



Economic and Social Council

Distr.: General
11 July 2011

Original: English

Economic Commission for Europe

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

Implementation Committee

Twenty-first session
Geneva, 20 June 2011

Report of the Implementation Committee on its twenty-first session

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I. Introduction

1. The twenty-first session of the Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) was held on 20 June 2011 in Geneva.

A. Attendance

2. All members of the Implementation Committee attended the session: Ms. T. Javanshir (Azerbaijan), Ms. N. Stoyanova (Bulgaria), Mr. N. Mikulic (Croatia), Mr. M. Sauer (Germany), Ms. R. Kalygulova (Kyrgyzstan), Mr. J. Jendroska (Poland), Ms. T. Plesco (Republic of Moldova) and Ms. V. Kolar-Planinsic (Slovenia).

3. The session was attended by two invited representatives of Belarus during the Committee's consideration of its initiative on Belarus (see section II below).

B. Organizational matters

4. The Chair of the Implementation Committee, Mr. Sauer, opened the session. The Committee adopted its agenda (ECE/MP.EIA/IC/2011/3/Rev.1), which had been prepared by the Convention secretariat in agreement with the Chair.

II. Committee initiative

5. The discussion held under the agenda item on the Committee initiative was not open to observers, in accordance with rule 17 of the Committee's operating rules.

6. The Committee continued its consideration of the possible systemic inconsistency between the Convention and environmental assessment within the framework of the State ecological expertise system of Belarus. The Committee had requested clarifications on this matter in its letter of 18 January 2011, inviting representatives of Belarus to attend its twenty-first session to discuss the issue further.

7. The Committee explained to the representatives of Belarus that later in the session it would take note of the official submission received from Lithuania concerning the planned building of a nuclear power station in Belarus, and that it would continue the consideration of that case in its forthcoming sessions on the basis of that submission. Consequently, at its present session, the Committee would focus only on discussing the systemic issues related to the implementation of the Convention by Belarus.

8. The Committee welcomed the replies to its subsequent questions and the legislation on environmental impact assessment that Belarus provided during the session.

9. In general terms, the Committee considered that holding discussions with the invited experts of Belarus during the session had been an effective way to obtain information on the State ecological expertise system in Belarus. It recommended, therefore, that the Implementation Committee, in its new composition, consider using this method of work in its forthcoming sessions, as needed.

10. In addition to reviewing the legislation in greater depth, the Committee wished to receive in writing for further scrutiny the Belarusian replies to its questions concerning the legislation. The Committee asked the Chair to write to the Government of Belarus, providing it with the updated questions from the Committee and inviting it to reply to each of them briefly by 15 August 2011 to allow the Committee to carry on its deliberations on

this issue at its twenty-second session. The Committee also tasked two of its members with the preparation of a summary of the Belarusian replies for submission to the next session of the Committee as an informal document.

11. Finally, the Committee acknowledged with appreciation that Belarus had provided the final environmental impact assessment documentation for the planned nuclear power station in Belarus to the affected Parties, as had been recommended by the Committee at its twentieth session.

III. Submissions

A. Armenia

12. The Committee took note of the submission by Azerbaijan expressing concerns about the planned building of a nuclear power station in Metsamor, Armenia, which had been received by the secretariat on 5 May 2011. It also took note of the message sent on the same day by the secretariat to the focal point of Armenia, forwarding the submission in conformity with paragraph 5 (a) of the appendix to decision III/2 (ECE/MP.EIA/6, annex II).

13. The Committee also noted that, following the receipt of the reply that had been requested from Armenia by 5 August 2011, the matter would be considered by the Committee, in its new composition, at its twenty-second session (5–7 September 2011).

B. Belarus

14. The Committee took note of the submission by Lithuania expressing concerns about the planned building of a nuclear power station in Belarus, which had been received by the secretariat on 16 June 2011. The Committee also took note of the message sent on the same day by the secretariat to the focal point of Belarus, forwarding the submission in conformity with paragraph 5 (a) of the appendix to decision III/2.

15. The Committee also noted that the official submission by Lithuania would be considered by the Implementation Committee at its twenty-third session (5–7 December 2011), following the receipt of the reply requested from Belarus by 16 September 2011. Consequently, at its present session, the Committee withheld from addressing any substantive issues regarding the submission, but focused only on discussing the systemic issues related to the implementation of the Convention by Belarus (see item II above).

16. Moreover, following the official submission by Lithuania, the Committee decided to close the information-gathering case on Belarus (EIA/IC/INFO/5) that had been initiated further to information provided by the Ukrainian non-governmental organization, Ecoclub. It requested the secretariat to inform Ecoclub accordingly.

17. Furthermore, the Committee instructed the secretariat to ask Belarus for its permission to release the correspondence related to the information-gathering case. The Committee stressed that the Convention's website should clearly indicate which of the published information related to the information-gathering case and which pertained to the official submission.

IV. Preparations for the fifth session of the Meeting of the Parties

18. The Committee discussed the follow-up to decision IV/2, as presented in draft decision V/4 on the review of compliance submitted to the fifth session of the Meeting of the Parties to the Convention (ECE/MP.EIA/2011/L.3, section II.A).

A. Follow-up to decision IV/2 regarding Ukraine

19. The Committee considered information by the Government of Ukraine, received on 28 February 2011, in response to the Committee's letter of 18 January 2011. It also noted the non-paper on Ukraine's actions to comply with decision IV/2 and the proposal for revised wording of section II.A of draft decision V/4 that Ukraine had submitted to the Meeting of the Parties. The Implementation Committee had also received information published by the Ukrainian non-governmental organization "Society and Environment", related to the changes to the Ukrainian environmental impact assessment legislation and its potential impact on Ukraine's compliance with its obligations under the Convention.

20. The Committee appreciated the progress made by Ukraine in the elaboration of bilateral agreements and wished to receive regular reports from Ukraine on the progress in their finalization and implementation.

21. The Committee noted with concern the recent changes in the legislative framework for development control, namely the Law on Regulating Urban Development adopted on 17 February 2010. That law, according to the information available to the Committee, appeared not to correspond to the Ukrainian Government's strategy to implement the Convention, and in fact diminished rather than strengthened the capacity of the legislative framework to ensure compliance with the Convention. In that respect, the Committee regretted that it had not received the Ukrainian responses to the questions contained in its letter of 1 February 2011, which it had requested by 31 May 2011. The Committee therefore asked the Chair to write again to the Government of Ukraine, inviting it to provide the missing replies by 30 August 2011, both electronically and in paper format, for consideration by the Committee at its twenty-second session.

22. The Committee then reviewed in depth the information made available to it regarding the revisions to the strategy of the Government of Ukraine to implement the Convention, the draft decree on public participation, the screening mechanism and the application of the criteria listed in annex I to the Convention.

23. Following its review, the Committee made the following comments and further requests for information and clarifications:

(a) On the revised strategy:

(i) Regarding the dates for the implementation of the strategy, the Committee requested that the deadlines be met and all draft laws, decrees, etc. (including the guidance on their practical application) be presented to it for comments before their approval;

(ii) The Committee also wished to know which activity, in the new circumstances created by the verdict of the Ukrainian Constitutional Court, would replace the originally scheduled activity which had been deleted;

(b) Regarding the draft Act on Public Participation, the Committee did not understand why the Council of Ministers had competence to adopt a general act on public participation but not the relevant details regarding environmental protection. In this regard, the Committee wished to receive further clarifications on:

(i) Whether article 20 of the Ukrainian environmental protection law had been changed since the adoption of the strategy;

(ii) Why the adoption of the decree on public participation had not been considered as an obstacle in the original strategy but was considered to be so at present;

(iii) Whether article 20 of the Environmental Protection Law precluded the adoption of the procedure for “public participation in assessing the impact of proposed activity on the environment” but did not preclude the approval of the procedure for public participation in assessing the impact in a transboundary context;

(c) With regard to the screening mechanism and application of the criteria listed in annex I, the Committee did not find that the reply by Ukraine was satisfactory in answering its concerns, and requested further clarifications. In particular, the reply seemed to suggest that the current provisions in Ukraine, including the list of activities subject to an impact assessment, were sufficient, although it had been indicated to Ukraine that that was not the case and although Ukraine had itself agreed to extend the list of activities (i.e., to include activities not requiring construction).

24. The Committee asked the Chair to write Ukraine a second letter, inviting it to provide the above further clarifications by 30 August 2011, both electronically and in paper format, for consideration by the Committee at its twenty-second session.

25. Finally, the Committee discussed textual proposals for revising draft decision V/4 regarding Ukraine, to reflect the fact that while Ukraine had fulfilled some of its obligations under paragraph 10 of decision IV/2 with respect to both phases of the project for the Danube-Black Sea Deep Water Navigation Canal in the Ukrainian sector of the Danube Delta, it had not fulfilled all of these obligations, and that, consequently, the caution to the Government of Ukraine issued by the Meeting of the Parties at its fourth session should be effective. The Committee also proposed to the Meeting of the Parties to note with concern the insufficient progress with the realization of the Ukrainian strategy to implement the Convention, and in particular the recent changes in the Ukrainian environmental impact assessment legislation that seemed to diminish the capacity of Ukraine to ensure its compliance with the Convention. Finally, the Committee discussed the report of the European Union (EU)-funded project to support Ukraine in its implementation of the Convention, and in particular the proposed measures to bring the canal project into compliance with the Convention (referred to in para. 19 of decision V/4). It stressed that the Meeting of the Parties could take note of the report only if Ukraine made it available to the Meeting.

B. Follow-up to decision IV/2 regarding Azerbaijan

26. The Committee proposed that the Meeting of the Parties welcome the ongoing technical advice for the review of Azerbaijan’s legislation on environmental impact assessment.

V. Other business

A. Application of the Convention by the European Union member States

27. The Committee considered the opinion from the Legal Service of the European Commission (ARES 2011 91651 of 27 January 2011) received on 7 February 2011 in

response to the Committee's letter of 19 January 2011. The Committee had sought confirmation of the European Commission's previous view that EU law did not preclude an EU member State, having concerns about another EU member State's compliance with its obligations under the Convention, from making a submission to the Committee.

28. The Committee observed that the work of the Implementation Committee under the Convention did not serve as a method of settlement of disputes as envisaged by article 344 of the Treaty on the Functioning of the Union (TFEU). That was shown already by the fact that the compliance procedure was based not on article 15 of the Convention (settlement of disputes), but on decision III/2 by the Meeting of Parties and in future on Article 14 bis after its entry into force. That view had been widely acknowledged in the academic literature. It had also been acknowledged and communicated by the European Commission services after the publication of the European Court of Justice (ECJ) ruling on the MOX plant in 2006 (Case C-459/03, *Commission v. Ireland*). The Commission's services clearly stated (at that time) that the ECJ ruling would not affect the work of the Implementation Committee. Further, the compliance procedure under the Convention provided that the Convention's Implementation Committee only made recommendations to the Meeting of the Parties to the Convention, which was the sole decision-making body.

29. The Committee did not consider that the explanations regarding the potential conflicts between the Convention's procedures for the review of compliance and the corresponding EU legislation on dispute settlements (TFEU art. 344) provided it with the clarifications it had requested.

30. The Committee therefore asked the Chair to write to the European Commission, inviting it to further clarify its views on the application of the Convention's compliance procedure by EU member States. The European Commission should be asked to provide the further clarifications by 15 August 2011, to allow for their consideration by the Committee at its twenty-second session.

B. Possible discrepancies between the different language versions of the Convention

31. The Committee took note of the letter of 7 June 2011 from the European Commission seeking clarification on the appropriate interpretation of the provisions of the Convention, in particular with a view to establishing whether the description of the no-action alternative to a proposed action as set out in appendix II, item (b), was compulsory or whether the national authorities had any margin of discretion. The European Commission argued that there was a discrepancy between the English, French and Russian language versions of the Convention that might lead to different interpretations and inconsistencies in the application of the Convention by the Parties.

32. The Committee noted also the clarifications that the secretariat had communicated to the European Commission on 3 May 2011 in response to the informal inquiries of the Commission. The Committee was in agreement with the informal clarifications by the secretariat, but in absence of time, it decided to postpone the discussions on the issue to the forthcoming session of the Committee.

C. Information on a proposed activity in Ukraine

33. The Committee considered information provided by a Ukrainian non-governmental organization regarding a planned activity in Ukraine, close to the border with Belarus and Poland. The Committee asked the Chair to invite the Government of Ukraine to provide, by 15 August 2011 for consideration by the Committee in September 2011, information on the

environmental impact assessment for the planned activity, as well as clarification on whether the Government of Ukraine had taken the necessary legal, administrative and other measures to implement the provisions of the Convention.

D. Information on a proposed activity in Romania

34. The Committee also considered information provided by a Romanian non-governmental organization regarding a planned activity in Romania, close to the border with Bulgaria. It asked the Chair to invite the Government of Romania to provide, by 15 August 2011 for consideration by the Committee in September 2011, information on the environmental impact assessment for the planned activity, as well as clarifications on whether the Government of Romania had taken the necessary legal, administrative and other measures to implement the provisions of the Convention.

VI. Presentation of the main decisions taken and closing of the meeting

35. The Committee, with new members elected by the Meeting of the Parties, would next meet again from 5 to 7 September and from 5 to 7 December 2011.

36. The Committee adopted the draft report of its session, prepared with the support of the secretariat. The Chair did not formally close the session on Monday, 20 June 2011, as the Committee continued to meet intermittently in the margins of the fifth session of the Meeting of the Parties (Geneva, 20–23 June 2011) to discuss pending issues.
