

Economic Commission for Europe

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

Third meeting

Geneva, 11-15 November 2013

Item 3 of the provisional agenda

Compliance and implementation

Elements for draft decisions on the review of compliance of the Convention and the Protocol

This note presents elements for draft decisions on the review of compliance of the Convention and of the Protocol prepared by the Implementation Committee under the Convention and the Protocol. The Committee considered the note at its twenty-eight session (10-12 September 2013) and agreed on its submission for information and possible comments by the Working Group on environmental impact assessment (EIA) and strategic environmental assessment (SEA) at its third meeting (Geneva, 11–15 November 2013).

The Chair of the Committee will present these elements to the Working Group on environmental impact assessment (EIA) and strategic environmental assessment (SEA) for its information at its third meeting (Geneva, 11–15 November 2013).

The Committee will then finalize the draft decisions at its subsequent sessions prior to their submission for consideration and adoption by the sixth session of the Meeting of the Parties to the Convention (MOP-6) and the second session of the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol (MOP/MOP-2) in June 2014.

Draft decision VI/2

[To be considered by the Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context at its sixth session]

Review of compliance with the Convention

Preamble

The Meeting of the Parties to the Convention

Recalling article 11, paragraph 2, of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), and decisions III/2, IV/2 and V/4 of the Meeting of the Parties to the Convention on the review of compliance,

Recalling further article 14 bis of the second amendment to the Convention,

Determined to promote and improve compliance with the Convention,

Seeking to promote the identification, as early as possible, of compliance difficulties encountered by Parties and the adoption of the most appropriate and effective solutions for resolving those difficulties,

Having considered the analysis made by the Implementation Committee on general compliance issues in the Third Review of Implementation of the Convention, as presented in [...],

Having also considered the findings and recommendations of the Implementation Committee on [three] submissions made to the Committee in accordance with paragraph 5 (a) in the appendix to decision III/2 (ECE/MP.EIA/6, annex II) and on [two] Committee initiatives further to paragraph 6 of the appendix to decision III/2, as set out in the reports of the Committee on its twenty-sixth, twenty-seventh, twenty-eighth [and ...] sessions (ECE/MP.EIA/IC/2012/6, annexes I and II; ECE/MP.EIA/IC/2013/2, annex; [and] ECE/MP.EIA/IC/2013/...[, and]),

Having reviewed the operating rules adopted in decision IV/2 and included as annex IV to that decision, as amended through decision V/4, annex, and recognizing the importance of the transparency and the predictability of the Implementation Committee's work,

Having also reviewed the opinions of the Implementation Committee,

Recognizing the importance of rigorous reporting by Parties of their compliance with the Convention, and noting the fourth review of the implementation of the Convention based on Parties' answers to the questionnaires on the implementation of the Convention, and adopted in decision VI/1,

Recalling that the compliance procedure is assistance-oriented and that Parties may make submissions to the Implementation Committee on issues regarding their compliance with the Convention and the Protocol,

I. General part

1. *Adopts* the Implementation Committee's report on its activities (ECE/MP.EIA/2014/...), welcomes the reports of the meetings of the Committee in the period after the fifth session of the Meeting of the Parties to the Convention, and requests the Committee:

- (a) To keep the implementation and application of the Convention under review;

(b) To promote and support compliance with the Convention, including to provide assistance in this respect, as necessary;

2. *Welcomes* the examination by the Implementation Committee of specific compliance issues identified in the third review of implementation adopted in decision V/1, regarding Croatia, Portugal and the Republic of Moldova, which in the case of Croatia and the Republic of Moldova resulted in the Committee declaring its satisfaction with the clarifications provided by Parties, and in the case of Portugal [...];

3. *Welcomes also* the examination by the Implementation Committee of information received from other sources, including the public, regarding Belarus, Romania, Lithuania, the United Kingdom of Great Britain and Northern Ireland, and twice, regarding Ukraine and which in the case of Romania [and ...] resulted in the Committee declaring its satisfaction with the clarifications provided by Part[y][ies] and in the case of Ukraine [and...] led to a Committee initiative;

4. [Notes the pending submissions initiated by [...] [and the information received from other sources which lead to [a] committee initiative[s]] that are to be considered by the Implementation Committee at its forthcoming sessions;]

5. *Considers also, following* the opinions of the Implementation Committee, that:

Notification by electronic means (e-mail)

(a) E-mail is a widely used, commonly acceptable and rapid means of communication and information exchange, including in public international relations, and the legal validity of electronic means of communication for the purposes of notifying is acknowledged^a;

(b) A Party that responded by electronic means to a notification within the time specified for response would have fulfilled its obligation under article 3, paragraph 3, as regards the timeliness of the response;^b

Expressing will to participate in the transboundary EIA

(c) The affected Party must clearly express its will to participate in the transboundary environmental assessment procedure. In addition, the affected Party may or may not express an opinion on the substance or the merits of the proposed activity which was the subject of the Party of origin's notification, without this causing prejudice to the future exchanges and consultation between the two Parties;^c

Application of the Convention under exceptional circumstances

(d) The obligation in article 3 of the Convention to notify potentially affected Parties rests solely with the Party of origin.^d Regardless of the fact that the secretariat [might have had to serve] as an intermediary, this does not release [a Party] from its obligations under the Convention;^e [...] Article 13 of the Convention cannot be interpreted as providing an obligation on the secretariat to act as an intermediary in the procedures set out in the Convention;^f

^a ECE/MP.EIA/IC/2012/6, annex I, para. 33.

^b Ibid.

^c Ibid., annex I, para. 34.

^d ECE/MP.EIA/IC/2012/2, para. 17 and . ECE/MP.EIA/IC/2012/6, annex I, para. 38.

^e ECE/MP.EIA/IC/2012/6, annex I, para. 37(a).

^f ECE/MP.EIA/IC/2012/6, annex I, para. 38.

(e) If, under exceptional circumstances, the Party of origin seeks the assistance of an intermediary in fulfilling its obligations in that respect, it would retain responsibility for any actions or omissions of the intermediary in the process of notification;^g

(f) When a Party of origin entrusts the notification procedure to an intermediary, the fulfilment of the conditions set out in article 3, paragraph 3, is to be established from the correspondence between the affected Parties and the intermediary, unless otherwise agreed upon between the Parties concerned and the intermediary;^h

(g) Any miscommunications between the Party of origin and the intermediary should have no impact on the application of the provisions of the Convention;ⁱ

(h) Neither the Convention itself nor the applicable international rules provide for [...] an exception [...], and therefore absence of diplomatic relations cannot be considered legitimate reason for not applying the Convention;^j

Extension of the lifetime of an NPP

(i) The extension of the lifetime of a nuclear power plant, even in absence of any works, [is] to be considered as a major change to an activity and consequently subject to the provisions of the Convention;^k

Effective public participation

(j) Although the Convention does not specify mechanisms for public participation, the holding of public hearings is an essential step in the effective public participation provided for in article 2, paragraph 6, and article 3, paragraph 8, of the Convention as set out in the Guidance on public participation;^l

(k) As such, a website could be one of the useful means to allow for the public of the Parties concerned to participate in a transboundary EIA procedure, if they so agree, provided that the information [is] complete, provided in time and, for the relevant parts of the EIA documentation, in the language of the affected Party, and that the public [is] given a possibility to comment on the website;^m

Consultations

(l) In accordance with article 5 of the Convention, consultations should not be only a mere formality but should concern the measures to “reduce or eliminate” (article 5, paragraph 1) the potential transboundary impact of the proposed activity and allow thorough examination of its possible alternatives;ⁿ

(m) In order to allow for meaningful consultations under article 5, the information provided by the Party of origin should be as complete and precise as possible, and in particular, should meet any reasonable request as to its scope made by the affected Party;^o

[Content of the environmental documentation – locational alternatives and choice of the location of a proposed activity]

^g Ibid., annex I, para. 37 (d) and ECE/MP.EIA/IC/2012/2, para. 17.

^h ECE/MP.EIA/IC/2012/6, annex I, para. 37(b) and para. 38;

ⁱ Ibid., annex I, para. 37 (c).

^j Ibid. annex I, para.46.

^k ECE/MP.EIA/IC/2013/2, para. 21, see also ECE/MP.EIA/IC/2011/8, para. 43.

^l Ibid., annex, para. 44.

^m Ibid., annex, para. 48.

ⁿ Ibid., annex, para. 51.

^o Ibid., annex, para. 52.

(n) The EIA documentation must evaluate and justify different elements to be taken into account for the “reasonable [locational] alternatives [appendix II to the Convention]”.^p

(o) The choice of the location of the proposed activity should result from the EIA procedure and should not be determined before the final EIA report [is] issued, unless the choice of the location [is] determined in an appropriate SEA procedure that included a transboundary procedure.^q

6. *Reiterates its recommendation that*, pending entry into force of the second amendment to the Convention as adopted by decision III/7, that Parties in their role of Party of origin (a) notify as early as possible and when determining case by case the content of environmental impact assessment documentation (“scoping”), where applicable, so that the environmental impact assessment documentation could meet the needs of the affected Party and (b) involve the affected Party in any such case-by-case determination (see decision V/4, para. 7);

7. *Encourages* Parties to bring issues concerning their own compliance before the Implementation Committee;

8. *Requests* the Implementation Committee to provide assistance to Parties in need of such assistance, as appropriate and to the extent possible, [and in this respect refers to decision of the sixth session of the Meeting of the Parties on the adoption of the workplan];

9. *Urges* Parties to take into account in their further work the recommendations for further improving the implementation of and compliance with the Convention, including by strengthening national legislation, based on but not limited to the analyses on general compliance issues:

(a) From the first review of implementation, adopted by decision III/1, the second review of implementation adopted by decision IV/1 and the third review of implementation adopted by decision V/3 of the Meeting of the Parties;

(b) As presented in chapter III of the Implementation Committee’s previous report on its activities (ECE/MP.EIA/2011/4),

(c) As presented in chapter ... of the Implementation Committee’s latest report on its activities (ECE/MP.EIA/2014/...);

10. *Also urges* Parties to take into account in their further work the opinions of the Implementation Committee in the period from 2001 to 2014 (ECE/MP.EIA/...), and requests the secretariat to arrange for the revision of the publication of these opinions to include the Committee’s opinions from 2011-2014,

11. *Adopts* the amendment to the operating rules of the Implementation Committee set out in the annex to this decision, which should be applied to any meeting and to any other conduct of business of the Committee and should be read together with and in furtherance of the structure, functions and procedures described in the appendix to decision III/2 of the Meeting of the Parties to the Convention, as amended through decision V/4, as well as decision V/6-I/6 of the Meeting of the Parties to the Convention and the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol, and requests the secretariat to arrange publication of the amended operating rules in electronic or paper format, as appropriate;

^p Ibid., annex, para. 54.

^q Ibid., annex, para. 54.

12. *Decides* to keep under review and to develop if necessary the structure and functions of the Implementation Committee as well as its operating rules at the seventh session of the Meeting of the Parties in the light of experience gained by the Committee in the interim, and requests the Committee to prepare any proposals, as it deems necessary, for the seventh session of the Meeting of the Parties;

II. Follow-up to decision V/4

A. *Regarding Ukraine*

13. *Welcomes* the efforts demonstrated by the Government of Ukraine...

14. *Appreciates* the reports received from the Government of Ukraine further to paragraph 24 of decision V/4;

15. *Endorses* the finding of the Implementation Committee at its twenty-ninth session that, ...;

16. *Declares* therefore that the caution to the Government of Ukraine issued in its fourth session [remains effective (see ECE/MP.EIA/IC/2009/4, para. 16)] [be lifted];

17. [*Requests* the Government of Ukraine to report by the end of each year to the Implementation Committee: (a) on steps taken to bring into full compliance the Danube-Black Sea Deep Water Navigation Canal in the Ukrainian sector of the Danube Delta, implementing the measures in accordance with paragraph 19, and on the post-project analysis of the project; (b) on the implementation of the strategy, in particular on concrete legislative measures adopted to this effect;

18. *Also requests* the Implementation Committee to report to the seventh session of the Meeting of the Parties to the Convention on its evaluation of the steps taken by the Government of Ukraine to bring about compliance and to implement the strategy, and to develop, if appropriate, further recommendations to assist Ukraine in complying with its obligations under the Convention;

19. *Offers* technical advice to the Government of Ukraine to assist it in bringing its legislation into line with the provisions of the Convention, subject to the availability of funding;]

B. *Regarding Armenia*

[Not yet addressed by the Committee/to be completed after the Committee's twenty-ninth session]

C. *Regarding Romania*

[Not yet addressed by the Committee/to be completed after the Committee's twenty-ninth session]

D. *Regarding Azerbaijan*

20. *Welcomes* the preparation by Government of Azerbaijan, with the technical assistance provided by a consultant to the Convention secretariat, of draft revised legislation for the implementation of the Convention;

21. *Appreciates* the reports received from the Government of Azerbaijan on progress in implementing the recommendations by the consultant for further strengthening Azerbaijan's capacity to comply fully with its obligations under the Convention;

22. [*Urges*] [*Requests*] Azerbaijan to incorporate the recommended improvements into its [draft law] and resolutions to be adopted ;

III. Submissions by Parties

Regarding Armenia^r

23. *Endorses* the finding of the Implementation Committee that Armenia was in non-compliance with its obligation under the article 3, paragraph 1, of the Convention to notify Azerbaijan as early as possible and no later than when informing its own public, with respect to the construction of the nuclear power plant in Metsamor referred to in the submission by Azerbaijan regarding Armenia on 5 May 2011;

24. *Endorses* the finding of the Committee that Armenia is not in non-compliance with article 3, paragraphs 5 and 8, article 4, paragraph 2, article 5 and article 6 of the Convention, considering that — to the extent that the final decision on the construction of the nuclear power plant had not yet been taken and the works had not yet been initiated — there was still a possibility for Armenia to continue the implementation of the subsequent steps in the transboundary EIA procedure;

25. Considering the willingness of the Governments of Armenia and Azerbaijan to continue implementing the provisions of the Convention and the presence of the exceptional circumstances, *encourages* both Parties to find practical ways to fully implement the provisions;

26. *Endorses* the proposals submitted to its present session by an ad hoc group to the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment and the Bureau regarding the implementation of the Convention by Parties with no diplomatic relations, including the possible designation of an intermediary and the use of new technologies and innovative approaches for communication between the two Parties, and requests Armenia and Azerbaijan to implement these proposals.

Regarding Azerbaijan^s

[advance unedited version of the text / to be confirmed whether the text will be included in the draft for WG-3 in November 2013]

27. *Endorses* the findings of the Committee that, in accordance with the information provided to the Committee, Azerbaijan was not in non-compliance with its obligations under article 2 paragraph 4, article 3 paragraphs 1 and 8, article 5, and article 6, paragraph 1, of the Convention, with respect to the following projects:

- (a) The Joint Development and Production Sharing for the Azeri and Chirag oil and gas Fields in the Deep Water Portion of the Gunashli oil and gas Field in the Azerbaijan Sector of the Caspian Sea, including the Sangachal terminal project;
- (b) The Exploration, Development and Production Sharing for the Shah Deniz Prospective Area in the Azerbaijan Sector of the Caspian Sea, including the expansion of the Sangachal terminal project;
- (c) The Baku-Novorossiysk pipeline – North Route Export Pipeline;
- (d) The Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgian, and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Main Export Pipeline Project;
- (e) The Baku-Tbilisi-Erzurum Gas Pipeline – South Caspian Pipeline;

^r ECE/MP.EIA/IC/2012/6, annex I, paragraph 51.

^s ECE/MP.EIA/IC/2013/4, annex, paragraph [78]

28. *Encourages* Azerbaijan to continue monitoring and submitting monitoring reports to Armenia with a view to taking all appropriate and effective measures to control any significant adverse transboundary impact from the activities mentioned in the submission, in accordance with article 2, paragraph 1, of the Convention.

29. *Encourages* Azerbaijan to continue improving the legal, administrative and other measures to reach full compliance with the Convention, in line with the recommendations made under the Committee initiative on Azerbaijan, including clearly designating in its legislation what decision constitutes a final decision and ensuring that this decision complies with the requirements of article 6 of the Convention.

Regarding Belarus¹

30. *Endorses* the findings of the Implementation Committee that Belarus is in compliance with its obligations under article 3, paragraph 2 (a) and (c), and article 3, paragraph 8, of the Convention in relation to the activities referred to in the activities referred to in the submission by Lithuania regarding Belarus on 16 June 2011;

31. *Endorses* the findings of the Implementation Committee that Belarus is in non-compliance with its obligations under article 2, paragraph 6, article 4, paragraph 2, article 5, paragraph (a), and article 6, paragraphs 1 and 2, of the Convention in relation to the activities referred to in the submission;

32. *Requests* the Government of Belarus to take a final decision on the site selection, in full compliance with the requirements of article 6, i.e., ensuring that due account has been taken of the outcome of the EIA documentation, and the comments thereon received pursuant to article 3, paragraph 8, and article 4, paragraph 2, as well as the outcome of the consultations referred to in article 5;

33. *Also requests* Belarus to provide to Lithuania the final decision on the proposed activity taken in accordance with the previous recommendation, along with the reasons and considerations on which it was based;

34. *Further requests* Belarus to continue the procedure of transboundary EIA on the basis of the final EIA documentation. To this end, and in accordance with the provisions of the Convention, Belarus should agree with Lithuania on the steps to be followed, answer all Lithuania's questions, and take into consideration the Lithuanian comments;

35. *Urges* Belarus and Lithuania to make further efforts to ensure that the language requirements of public consultations are satisfied;

36. *Requests* Belarus and Lithuania to ensure that the Lithuanian public is informed about the final EIA report and provided with possibilities for making comments or objections to it, in line with article 3, paragraph 8, of the Convention;

37. *Encourages* Belarus and Lithuania to continue consultations, on the basis of article 5, and urge Parties to agree on a reasonable time frame for the consultation period;

38. *Also encourages* Belarus and Lithuania to agree on a post-project analysis in accordance with article 7 of the Convention;

39. *Further encourages* Belarus and Lithuania to conclude the bilateral agreement for the implementation of the Convention in accordance with article 8;

40. *Requests* Belarus and Lithuania to report by the end of each year to the Implementation Committee on the implementation of these recommendations.

¹ ECE/MP.EIA/IC/2013/2, annex, paragraph 74.

IV. Committee initiative

Regarding Albania^u

41. *Endorses* the finding of the Implementation Committee that Albania is not in non-compliance with the Convention in relation to its obligation to report on its implementation of the Convention;

42. *Encourages* Albania to create the necessary institutional framework to ensure proper implementation of the requirement to report on its implementation.

Regarding Ukraine

[To be finalized by the Committee]

Annex

Amendment of the operating rules of the Implementation Committee

See document ECE/MP.EIA/WG.2/2013/INF.3/Add.1

[...]

^u ECE/MP.EIA/IC/2012/6, Annex II, paragraph 31.

Draft decision II/2

[To be considered by the 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 at its second session]

Review of compliance with the Protocol

Preamble

The Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol on Strategic Environmental Assessment,

Recalling article 14, paragraph 6, of the Protocol on Strategic Environmental Assessment to the Convention, and decision V/6-I/6 of the of the Meeting of the Parties to the Convention and the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol, concerning the application of the compliance procedure of the Convention to the Protocol,

Determined to promote and improve compliance with the Convention and the Protocol,

Seeking to promote the identification, as early as possible, of compliance difficulties encountered by Parties and the adoption of the most appropriate and effective solutions for resolving those difficulties,

Having reviewed the operating rules adopted in decision IV/2 and included as annex IV to that decision, as amended through decision V/4, annex, and recognizing the importance of the transparency and the predictability of the Implementation Committee's work,

Having also reviewed the opinions of the Implementation Committee,

Recognizing the importance of rigorous reporting by Parties of their compliance with the Protocol, and noting the first review of the implementation of the Protocol, based on Parties' answers to the questionnaires on the implementation of the Convention and the Protocol, and adopted in decision II/2,

Recalling that the compliance procedure is assistance-oriented and that Parties may make submissions to the Implementation Committee on issues regarding their compliance with the Convention and the Protocol,

1. *[Adopts* the Implementation Committee's report on its activities (ECE/MP.EIA/2014/...), welcomes the reports of the meetings of the Committee in the period after the fifth session of the Meeting of the Parties to the Convention and the first session of the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol, and requests the Committee]:

- (a) To keep the implementation and application of the Protocol under review;
- (b) To promote and support compliance with the Protocol, including to provide assistance in this respect, as necessary;

2. *Welcomes* the examination by the Implementation Committee of information received from other sources, including the public, regarding Romania, which resulted in the Committee declaring its satisfaction with the clarifications provided by the Party [and] [...];

3. [Notes the pending submissions initiated by [...] that are to be considered by the Implementation Committee at its forthcoming sessions;]

4. *Considers also*, following the opinion of the Implementation Committee, that [t]he obligation in article 10 of the Protocol to notify potentially affected Parties rests solely with the Party of origin.^v

5. *Encourages* Parties to bring issues concerning their own compliance before the Implementation Committee;

6. *Requests* the Implementation Committee to provide assistance to Parties in need of such assistance, as appropriate and to the extent possible, [and in this respect refers to decision of the second session of the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol on the adoption of the workplan];

7. *Urges* Parties to take into account in their further work the recommendations for further improving the implementation of and compliance with the Protocol, including by strengthening national legislation, based on but not limited to the analyses on general compliance issues:

(a) From the first review of implementation, adopted by decision II/... of the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol;

(b) As presented in chapter ... of the Implementation Committee's latest report on its activities (ECE/MP.EIA/2014/...);

^v ECE/MP.EIA/IC/2012/2, para. 17.