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ECONOMIC COMMISSION FOR EUROPE

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

Implementation Committee

Eighteenth session
Geneva, 23–25 February 2010

**REPORT OF THE IMPLEMENTATION COMMITTEE
ON ITS EIGHTEENTH SESSION**

CONTENTS

| | <i>Paragraphs</i> | <i>Page</i> |
|---|-------------------|-------------|
| I. INTRODUCTION | 1–5 | 3 |
| A. Attendance | 2–4 | 3 |
| B. Organization of work | 5 | 3 |
| II. FOLLOW-UP TO DECISION IV/2 REGARDING UKRAINE (PARAGRAPHS 7–14) | 6–14 | 4 |
| III. FOLLOW-UP TO DECISION IV/2 REGARDING ARMENIA (PARAGRAPHS 15–19) | 15–17 | 5 |

CONTENTS (*continued*)

| | Paragraphs | Page |
|--|------------|------|
| IV. SECOND REVIEW OF IMPLEMENTATION | 18–24 | 6 |
| A. General compliance issues | 18–22 | 6 |
| B. Specific compliance issues..... | 23–24 | 7 |
| V. SUBMISSIONS | 25–27 | 7 |
| VI. COMMITTEE INITIATIVE | 28–46 | 7 |
| A. Azerbaijan | 29 | 8 |
| B. Ukraine..... | 30 | 8 |
| C. Belgium..... | 31–41 | 8 |
| D. Slovakia..... | 42–43 | 10 |
| E. Belarus | 44–45 | 10 |
| F. Republic of Moldova | 46 | 11 |
| VII. REVISED QUESTIONNAIRE | 47 | 12 |
| VIII. STRUCTURE AND FUNCTIONS, AND OPERATING RULES | 48 | 12 |
| IX. PREPARATIONS FOR THE FIFTH SESSION OF THE MEETING OF THE PARTIES..... | 49–52 | 12 |
| X. OTHER BUSINESS | 53–55 | 13 |
| XI. PRESENTATION OF THE MAIN DECISIONS TAKEN AND CLOSING OF THE MEETING | 56–58 | 13 |
| <u>Annex</u> | | |
| Findings and recommendations further to a submission by Ukraine regarding Romania (EIA/IC/S/2)..... | | 14 |

I. INTRODUCTION

1. The eighteenth session of the Implementation Committee was held from 23 to 25 February 2010 in Geneva.

A. Attendance

2. The following members of the Implementation Committee attended the session: Ms. Nina Stoyanova (Bulgaria), Mr. Nenad Mikulic (Croatia), Mr. Matthias Sauer (Germany), Ms. Rakia Kalygulova (Kyrgyzstan), Mr. Jerzy Jendroska (Poland), Ms. Diana Bragoi (Republic of Moldova) and Ms. Vesna Kolar-Planinsic (Slovenia). The member nominated by Azerbaijan, Ms. Tatiana Javanshir, did not attend.

3. The session was attended by representatives of Romania and Ukraine during the Committee's consideration of the follow-up to decision IV/2 regarding Ukraine (see section II below), following the Committee's agreement to open that agenda item to observers.

4. The Committee recalled rule 4, paragraph 2, of the operating rules of the Committee (ECE/MP.EIA/10, decision IV/2, annex IV), specifying that members were expected to participate in every meeting of the Committee. No reply had been received from Azerbaijan to the Chair's letter of 3 November 2009 regarding the absence of the member nominated by Azerbaijan, Ms. Javanshir, from the previous session (ECE/MP.EIA/IC/2009/4, para. 6). The Committee noted the absence of the member nominated by Azerbaijan from the current session, despite the exceptional provision of financial support and despite all efforts by the secretariat to arrange for travel. No explanation had been provided by Azerbaijan. The Committee considered that the repeated absence of the member nominated by Azerbaijan placed an additional burden on the other members of the Committee, undermined the Committee's work and brought into question Azerbaijan's membership of the Committee. The Committee requested the Chair again to write to the Minister of Environment of Azerbaijan to inform him that the Committee had agreed to recommend to the fifth session of the Meeting of the Parties that Azerbaijan be replaced on the Committee, unless:

(a) The Committee received by 17 May 2010 assurances from the Government of Azerbaijan that the member nominated by Azerbaijan would attend in future and without financial support;

(b) The member nominated by Azerbaijan did indeed attend the future sessions of the Committee.

B. Organization of work

5. Mr. Sauer, the Chair, opened the meeting. The Committee adopted the agenda as set out in ECE/MP.EIA/IC/2010/1.

II. FOLLOW-UP TO DECISION IV/2 REGARDING UKRAINE (PARAGRAPHS 7–14)

6. The Committee considered the strategy of the Government of Ukraine to implement the Convention, as requested by the Meeting of the Parties (ECE/MP.EIA/10, decision IV/2, para. 12), and the accompanying explanatory notes received from the Government of Ukraine on 31 December 2009. The Committee also considered the strategy as adopted by resolution of the Cabinet of Ministers of Ukraine on 6 January 2010.

7. Mr. Jendroska reported on his leadership of a European Commission project to assist Ukraine in the implementation of the Espoo and Aarhus Conventions.¹ The Government of Ukraine had developed the strategy, but the project had provided input to improve the compliance of the strategy with the Espoo Convention. The Committee agreed that Mr. Jendroska's involvement in the project did not, further to rule 17 of the operating rules of the Committee (decision IV/2, annex IV), exclude his participation from the Committee's consideration of the strategy.

8. There were two key problems identified by the European Commission project as being faced by Ukraine in implementing the Convention. Firstly, Ukraine's procedure for the assessment of environmental impact of a proposed activity was carried out mostly by the proponent and not by the authorities that were competent to authorize the activity. The procedure had involved the authorities only late in the process, once any public participation has taken place. Secondly, the subsequent State ecological review by the authorities was essentially limited to a review of the legality of the proposed activity. The independent review of Ukraine's legal, administrative and other measures to implement the provisions of the Convention (ECE/MP.EIA/IC/2009/5) had equated the final decision in the meaning of article 6 of the Convention with the conclusion of the State ecological review, whereas the European Commission project had determined that the final decision should rather be equated with the conclusion of the subsequent integrated State review, which included the State ecological review and several other sectoral reviews. The speaker reminded the Committee that the Convention reflected the system of environmental impact assessment prevalent in Western Europe, and was less compatible with the systems of environmental assessment and State ecological review inherited by many countries of the former Soviet Union.

9. The European Commission project had identified the need in Ukraine for a separate list of activities that were always subject to transboundary environmental impact assessment to supplement the current system of ad hoc screening that had clearly proved insufficient to detect activities subject to the Convention. The list should include clear criteria, determined by an expert group, for each activity listed, for example the scale and proximity of the activity to an international border. A particular difficulty with activities listed in appendix I to the Convention that did not involve construction, such as deforestation of large areas, was that they were not

¹ The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998), respectively.

currently subject to Ukraine's system of environmental impact assessment and State ecological review.

10. The Committee requested the Chair to write to Ukraine expressing its thanks for the strategy and other documents received, and taking note of the copies received of letters sent by Ukraine to neighbouring States proposing the negotiation of bilateral agreements or other arrangements. The Committee wished to know whether the deadlines indicated in the strategy were still valid in the light of a possible change of Government in Ukraine and requested that the deadline and responsible authority be identified for each action in the strategy. The Committee recommended that as many provisions of the Convention as possible should be implemented in legislation, not in subordinate regulations, and that non-construction activities listed in appendix I to the Convention be covered by the strategy. The Committee agreed to request information on the status of the expected revision of regulations on public participation and asked for confirmation that the strategy would be implemented in line with the explanatory notes. The Committee requested Ukraine to provide answers to the above questions by 31 May 2010. Furthermore, the Committee wished to receive an update on the status of negotiation of bilateral agreements or other arrangements, which would later be provided to the fifth session of the Meeting of the Parties. The Committee agreed to consider the matter further at its next session.

11. The Committee requested the secretariat to make the strategy and the Chair's letter to Ukraine (see para. 10 above) available on the website of the Convention.

12. More generally, the Committee also discussed the possible challenges to effective environmental impact assessment when organized by the proponent rather than the authorities, including regarding adequate access to the environmental impact assessment documentation and a proper record of a public hearing.

13. The Committee decided that the secretariat should ask the Governments of Romania and Ukraine for their agreement to make publicly available the following documents relating to the original submission by Romania (EIA/IC/S/1): the submission by Romania, the reply by Ukraine, the clarifications provided by both Parties and the comments by both Parties on the draft findings and recommendations.

14. The Committee took note of the final decision on the Bystroe Canal Project taken by the Government of Ukraine on 25 January 2010, as well as of a letter received during the session, on 24 February 2010, from a Ukrainian non-governmental organization, Environment-People-Law, presenting a legal assessment of the final decision. The Committee recalled that it had decided not to consider this matter further pending a decision by the Meeting of the Parties (ECE/MR.EIA/IC/2009/4, para. 18).

III. FOLLOW-UP TO DECISION IV/2 REGARDING ARMENIA (PARAGRAPHS 15–19)

15. The Committee considered a report received from the Government of Armenia on 1 February 2010, further to paragraph 19 of decision IV/2. The Committee asked the Chair to write to the Government of Armenia expressing its appreciation for the report and its pleasure at

the satisfaction of Armenia with the technical advice provided by the consultant who had been approved by the Committee. The Committee wished to receive by 31 July 2010 more details on the timing of all the steps planned to be taken by the Government of Armenia to implement fully the Convention.

16. The Committee requested the secretariat to make Armenia's report available on the website of the Convention.

17. The Committee reviewed the draft programme of the planned seminar on legislation and procedures for the implementation of the Convention in Armenia (ECE/MP.EIA/10, decision IV/7), expected to be held on 17 May 2010 within a meeting of the Working Group on Environmental Impact Assessment to be led by Armenia. The Committee proposed a number of revisions to the programme and agreed that Mr. Sauer would chair the seminar and Mr. Jendroska would provide the concluding remarks.

IV. SECOND REVIEW OF IMPLEMENTATION

A. General compliance issues

18. Ms. Bragoi presented her findings on an examination of the implementation of articles 7, 8 and 9 of the Convention, as reported in the completed questionnaires for the period from 2003 to 2005. Consequently, the Committee recommended that Parties include monitoring conditions in their final decisions when applying the Convention. While recognizing the merits of bilateral and multilateral agreements, the Committee also recommended that Parties should consider developing informal agreements, such as bilateral guidelines, common declarations and memorandums of understanding, in cases where bilateral agreements were inappropriate.

19. The Committee decided to remind Parties of their obligation to exchange the results of research programmes in accordance with article 9 and to encourage them to exchange such results through the mechanisms for the exchange of information under the workplan of the Convention. Parties should fulfil the above-mentioned obligation through, among other means, national reporting when completing the questionnaire on their implementation of the Convention.

20. Mr. Mikulic presented his findings regarding an examination of the implementation of the Convention's provisions on notification, as reported in the completed questionnaires for the period from 2003 to 2005. He had not found general compliance issues, but had made recommendations for optimization of the notification procedure. The Committee suggested that the next questionnaire might be used to gather statistics on actual timing of the different steps within notification. The Committee asked the secretariat to send a reminder to focal points in advance of the next meeting of the Working Group on Environmental Impact Assessment to remind them to update the lists of points of contact and focal points posted on the website of the Convention, and to ask the Chair of the Working Group to raise the matter in the Working Group meeting in May 2010. The Committee recommended that Parties should notify as early possible and at the scoping stage, where applicable, so that the environmental impact assessment documentation could meet the needs of the affected Party.

21. More generally, the Committee considered that Parties, either individually or through bilateral or multilateral agreements or other arrangements, might find useful to establish a list of activities, with thresholds if appropriate, that should automatically be subject to notification.

22. Mr. Jendroska agreed to present at the next session of the Committee the findings of his review examining the implementation of the provisions of the Convention on public participation.

B. Specific compliance issues

23. The Committee continued from its previous session its examination of specific compliance issues identified in the second review of implementation (ECE/MP.EIA/11), and in the completed questionnaires on which the review was based.

24. The Committee considered a revised completed questionnaire, or national report, on Albania's implementation of the Convention, as submitted by Albania on 8 January 2010 in response to letters from the Chair on 7 April and 15 September 2009 (ECE/MP.EIA/IC/2009/4, para. 33). The Committee requested that the Chair write to the Government of Albania expressing the Committee's satisfaction with the revised national report and its expectation that Albania would report fully on its practical application of the Convention when completing the questionnaire on the implementation of the Convention in the period from 2006 to 2009 (see section VII below). The Chair should also request publication on the website of the Convention of the correspondence between the Committee and Albania on this issue.

V. SUBMISSIONS

25. This agenda item was not open to observers in accordance with rule 17, paragraph 1, of the operating rules of the Committee.

26. The Committee reviewed the comments received from Romania and Ukraine on 29 and 28 January 2010, respectively, on its draft findings and recommendations further to the submission by Ukraine, received by the secretariat on 6 March 2009, expressing concerns about the compliance of Romania with its obligations under the Convention (ECE/MP.EIA/IC/2009/4, paras. 39–40). Having completed its findings and recommendations as provided in the annex to this report, the Committee requested the secretariat to bring them to the attention of the concerned Parties once issued as an official document.

27. The Committee requested that the secretariat ask the Governments of Romania and Ukraine for their agreement to make publicly available the following documents relating to the submission by Ukraine (EIA/IC/S/2): the submission by Ukraine, the reply by Romania, the clarifications provided by both Parties and the comments by both Parties on the draft findings and recommendations.

VI. COMMITTEE INITIATIVE

28. This agenda item was not open to observers in accordance with rule 17 of the Committee's operating rules.

A. Azerbaijan

29. The Committee took note of the positive response from Azerbaijan, dated 22 January 2010, in response to the Chair's letter of 15 September 2009 proposing technical advice for the review of Azerbaijan's legislation on environmental impact assessment (ECE/M.P.EIA/IC/2009/4, para. 32). The secretariat reported on its difficulties in establishing contacts with Azerbaijan for the implementation of this advice. The Committee asked the Chair to write to the Government of Azerbaijan expressing the Committee's pleasure at Azerbaijan's positive reaction to the Committee's proposal, presenting the draft terms of reference for a consultant to provide the technical advice and requesting the Government of Azerbaijan to contact the secretariat to complete the practical arrangements.

B. Ukraine

30. The Committee requested the Chair to write to the Republic of Moldova informing it of the Committee's decision not to consider further the information provided by the secretariat regarding the Dniester hydro-accumulating power station in Ukraine, upstream of the Republic of Moldova (ECE/M.P.EIA/IC/2009/4, para. 46).

C. Belgium

31. The Committee considered replies by the Governments of Belgium and the Netherlands, dated 3 February 2010 and 12 December 2009, respectively, to the Chair's letter of 13 October 2009, further to information provided by a Dutch non-governmental organization, Comité Centrale Néé, regarding a proposed activity in Belgium close to the border with the Netherlands. The Chair's letter had sought more clarification of the procedure for transboundary environmental impact assessment. The Committee took note of the on-going appeal by Eijsden City Hall (Netherlands) and three Belgian citizens before the administrative section of a Belgian court, the Council of State of Belgium, against the final decision on the activity.

32. The Committee decided not to begin a Committee initiative further to the information provided, as there was insufficient evidence of non-compliance. Nonetheless, the Committee noted that some aspects of the practical application of the Convention to the activity did not necessarily constitute good practice and therefore decided to make some observations.

33. It was important that the no-action alternative should be addressed fully so that the evolution of the environment in the absence of the project could be considered.

34. The standards of the Party of origin relating to the content of the environmental impact assessment documentation were normally applicable, as long as they complied with international legislation applicable in the concerned Parties.

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

paragraph 2 of the Convention. That access must be based on at least partial translation of documentation, when documentation was in a language that could not be understood by the public of the affected Party. Unless otherwise provided for in a bilateral or multilateral agreement or other arrangement, the concerned Parties should, when sending or responding to the notification, agree at the start of the procedure for transboundary environmental impact assessment on the scope of documentation to be translated. The documentation to be translated should, as a minimum, include the non-technical summary and those parts of the environmental impact assessment documentation that were necessary to provide an opportunity to the public of the affected Party to participate that was equivalent to that provided to the public of the Party of origin. The Committee recommended that environmental impact assessment documentation should include a separate chapter on transboundary impact to facilitate translation. Unless otherwise provided for in a bilateral or multilateral agreement or other arrangement, the burden for translation should fall upon the Party of origin in line with the polluter pays principle. The Committee noted that the duration of the procedure was dependent upon the timely provision of the environmental impact assessment documentation translated as necessary.

36. The Committee considered that entrusting the proponent of an activity with the carrying out of the procedure for transboundary environmental impact assessment would not be adequate, unless the proponent was the State.

37. The Committee reiterated the common responsibility of all concerned Parties to ensure that the opportunity provided to the public of the affected Party to participate in the procedure under the Convention was equivalent to that provided to the public of the Party of origin. The affected Party had an obligation to allow such an opportunity. If the affected Party refused to carry out its duties, the Party of origin could not be held responsible for organizing public participation in the affected Party, but should provide the possibility for the public of the affected Party to participate in the procedure of the Party of origin.

38. The Committee emphasized that the Government of the Party of origin was responsible for ensuring that notification under article 3 was carried out properly. The recipient of a notification in the affected Party was the point of contact in accordance with decision I/3 (ECE/MP.EIA/2, annex III), unless otherwise provided for in a bilateral or multilateral agreement or other arrangement.

39. The Committee reminded Parties that consultations under article 5 were bilateral or multilateral discussions between authorities that had been authorized by the concerned Parties, and should not be confused with public participation under article 3, paragraph 8, and article 4, paragraph 2, or with consultation of the authorities under article 4, paragraph 2, in the areas likely to be affected.

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

41. The Committee requested the Chair to write to the Governments of Belgium and the Netherlands, and to Comité Centrale Néé, indicating that the Committee would not consider the matter further, and listing the Committee's observations in paragraphs 33 to 40 above. The Chair should also request that the correspondence between the Committee and the two Governments on the issue be posted on the website of the Convention.

D. Slovakia

42. The Committee considered replies by the Governments of Slovakia and Ukraine received on 31 and 30 December 2009, respectively, to the Chair's letters of 14 October 2009, further to information provided by Ukraine and the secretariat regarding a proposed activity in Slovakia. The Committee agreed that Mr. Jendroska should not be excluded from the Committee's consideration of the information further to rule 17 of the Committee's operating rules, as Poland was not directly involved in the compliance procedure. The Committee decided that it would not examine Slovakia's compliance with the provisions of the Convention on notification, as Slovakia had accepted Ukraine's participation in the procedure for transboundary environmental impact assessment. Nonetheless, the Committee asked the Chair to write to the Government of Slovakia seeking clarification by 31 May 2010 of how Slovakia had furnished Ukraine with the environmental impact assessment documentation, pursuant to article 4, paragraph 2. The Committee wished to know the date, addressee, documentation formats and means of communication used to transmit the documentation. The means of communication, in the Committee's view, might include e-mail, courier, regular post, recorded delivery or the use of diplomatic channels. The documentation formats might include printed copy, compact disc and electronic files attached to an e-mail or posted on a public website. The Committee also wished to know the language or languages of the documentation provided and whether the Government of Slovakia had obtained confirmation that the Government of Ukraine had received the environmental impact assessment documentation. If so, how and on what date had confirmation been received? A copy of the Chair's letter to Slovakia should be sent to Ukraine.

43. More generally, the Committee recalled decision I/3 by which the Meeting of the Parties had agreed that notifications should be transmitted to the relevant points of contact, unless otherwise provided for in bilateral or multilateral agreements or other arrangements. The Committee recommended that Parties should retain records of the means of communication, dates and addresses, and that communications should be sent in parallel by other means, for example simultaneously by post and e-mail.

E. Belarus

44. The Committee considered replies by the Governments of Belarus, Latvia, Lithuania, Poland and Ukraine received on 16 November 2009, 29 December 2009, 4 January 2010, 22 December 2009 and 30 December 2009, respectively, to the Chair's letters of 12 and 13 October 2009, further to information provided by a Ukrainian non-governmental organization, Ecoclub, regarding a proposed activity in Belarus close to the border with Lithuania. The Committee agreed that Mr. Jendroska should not be excluded from the Committee's consideration of the information further to rule 17 of the operating rules of the Committee, as Poland was not directly involved in the compliance procedure. To understand better the decision-making for the proposed activity, and to clarify whether the Government of

Belarus had taken the necessary legal, administrative and other measures to implement the provisions of the Convention, the Committee asked the Chair to write to the Government of Belarus to request the following information by 31 May 2010:

- (a) A brief overview of the procedure for transboundary environmental impact assessment and of how it related to the relevant permitting process for the proposed activity, explaining when the final decision was expected to be taken and by whom, and identifying the stages in the procedure, the relevant legal provisions, and the time allowed for each stage;
- (b) The dates on which Belarus:
 - (i) Provided notification regarding the proposed activity according to article 3, paragraph 2, of the Convention;
 - (ii) Provided information according to article 3, paragraph 5;
 - (iii) Requested information from Lithuania according to article 3, paragraph 6;
- (c) Whether the preliminary environmental impact assessment documentation sent to the affected Parties on 24 August 2009 was the full environmental impact assessment documentation according to article 4, paragraph 1, and appendix II to the Convention;
- (d) An explanation of what the opportunities for public participation in the affected Parties had been to date, according to article 3, paragraph 8;
- (e) An explanation also of what opportunities for public participation in the affected Parties were planned or had taken place, according to article 4, paragraph 2;
- (f) Whether and if so, how a private company represented the Government of Belarus, for example in notification, with reference to the regulation of 4 May 2009;
- (g) Identification of the legislation ensuring that the comments received from the affected Parties would be taken into account in the final decision, and that the affected Parties would be informed of the final decision in accordance with article 6 of the Convention;
- (h) A copy of the new Law on State Ecological Expertise approved by the Council of the Republic of Belarus on 22 October 2009.

45. The Committee requested the secretariat to inform Ecoclub of the above by e-mail.

F. Republic of Moldova

46. The Committee considered replies by the Governments of the Republic of Moldova, Romania and Ukraine received 6 July, 29 June and 25 June 2009, respectively, to the Chair's letter of 7 April 2009, further to information provided by the secretariat regarding a proposed activity in the Republic of Moldova close to the borders with Romania and Ukraine. The member of the Committee nominated by the Republic of Moldova (Ms. Bragoi) left the room in

accordance with rule 17 of the operating rules of the Committee. The Committee asked the Chair to write to the Government of the Republic of Moldova to request by 31 May 2010 further information on the procedure for transboundary environmental impact assessment.

VII. REVISED QUESTIONNAIRE

47. The secretariat reported on the distribution in September and October 2009 of pre-filled questionnaires on the implementation of the Convention. No completed questionnaires had been received, with the deadline being 30 June 2010. The Committee requested the secretariat to send a reminder by e-mail in May 2010, pointing out that Parties failing to complete the questionnaire in time would be identified to the Meeting of the Parties.

VIII. STRUCTURE AND FUNCTIONS, AND OPERATING RULES

48. The Committee noted that it was expected to keep under review and, if necessary, develop its structure and functions as well as its operating rules, in the light of the experience it had gained (decision IV/2, para. 6). The Committee examined an informal document prepared by the secretariat presenting options for increasing the transparency of the Committee's work. The Committee requested the secretariat to prepare a proposal on amending rule 16 of the operating rules, which provided for the publication of documents and information. The proposal should address submissions, the Committee initiative and information received from other sources, unless confidential, once the issue had been considered by the Committee. Pending consideration by the Committee, a summary of the issue should be available on the Convention website together with a list of relevant documents and information, but not their content. Nonetheless, documents and information might be available upon request, unless they were confidential, were in draft form or related to a self-referral. The Committee agreed to consider the proposal at its next session.

IX. PREPARATIONS FOR THE FIFTH SESSION OF THE MEETING OF THE PARTIES

49. In response to a request by the Bureau (see para. 53 below), the Committee considered the appropriateness of the current format of the second review of implementation (ECE/MP.EIA/11). The Committee expressed satisfaction with the second review and said that its format should not be changed for the next review. However, the Committee suggested that the Committee, when examining the third review, should identify trends in general compliance issues (see IV.A above for examples of such issues) and that those trends should be reported in the fourth review of implementation.

50. The Committee examined an informal document prepared by the secretariat presenting the opinions of the Committee. Such a document could be of great use to Parties and to the Committee, if the opinions were to be arranged under each of the provisions of the Convention. The document should be available in the three official languages, as an attractive printable file publicly available on the Convention website. It should be updated regularly, ideally following the issue of the report of each Committee session. The draft decisions on the review of compliance and on adoption of the workplan, to be considered by the next session of the Meeting of the Parties, should reflect those conclusions.

51. The Committee took note of an early draft, prepared by the secretariat, of a decision on the review of compliance that was to be considered at the fifth session of the Meeting of the Parties. The Committee suggested that a few key opinions of the Committee might be included in the draft to bring them to the attention of the Parties. The Committee also took note of an early draft, also prepared by the secretariat, of the report on the activities of the Committee, to be put before the Meeting of the Parties, as foreseen in the workplan (decision IV/7). The Committee agreed that it would discuss the draft decision and the draft report in detail at its next session.

52. The Committee examined a draft proposal, prepared by the secretariat, for a possible workplan activity to prepare an implementation guide for the Convention. The Committee considered that the proposal might focus on those countries of the former Soviet Union that had inherited the system of environmental impact assessment followed by a State ecological review, suggesting that the outcome might form an addendum to the guidance on the practical application of the Convention (ECE/MP.EIA/8). The proposal might also address implementation of the Protocol on Strategic Environmental Assessment. The Committee suggested that, to promote ownership, the workplan activity might be led by a Party of Eastern Europe, the Caucasus or Central Asia, carried out in Russian and supported by a consultant.

X. OTHER BUSINESS

53. Ms. Kolar-Planinsic reported on the meeting of the Bureau that she had attended on behalf of the Chair in January 2010. She highlighted the request by the Bureau that the Implementation Committee advise on the appropriateness of the current format of the review of implementation (see section IV above).

54. The Committee took note of the publication by the secretariat of guidance on notification according to the Convention (ECE/MP.EIA/12), further to the Committee's request at its previous session (ECE/MP.EIA/IC/2009/4, para. 52).

55. The Committee reviewed briefly a draft booklet introducing the Convention, prepared by the secretariat, and asked the secretariat to e-mail the draft booklet to the members. The deadline for providing comments on the draft booklet to the secretariat was 31 March 2010.

XI. PRESENTATION OF THE MAIN DECISIONS TAKEN AND CLOSING OF THE MEETING

56. The Committee decided that it was not necessary to meet in June 2010. The Committee therefore decided to hold its next session from 31 August to 2 September 2010, with the final session of the current composition of the Committee to be held from 11 to 13 January 2011. Should an additional session be required, it could be held from 2 to 4 November 2010.

57. The Committee adopted the draft report of its session, prepared with the support of the secretariat.

58. The Chair closed the meeting.

Annex

Findings and recommendations further to a submission by Ukraine regarding Romania (EIA/IC/S/2)

I. INTRODUCTION – SUBMISSION AND THE COMMITTEE’S PROCEDURE

1. On 6 March 2009, the Government of Ukraine made a submission to the Implementation Committee expressing concerns about Romania’s compliance with its obligations under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) with respect to inland waterways in the Romanian sector of the Danube Delta which permit the passage of vessels of over 1,350 tons. The submission claimed that activities undertaken by Romania had led to a redistribution of water flows in the Danube Delta, resulting in the shallowing of the Ukrainian part of the Danube Delta, which consequently had significant adverse impacts on the environment of the territory of Ukraine, as well as on related ecosystem components.

2. On the same day, the secretariat, further to paragraph 5 (a) of the appendix to decision III/2 (ECE/MP.EIA/6), forwarded a copy of the submission to the Convention’s focal point in Romania requesting that Romania send any reply and information in support thereof to the secretariat and to the focal point in Ukraine within three months, that is, not later than 5 June 2009.

3. At its sixteenth session on 10–12 March 2009, the Implementation Committee took note of the submission by Ukraine and of the message sent by the secretariat. The Committee decided to write to the Government of Ukraine asking for clarification on the activity or activities claimed to have been carried out without application of the Convention, and for which permitting or decision-making processes had been begun after the entry into force of the Convention in the two Parties (ECE/MP.EIA/IC/2009/2, para. 45).

4. The Committee also decided to write to the Government of Romania to ask for details and precise dates of any environmental impact assessment procedures, whether transboundary or not, and of permitting or decision-making processes for the activities outlined in the submission by Ukraine. The Committee agreed that one of its members, Ms. Nina Stoyanova, who had been nominated by Bulgaria, would act as curator for the submission. The Committee also agreed to invite the two Parties to its next session, where the Committee would begin its consideration of the submission (ECE/MP.EIA/IC/2009/2, paras. 46–47).

5. At the sixteenth session, the Embassy of Ukraine in Berlin, the venue of the session, delivered a video recording related to the submission. The Committee viewed the video and took note.

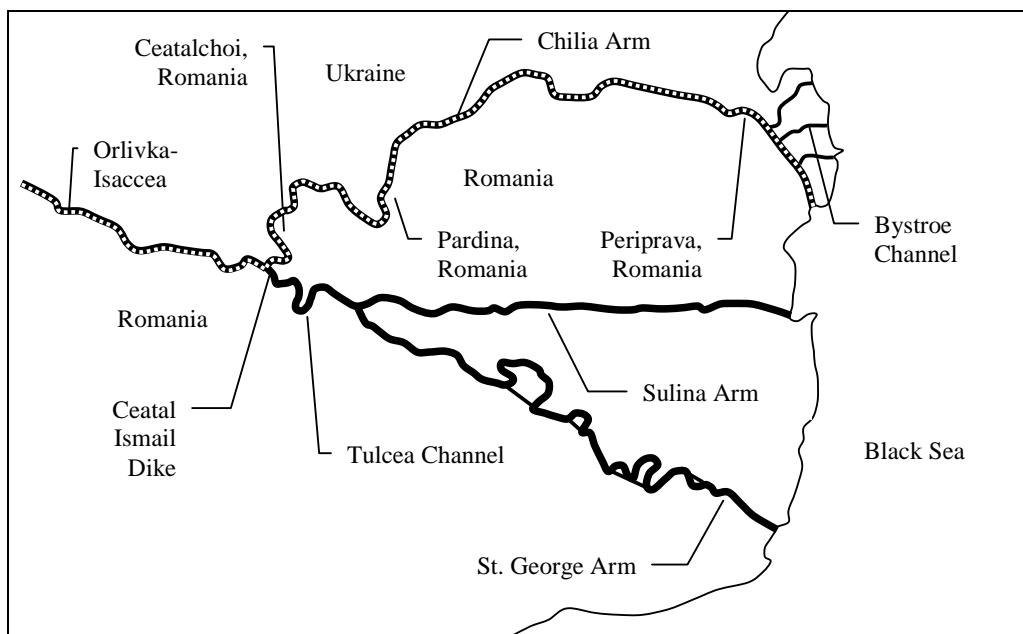
6. The Government of Romania provided its reply to the submission on 4 June 2009 and its reply to the Committee’s request for clarification on 29 June 2009. The Government of Ukraine provided its reply to the Committee’s request for clarification on 26 June 2009.

7. At its seventeenth session on 14–18 September 2009, the Committee considered the matter of the submission, first inviting the Ukrainian delegation present and thereafter the Romanian delegation present to describe 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. The Committee then drafted its findings and recommendations.

8. Before finalizing the findings and recommendations, in accordance with paragraph 9 of the description of the structure and functions of the Committee, which is appended to decision III/2, the Committee sent the draft findings and recommendations to the two Parties, inviting their comments or representations by 29 January 2010. At its eighteenth session on 23–25 February 2010, the Committee completed its findings and recommendations, taking into account representations received from the two Parties.

II. SUMMARY OF FACTS, INFORMATION AND ISSUES

9. The main stream of the Danube River forms the border between Romania and Ukraine from the point where the borders of Romania, the Republic of Moldova and Ukraine meet (close to Giurgiulesti, Republic of Moldova) until the point where the main stream bifurcates at Ismail Chatal (or Ceatal Ismail) Cape, left into the Chilia Arm and right into the Tulcea Channel (Romania). The Chilia Arm continues to form the border (broadly) until it reaches the Black Sea. The Tulcea Channel bifurcates after about 15 km, left into the Sulina Arm and right into the Saint George Arm (see map below, which provides features and locations referred to in the text).



Note: This map is for illustrative purposes only and is highly approximate. The border between Romania and Ukraine is indicated approximately by the broken line. The designations employed and the presentation of the material in this map do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations.

10. A dike was constructed at Ismail Chatal Cape in about 1900 to divert flow from the Chilia Arm into the Tulcea Channel and so into the Sulina Arm. The Sulina Arm, which was canalized in the second half of the nineteenth century and is the most direct east-west route across the Danube Delta, provides the main shipping channel through the Delta. The Sulina Arm and the river upstream is the only channel subject to the Convention regarding the Regime of Navigation on the Danube (Belgrade, 1948). The bifurcation between the Chilia Arm and the Tulcea Channel is also referred to as mile marker 44; markers numbered above 44 are on the main stream of the River Danube, those below are on the Tulcea Channel and the Sulina Arm.

11. The submission by Ukraine relates to inland waterways in the Romanian sector of the Danube Delta which permit the passage of vessels of over 1,350 tons and therefore, according to Ukraine, fall under appendix I to the Espoo Convention (item 9). The submission relates in particular to the following claimed activities in Romania:

- (a) Works to improve navigation on the Sulina Arm;
- (b) Works to canalize the Saint George Arm;
- (c) The construction of artificial channels between the Chilia and Sulina Arms;
- (d) The dumping of dredged materials, allegedly contaminated with heavy metals, in the Chilia Arm and in the main stream of the Danube River;
- (e) The National Territory Development Plan of Romania and activities proposed therein.

12. Furthermore, Ukraine claimed that the activity under item (d) above falls under appendix I to the Espoo Convention (item 10).

13. Ukraine further claimed that the above-mentioned activities had collectively led to a redistribution of the Danube River discharge, with a reduction in flows through the Chilia Arm and an increase in flows through the Sulina Arm.

14. Romania denied that any activities identified in paragraph 11 above, items (a) to (d), had the “goal of ensuring passage of vessels over 1,350 tons”¹. Further, in relation to items (c) and (d) of the same paragraph, Romania denied that it undertook “any activities with the purpose to divert water from one branch of the river Danube to another”². Romania stated that all the existing artificial channels had been constructed long ago and no new activities subject to the Convention had taken place there since the Convention’s entry into force for Romania. In this context Romania referred to the fact that the obligations under the Convention were not to be considered as having a retroactive effect.

¹ Romania’s reply, page 2.

² Romania’s reply, page 7.

15. Furthermore, while admitting some maintenance dredging in the Sulina Arm and upstream, Romania emphasized that all activities that did take place were required by the Belgrade Convention. In this context Romania invoked article 2, paragraph 10, of the Espoo Convention.

A. Claimed works to improve navigation on the Sulina Arm

16. Ukraine stated that Romanian mass media had reported that Romania was undertaking dredging in the Sulina Arm to deepen the channel from its planned, current depth of 24 feet to achieve a depth of between 26 and 28 feet.³ Ukraine claimed that this represented a major change in the activity, in the meaning of article 1(v) of the Convention.

17. Romania asserted that it was carrying out only maintenance dredging in the Sulina Arm to maintain the depth of 24 feet required further to the Belgrade Convention. The dredging was being undertaken by the River Administration of the Lower Danube.⁴ The Danube Delta Biosphere Reserve Administration of Romania is the regulatory authority for activities within the Danube Delta Biosphere Reserve; the Reserve Administration issued an environmental permit (No. 856/6.11.2007) for the dredging works, as well as for “transport on inland waterways, other means of accommodation”. The Romanian Waters National Administration, together with the River Administration of the Lower Danube, identified the dumping sites and conditions.⁵

B. Claimed works to canalize the Saint George Arm

18. Ukraine claimed that Romania is currently undertaking dredging, streamlining and widening of the bed of the Saint George Arm, consolidation with concrete and stone of the river banks, and construction of related infrastructure. Ukraine stated that the mass media had reported that the Saint George and Sulina Arms were together to provide two-way navigation through the Danube Delta; the Sulina Arm currently provides for one-way traffic only.⁶

19. Romania stated that no dredging works had been undertaken in the Saint George Arm since 1992, when the Delta became a protected biosphere reserve, and no works were being carried out to improve navigation.⁷

C. Claimed construction of artificial channels between the Chilia and Sulina Arms

20. Ukraine claimed that a network of channels across the wetland area between the Chilia and Sulina Arms was diverting water.⁸

- (a) From the Chilia Arm into the Sulina Arm;
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³ Ukraine’s clarification, page 2.

⁴ A body established under the Belgrade Convention, with its seat in Romania and organized under Romanian law as an autonomous agency.

⁵ Romania’s reply, paragraphs 28–32, and Romania’s clarification, sections I and II.2.

⁶ Ukraine’s clarification, page 2.

⁷ Romania’s reply, paras. 22–26, and Romania’s clarification, section II.4.

⁸ Ukraine’s submission, pages 3–4.

(b) From the wetland area into the Sulina Arm, whereas the wetland area would naturally have drained into the Chilia Arm.

21. Romania asserted that only one channel linked the Chilia and Sulina Arms, that it was constructed in 1983–1984 and that the channel flow was from the Sulina Arm to the Chilia Arm, discharging at mile marker 36 on the Tulcea Channel.⁹ This channel was the canal between Pardina (Romania) on the Chilia Arm and Tudor Vladimirescu village (a suburb of Tulcea city, Romania) on the Tulcea Channel; the canal lies to the west of the wetland identified in Ukraine's submission.

22. The satellite imagery provided by Ukraine with its submission¹⁰ revealed a network of channels across the wetland; a number of channels were linked to the Chilia Arm; one channel marked by Ukraine also appeared to link the network of channels to the Sulina Arm. No information was available on the direction of flow or the date of construction. However, a map of part of the biosphere reserve¹¹ shows an extensive network of channels that had already been established in 1985. Romania presented further satellite imagery showing that certain channels were not or no longer connected to the Chilia Arm as a result of more recent works. Romania also described works to reduce turnover of water within the biosphere reserve and thus restore the wetlands. Further, examination of publicly available satellite imagery by the Committee revealed that two of the six channels marked by Ukraine as being “water re-direction canals” connected to “water diversion points” on the Chilia Arm were in fact roads and one or two channels did not connect with the Chilia Arm, or with its side streams or braids. It was not clear from this imagery whether the other channels marked by Ukraine linked the two arms. This examination led the Committee to conclude that the imagery provided by Ukraine was not reliable.

D. Claimed dumping of dredged materials, allegedly contaminated with heavy metals, in the Chilia Arm and in the main stream of the Danube River

23. Ukraine claimed that over the period 2002 to 2004, a dredger dumped dredged materials from the Tulcea Channel just downstream of Ismail Chatal Cape at 116 km, in the stretch referred to as 114 to 116 km; Ukraine recorded 121 such trips.¹² The video provided by Ukraine¹³ showed a Romanian dredger twice entering the Chilia Arm from the Tulcea Channel and dumping its load immediately downstream of the Ismail Chatal Cape Dike; the video indicated that it was recorded on 20 September 2003.

24. Ukraine also claimed that the dredger continued dumping dredged materials in the main river over the period from 2006 to 2008, in the stretch between mile markers 53 and 58, while

⁹ Romania's reply, paragraph 43, and Romania's clarification, section II.5.

¹⁰ Ukraine's submission, annexes 11 and 12.

¹¹ Ukraine's submission, annex 10.

¹² Ukraine's submission, page 3.

¹³ Ukraine's submission, annex 4.

dredging nearby in the stretch between mile markers 56 and 57.¹⁴ This stretch is approximately 25–30 km upstream of Ismail Chatal Cape, close to Isaccea (Romania) and Orlivka (Ukraine).

25. Ukraine claimed that the above-described dumping had led to the development of shallows in the Chilia Arm just downstream of Ismail Chatal Cape.¹⁵ The shallows were clearly visible on satellite and aerial imagery provided by Ukraine.¹⁶

26. Further, Ukraine claimed that the dumping of dredged materials in the Chilia Arm had significant impact on Ukraine by:

(a) Reducing the flow in the Chilia Arm;¹⁷

(b) Affecting the quality of waters used for the drinking water supply in a number of towns and villages in Ukraine, including the city of Vilkovo.¹⁸

27. Ukraine presented the results of modelling of the dispersal of suspended sediments following dumping of dredged materials. It was concerned about the effect of these sediments on navigability and that the sediments might be contaminated with various pollutants, notably heavy metals.

28. Finally, Ukraine noted that the Belgrade Convention applied to the Sulina Arm and the river upstream, not to the Chilia Arm.¹⁹

29. Romania described the conditions applied to the selection of dumping sites and to the dumping operations²⁰ and reported that an environmental permit had been issued by the Romanian Danube Delta Biosphere Reserve Administration. Furthermore, Romania provided information as to how, before issuing the authorization for dumping of dredged material, it had concluded that the dumping in transfrontier waters would not lead to a significant adverse transboundary impact.²¹

30. Romania asserted that materials dredged from the Tulcea Channel, between mile markers 41 and 42 had been dumped in the Chilia Arm in the stretch between kilometre markers 114.5 and 115, to limit the effects of erosion in the Ceatalchioi area (Romania), and from 2005 they had been dumped further upstream, on the right bank (Romania), around mile marker 45.5. Materials dredged further upstream of the bifurcation, between mile markers 56 and 57, had been dumped on the right bank in the area around mile marker 58 to 58.5, to limit the effect of erosion in the area of Isaccea Port.²² Romania stated that only dredged materials had been dumped.

¹⁴ Ukraine's submission, page 3.

¹⁵ Ukraine's submission, page 3.

¹⁶ Ukraine's submission, annexes 7 to 9, dated 2006 to 2008.

¹⁷ Ukraine's submission, page 3.

¹⁸ Ukraine's clarification, page 3.

¹⁹ Ukraine's clarification, page 2.

²⁰ Romania's clarification, section II.2.

²¹ Romania's comments on the findings and recommendations, page 2.

²² Romania's reply, paragraph 34.

Romania also stated that dredged materials were always dumped near the right bank (Romania) and noted that dumping also took place in the Saint George Arm.²³ Romania declared that the visibility of shallows in the Chilia Arm was the result of natural phenomena, including variations in water level.

31. Further, Romania claimed that its dumping of dredged materials in the Chilia Arm was intended to prevent the erosion of the Romania bank of the Arm, to consolidate the bank, to protect settlements and to avoid a loss of national territory.²⁴ Romania also claimed that the dredging and dumping were carried out to satisfy its obligations under the Belgrade Convention.

32. Finally, Romania observed that the activity of dumping dredged material was not listed in appendix I to the Convention. Romania also considered that the activity did not satisfy the significance criteria set out in appendix III to the Convention. Further, Romania stated that Ukraine had never asked for the holding of discussions further to article 2, paragraph 5, of the Convention, relating to activities not listed in appendix I but nonetheless likely to cause a significant adverse transboundary impact.²⁵

E. The National Territorial Development Plan of Romania and activities proposed therein

33. Ukraine stated that Act No. 363 of Romania “about adoption of the National Territorial Development Plan” stipulated the “creation of new artificial canals and clearing of existing courses in order to meet the demands of navigation on the [inland] waterways” and claimed that Romania had failed to inform Ukraine in advance about the plan and activities proposed therein subject to the Convention.²⁶

34. Romania reported on its application of the Convention to a project on “technical assistance for the improvement of navigation conditions on the common Romanian-Bulgarian sector of the Danube and accompanying studies”; Romania had notified the Republic of Moldova, Serbia and Ukraine regarding this project further to article 3 of the Convention.²⁷

III. CONSIDERATION AND EVALUATION

A. General observations

35. 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 Convention. The Committee considered the initial submission by Ukraine to be structured in such a way that it was difficult to identify the activity that was the subject of the submission and the legal basis of the submission. The subsequent clarification by Ukraine was more precise and factual, and the

²³ Romania’s reply, paragraph 35.

²⁴ Romania’s reply, paragraph 33.

²⁵ Romania’s reply, paragraphs 39–41.

²⁶ Ukraine’s clarification, page 1.

²⁷ Romania’s reply, paragraph 11.

annexes to the original submission were clear. Both the reply and the clarification by Romania were sufficiently precise for the Committee's consideration.

36. Bearing in mind that some information submitted proved not to be fully adequate, the Committee expressed the wish that information presented should not only be correct but also as comprehensive, precise and clear as possible.

B. Legal basis

37. Romania deposited its instrument of ratification of the Convention on 29 March 2001 and it entered into force 90 days later. Ukraine deposited its instrument of ratification of the Convention on 20 July 1999 and it entered into force 90 days later.

38. Item 9 in appendix I to the Convention identifies "trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tons". Item 10 in appendix I identifies "waste-disposal installations for the incineration, chemical treatment or landfill of toxic and dangerous wastes".

39. The Committee considered that while indeed the Convention did not have retroactive effect and in the absence of genuinely new activities undertaken after entry into force of the Convention for Romania, the key issue was whether the maintenance dredging of an inland waterway carried out by Romania, including the dumping of dredged materials, could be considered to constitute a major change in the meaning of article 1(v) of the Convention.

40. In this context the Committee assessed whether the dredging in the Sulina Arm and upstream could be considered as a major change. The Sulina Arm and upstream is an existing waterway under the Belgrade Convention with a depth of 24 feet. Any permission for dredging could be a change to such an existing waterway. Nevertheless the Committee was of the opinion that if the only purpose of the dredging was to maintain a depth of an existing waterway which was duly permitted, such dredging must be considered as maintenance of an already existing activity and therefore did not constitute a major change which could trigger the obligations under the Convention. However, maintenance of a depth in a waterway—if such a depth resulted from an activity that should have been but had not been duly permitted under the Convention—constitutes continuation of such activity and remains subject to the obligations under the Convention.

41. The Committee noted that article 2, paragraph 10, of the Convention is meant to make it clear that following the obligations related to notifying potentially affected Parties and conducting, if appropriate, other steps of transboundary procedure, does not release the Parties from observing relevant obligations under other international instruments, unless such instruments specifically provide so. Simultaneously, following the obligations stemming from any international instrument can by no means be interpreted as an excuse for not observing the requirements of the Convention related to notifying potentially affected Parties and conducting, if appropriate, other steps of transboundary procedure. Therefore the undertaking of any activity related to fulfilling obligations stemming from the Belgrade Convention does not release

Romania from the obligations under the Espoo Convention if such an activity is subject to its provisions.

C. Activities

1. Claimed works to improve navigation on the Sulina Arm

42. There was no evidence demonstrating a proposed activity on the Sulina Arm subject to the Convention since the Convention had entered into force for Romania. The maintenance works could not be considered to be a major change and the activity was not subject to the provisions of the Convention (see para. 40 above).

2. Claimed works to canalize the Saint George Arm

43. There was no evidence demonstrating a proposed activity on the Saint George Arm subject to the Convention since the Convention had entered into force for Romania. Moreover, in the light of the evidence provided, the Saint George Arm is not suitable for navigation by vessels over 1,350 tons, and therefore the Committee was of the opinion that there was no activity subject to the provisions of the Convention.

3. Claimed construction of artificial channels between the Chilia and Sulina Arms

44. There was no evidence that artificial channels had been developed between the Chilia and Sulina Arms since the Convention had entered into force for Romania. Further, there was no evidence of any activity between the Chilia and Sulina Arms that is listed in appendix I to the Convention, since the Convention had entered into force for Romania.

4. Claimed dumping of dredged materials, allegedly contaminated with heavy metals, in the Chilia Arm and in the main stream of the Danube River

45. The dumping of dredged materials in the Chilia Arm and in the main stream of the Danube River may have had a significant adverse transboundary impact. However, dumping of dredged materials neither belongs to nor contributed to any activity listed in appendix I to the Convention. Moreover, although the dumping is related to dredging in the Sulina Arm and upstream, which are waterways covered by item 9 in appendix I to the Convention, but as it was already established, the dredging was related to maintenance of existing waterways and does not constitute a “proposed activity” in the meaning of the Convention (see para. 40 above).

46. The dumping of dredged materials, whether contaminated or not, in a river cannot constitute “landfill” in the sense of item 10 in appendix I to the Convention. The Committee did not therefore consider whether the dredged materials constituted “toxic and dangerous wastes”.

47. Furthermore, there was no evidence that Ukraine had sought to have discussions further to article 2, paragraph 5, of the Convention to determine whether such dumping was likely to cause a significant adverse transboundary impact and thus should be treated as if it were listed in appendix I to the Convention. However, the Committee recognized the claim by Ukraine to have

requested information on Romania's activities in the Danube Delta. Also, Romania has not submitted, further to article 2, paragraph 5, of the Convention, information on the dumping of dredged materials in the Chilia Arm.

5. The National Territory Development Plan of Romania and proposed activities therein

48. The Committee, considering claims concerning the National Territory Development Plan of Romania, learned that, although it envisaged implementation of a number of projects that were potentially subject to the Convention, it nevertheless had not only the name but also the legal nature of a plan and not of a specific activity. While some of the projects envisaged in such plan may well be considered specific activities and might be subject to the Convention before the decision to authorize undertaking such projects is granted, the Plan as such is not subject to the Convention but rather to its Protocol on Strategic Environmental Assessment, which is not yet in force. In this context the Committee recalled that it had already informed the Government of Romania that the Committee was of the opinion that the ongoing procedure for the navigation project on the Bulgarian-Romanian stretch of the Danube River appeared in March 2009 to be in line with the Convention (ECE/MP.EIA/IC/2009/2, para. 48).

6. Claimed redistribution of the Danube River discharge

49. The redistribution of river discharge is not an activity subject to the Convention. Furthermore, bearing in mind that the above-mentioned activities, either individually or collectively, are not subject to the Convention, the Committee did not consider the claimed redistribution of the Danube River discharge, allegedly caused by these activities.

IV. FINDINGS

50. 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.

51. On the basis of the information provided, the Committee found that the claims in the submission by Ukraine proved to be unsubstantiated because in this respect Romania had not carried out any proposed activity or any proposed major change to an existing activity subject to the provisions of the Convention, since the entry into force of the Convention for both Parties on 27 June 2001.

52. The Committee observed that Romania, while not being in non-compliance with the Convention, might have enhanced bilateral cooperation with Ukraine if it would have submitted, further to article 2, paragraph 5, of the Convention, information on the dumping of dredged materials in the Chilia Arm.

53. While the Committee eventually found that Romania had not carried out any proposed activity or any proposed major change to an existing activity listed in appendix I to the Convention, it wished to stress that Ukraine, before making a submission to the Committee,

could have used the opportunities provided by article 3, paragraph 7, and ultimately article 2, paragraph 5.

V. RECOMMENDATIONS

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

- (a) Endorse the findings of the Implementation Committee that Romania was not in non-compliance with the Convention in relation to the activities referred to in the submission;
 - (b) Urge the Governments of Romania and Ukraine to accelerate negotiations to cooperate in the preparation of a bilateral agreement or other arrangement in order to support further the provisions of the Convention, as set out in article 8 of the Convention, further to paragraph 14 of decision IV/2, and invite them in this context to consider extending the list of activities subject to the Convention in relation to the protection of the Danube Delta, and to introduce provisions on management and monitoring.
-