 2006.

53. The notification of April 2007 was not only late but also did not meet all the requirements of Article 3, paragraph 2; in particular it did not properly indicate the nature of the possible decision. The Committee also noted that the notification was not made according to decisions I/3 and I/4 (ECE/MP.EIA/2, annexes III and IV, respectively).

54. The information provided shows that, after the Inquiry Commission delivered its final opinion, decision-making procedures concerning Phase II were carried out with the decision on the conclusion of the State ecological examination being taken in October 2006 on the basis of EIA documentation that denied a significant adverse transboundary impact.

55. The Committee is of the opinion that immediately after the final opinion of the Inquiry Commission was delivered, the authorization for Phase II should be suspended until:

(a) Romania is given proper possibility to submit comments, in particular regarding potential transboundary impact to be assessed in the EIA documentation;

(b) The public in Romania is given an opportunity to deliver its comments;

(c) Proper consultations between Ukraine and Romania on the basis of the EIA documentation have taken place.

56. The above procedures envisaged by the Convention should precede the final decision on the proposed activity. The Committee is of the opinion that, 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. In this respect, the Committee doubts whether the decision of the local authorities in Ukraine may significantly vary from the preceding respective decisions taken by the central authorities.

57. The Committee notes a positive approach and efforts of the Government of Ukraine to undertake consultations with the Romanian public and authorities.

IV. FINDINGS

58. Having considered the above, the Committee adopts the following findings with a view to bringing them to the attention of the Meeting of the Parties for formal adoption in accordance with paragraph 13 of the appendix to decision III/2.

59. The provision in the Constitution to directly apply international agreements (see para. 31 above) is considered by the Committee as being insufficient for proper implementation of the Convention without more detailed provisions in the legislation. In particular, the national regulatory framework should clearly indicate:

(a) Which of the decisions for approving the activities should be considered the final decision for the purpose of satisfying the requirements of the Convention;

(b) 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.

60. The information provided by the delegation of Ukraine leads the Committee to conclude that Ukraine has established a domestic EIA system, but that Ukraine does not comply fully with Article 2, paragraph 2, of the Convention because it does not provide sufficiently clearly in its regulatory framework the information referred to in paragraph 59.

61. Furthermore, Ukraine has not implemented decisions I/3 and I/4 taken by the Meeting of the Parties.

62. In the absence of an adequate regulatory framework, it is particularly important that officials are sufficiently aware of the obligations stemming from the Convention. However, the

information provided by the delegation of Ukraine did not convince the Committee that these obligations are sufficiently understood by all officials in Ukraine involved in the transboundary EIA procedure and related decision-making.

63. Further to paragraph 38 above, the Committee is convinced that immediately after the final opinion of the Inquiry Commission was delivered, the transboundary procedure for this project should have been initiated with the sending of the notification according to Article 3, paragraph 2, of the Convention.

64. In relation to Phase I:

(a) The Committee finds that the fact of authorizing and implementing Phase I cannot be considered as being in clear non-compliance with the Convention at the time of the decision-making, because Ukraine assumed that the project was not likely to have a significant adverse transboundary impact;

(b) However, the Committee is of the opinion that, in light of the reasons stated in paragraph 48 above, Ukraine should have suspended the project, including its maintenance and operation (see para. 36 above), immediately after Romania requested the establishment of the Inquiry Commission in August 2004. Further, with the final opinion of the Inquiry Commission (see para. 4 above), the project, including its maintenance and operation, should have continued to be suspended pending the completion of the procedures under the Convention.

(c) Further to paragraph 38 above, the Committee finds that not notifying Romania immediately after the final opinion of the Inquiry Commission should be considered as non-compliance with the Convention.

65. In relation to Phase II of the project:

(a) The Committee finds that, by failing to timely and sufficiently notify Romania after the final opinion of the Inquiry Commission, Ukraine was not in compliance with its obligations under Article 3 of the Convention;

(b) The Committee finds that Ukraine cannot be considered as being in non-compliance with the Convention:

(i) As long as the final decision regarding Phase II is not taken; and
(ii) As long as before the final decision regarding Phase II is taken all the necessary steps envisaged by the Convention are followed, in particular:
a. EIA documentation is prepared following all the requirements of Appendix II including properly addressing transboundary impacts;
b. Romania is given a proper possibility to submit comments on the EIA documentation;
c. The public in Romania is given an opportunity to deliver its comments;

d. Proper consultations between Ukraine and Romania take place concerning, inter alia, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact; and

(iii) If Ukraine, subsequently to the steps in (ii):

a. Submits the final decision to Romania, having taken due account of the comments so received;

b. If then requested by Romania, determines together with Romania whether to carry out a post-project analysis.

V. RECOMMENDATIONS

66. The Committee recommends that the Meeting of the Parties:

(a) Endorse the findings of the Implementation Committee that Ukraine has been in non-compliance with its obligations under the Convention, in particular Articles 2, 3 and 4;

(b) Request the Government of Ukraine, in order to avoid further non-compliance, to apply fully the provisions of the Convention with regard to the Bystroe Canal Project, taking into account the findings of the Implementation Committee, and to report to the Implementation Committee at its fifteenth meeting (October 2008) and subsequent meetings if necessary;

(c) Also request the Government of Ukraine to ensure that its legislation and administrative measures are able to implement fully the provisions of the Convention, and agree 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. This independent review shall be undertaken by a consultant to be nominated by the Committee and financed from the budget of the Convention;

(d) Further request the Government of Ukraine to submit to the Implementation 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 report to the Committee on the implementation of the strategy;

(e) Further request the Implementation Committee to report to the fifth meeting of the Parties on the strategy and its implementation and to develop if appropriate further recommendations to assist Ukraine in complying with its obligations under the Convention;

(f) Invite the Government of Ukraine to enter into negotiations with its neighbouring Parties to cooperate in the elaboration of bilateral agreements or other arrangements in order to support further the provisions of the Convention, as set out in Article 8, and to seek advice from the secretariat. The Government of Ukraine is invited to report on

progress with the elaboration of such agreements, particularly with Romania, to the Implementation Committee by the end of 2010 and to the fifth meeting of the Parties.

*****