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Fifth session

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Items 3 (a) and 11 (a) of the provisional agenda

Outstanding issues: draft decision on the review of compliance

**Adoption of decisions: decisions to be taken by the Meeting of
the Parties**

Draft decision on the review of compliance

Proposal by the Implementation Committee

Summary

This draft decision was finalized by the Implementation Committee at its twentieth session (Geneva, 11–13 January 2011), having taken into account suggestions made by the Working Group on Environmental Impact Assessment at its fourteenth meeting (Geneva, 24–26 November 2010).

Draft decision V/4

(to be considered by the Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context at its fifth session)

Review of compliance

Preamble

The Meeting of the Parties,

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

Recalling also 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 Second Review of Implementation, as presented in the annex to decision IV/1,

Having also considered the findings and recommendations of the Implementation Committee on a submission made to the Committee in accordance with paragraph 5 (a) in the appendix to decision III/2 (ECE/MP.EIA/6, annex II), as set out in the report of the Committee on its eighteenth session (ECE/MP.EIA/IC/2010/2, annex),

Having reviewed the structure and functions of the Implementation Committee, as described in the appendix to decision III/2, and being aware of the consequences for the composition of the Committee resulting from the entry into force of the Protocol on Strategic Environmental Assessment,

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

Having further reviewed the opinions of the Implementation Committee,

Recognizing the importance of rigorous reporting by Parties of their compliance with the Convention, and noting the third review of the implementation of the Convention based on Parties' answers to the questionnaire on the implementation of the Convention and adopted in decision V/3,

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,

I. General part

1. *Adopts* the Implementation Committee's report on its activities (ECE/MP.EIA/2011/4), welcomes the reports of the meetings of the Committee in the period after the fourth session of the Meeting of the Parties, 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 second review of implementation adopted in decision IV/1, regarding Albania, Austria, Belgium, Greece, Hungary, Latvia, Liechtenstein and Slovenia, which resulted in the Committee declaring its satisfaction with the clarifications provided by Parties;

3. *Welcomes also* the examination by the Implementation Committee of information received from other sources, including the public, regarding Belgium, the Republic of Moldova, Romania, Slovakia and Ukraine, which resulted in the Committee declaring its satisfaction with the clarifications provided by Parties;

4. *Notes* the ongoing consideration by the Implementation Committee of information provided by a Ukrainian non-governmental organization regarding a proposed activity in Belarus close to the border with Lithuania;

5. *Considers*, following the observation of the Implementation Committee, that the final opinion of an inquiry commission that an activity is likely to have a significant adverse transboundary impact is final inasmuch as it decides that the transboundary environmental impact assessment procedure foreseen in the Convention must be applied in full, beginning with the immediate notification of the affected Party. The procedure may be stopped only if either (a) the planned activity is abandoned or (b) the affected Party indicates that it does not wish to participate. Any subsequent studies or analyses, including findings of the environmental impact assessment documentation prepared in accordance with article 4 of and appendix II to the Convention, by no means have any effect on the validity of the respective opinion of the inquiry commission, even if they show no actual significant adverse transboundary impact of the activity in question;¹

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

(a) The Party of origin is responsible for ensuring that notification under article 3 is carried out properly;²

(b) Entrusting the proponent of an activity with the carrying out of the procedure for transboundary environmental impact assessment is not adequate, unless the proponent is the State;³

(c) During the procedure for transboundary environmental impact assessment the concerned Parties share the responsibility for ensuring that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin. That opportunity must be based on accurate and effective notification of the public and access to at least relevant parts of the documentation in the appropriate language of the

¹ ECE/MP.EIA/IC/2009/2, para. 22.

² ECE/MP.EIA/IC/2010/2, para. 38.

³ Ibid., para. 36.

affected Party, when documentation is in a language that could not be understood by the public of the affected Party. That is in addition to their responsibility to provide the possibility of access to the full and final environmental impact assessment documentation in the original language or languages during the procedure for transboundary environmental impact assessment. In that context, while recognizing the lack of administrative powers of the Party of origin's competent authority on the territory of the affected Party, at a minimum it has to provide the possibility for the public of the affected Party to participate in the procedure of the Party of origin. The Party of origin's competent authority should furthermore support the affected Party's competent authority in providing effective participation for the public of the affected Party in the procedure for transboundary environmental impact assessment;⁴

(d) The affected Party has an obligation to allow that the opportunity provided to the public of the affected Party to participate in the procedure under the Convention is equivalent to that provided to the public of the Party of origin. If the affected Party refuses to carry out its duties, the Party of origin cannot 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;⁵

(e) Copyright protection should not be considered as allowing for the prevention of the public availability of the full environmental impact assessment documentation;⁶

(f) 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 the documentation to be translated. The documentation to be translated should, at a minimum, include the non-technical summary and those parts of the environmental impact assessment documentation that are necessary to provide an opportunity to the public of the affected Party to participate that is equivalent to that provided to the public of the Party of origin. 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;⁷

(g) The final decision should provide a summary of the comments received pursuant to article 3, paragraph 8, and article 4, paragraph 2, of the Convention 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 have been incorporated or otherwise addressed in the final decision, in the light of the reasonable alternatives described in the environmental impact assessment documentation;⁸

(h) In the light of article 3, paragraph 8 and article 4, paragraph 2, of the Convention, the obligation under article 6, paragraph 2, shall be interpreted as an obligation to inform also the public concerned in the affected Party of the final decision;⁹

(i) If the conditions attached to a decision can be altered subsequently by other decisions, the former cannot be considered the "final decision" in the meaning of the Convention;¹⁰

⁴ ECE/MP.EIA/IC/2010/2, para. 35, and ECE/MP.EIA/IC/2010/4, paras. 19 (c) and 20.

⁵ ECE/MP.EIA/IC/2010/2, para. 37.

⁶ ECE/MP.EIA/IC/2010/4, para. 20.

⁷ ECE/MP.EIA/IC/2010/2, para. 35.

⁸ *Ibid.*, para. 40.

⁹ See ECE/MP.EIA/IC/2009/2, para. 27.

¹⁰ *Ibid.*, para. 21.

(j) An extended time period between a final decision on a planned activity and subsequent construction works might bring into doubt the validity of the environmental impact assessment for the planned activity and thus of the final decision;¹¹

7. *Recommends*, 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;¹²

8. *Recommends also*, following the opinion of the Implementation Committee, that:

(a) Parties 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,¹³

(b) Environmental impact assessment documentation should include a separate chapter on transboundary impact to facilitate translation;¹⁴

9. *Recommends further* that Parties consider developing informal agreements, such as bilateral guidelines, common declarations and memorandums of understanding, in cases where bilateral and multilateral agreements are inappropriate;¹⁵

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

11. *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 fifth session of the Meeting of the Parties on the adoption of the workplan;

12. *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 Review of Implementation 2003, adopted by decision III/1;

(b) As presented in chapter V of the Implementation Committee’s previous report on its activities as set out in annex III to decision IV/2,

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

13. *Also urges* Parties to take into account in their further work the opinions of the Implementation Committee in the period from 2001 to 2010 (ECE/MP.EIA/2011/6), and requests the secretariat to arrange for the publication of these opinions in electronic or paper format, as appropriate, and for the periodic revision of the publication;

14. *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

¹¹ ECE/MP.EIA/IC/2009/4, paras. 36 (a) and 46.

¹² ECE/MP.EIA/IC/2010/2, para. 20, and ECE/MP.EIA/IC/2009/4, para. 26.

¹³ ECE/MP.EIA/IC/2010/2, para. 43.

¹⁴ *Ibid.*, para. 35.

¹⁵ *Ibid.*, para. 18.

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, and requests the secretariat to arrange publication of the amended operating rules in electronic or paper format, as appropriate;

15. *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 sixth session of the Meeting of the Parties in the light of experience gained by the Committee in the interim, including recommendations to the Meeting of the Parties on the imposition of sanctions for non-compliance, and in this context requests the Committee to prepare any necessary proposals for the sixth session of the Meeting of the Parties;

16. *Requests* the secretariat to promote the use by international financial institutions of a checklist prepared by the European Bank for Reconstruction and Development under the workplan adopted by decision IV/7;

II. Follow-up to decision IV/2

A. Regarding Ukraine

17. *Endorses* the finding of the Implementation Committee that Ukraine has remained in non-compliance with its obligations under the Convention 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, and has not fulfilled its obligations under paragraph 10 of decision IV/2;

18. *Decides* to issue a declaration of non-compliance to the Government of Ukraine;

19. [*Alternative 1: Declares* therefore that the caution to the Government of Ukraine issued in its fourth session is effective]/[*Alternative 2: Also decides* to issue a caution to the Government of Ukraine with immediate effect] (see ECE/MP.EIA/IC/2009/4, para. 16);¹⁶

20. *Welcomes* the independent review of Ukraine's legal, administrative and other measures to implement the provisions of the Convention (ECE/MP.EIA/IC/2009/5) and notes the report of the European Union-funded project to support Ukraine in its implementation of the Convention, and in particular the proposed measures to bring the project for the Danube-Black Sea Deep Water Navigation Canal in the Ukrainian sector of the Danube Delta into compliance with the Convention;¹⁷

¹⁶ *Note by the secretariat:* The Committee found that Ukraine remained in non-compliance with its obligations under the Convention with respect to both phases of the Project and agreed that this should be communicated to the next session of the Meeting of the Parties. The Committee concluded that its earlier decision that the caution should not become effective had been based on information that proved not to be comprehensive. Therefore the caution should have become effective on 31 October 2008. The Committee was uncertain of the legal consequences of such a conclusion after 31 October 2008 and of its mandate issued by the fourth session of the Meeting of Parties in this respect. Thus the Committee decided that this conclusion should be communicated to the next session of the Meeting of the Parties, with a recommendation that the Meeting of the Parties either bring into effect the caution issued in its fourth session or issue a new caution.

¹⁷ *Support to Ukraine to Implement the Espoo and Aarhus Conventions, Draft Final Report*, EuropeAid Development and Cooperation, European Commission, August 2010, prepared by NIRAS A/S,

21. *Appreciates* the strategy of the Government of Ukraine to implement the Convention as requested in the decision IV/2, paragraph 12, as an important step towards future compliance;

22. *Requests* the Government of Ukraine to report by the end of each year to the Implementation Committee on steps taken to bring into compliance the Danube-Black Sea Deep Water Navigation Canal in the Ukrainian sector of the Danube Delta, and on the implementation of the strategy;

23. *Also requests* the Implementation Committee to report to the sixth session of the Meeting of the Parties 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;

B. Regarding Armenia

24. *Welcomes* the preparation by the Government of Armenia, with the assistance of the Implementation Committee and the Convention secretariat, of draft revised legislation for the implementation of the Convention in accordance with the Committee's findings (decision IV/2, annex II), [*Alternative 1: and welcomes also the entry into force of the legislation as providing a suitable framework for the implementation of the Convention in Armenia*]/[*Alternative 2: welcomes also the draft legislation as providing a suitable framework for the implementation of the Convention in Armenia, and requests Armenia to revise its legislation in accordance with the draft legislation*];

25. *Appreciates* the reports received from the Government of Armenia further to paragraph 19 of decision IV/2;

III. Submissions by Parties

Regarding Romania

26. *Endorses* 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 by Ukraine regarding Romania on 6 March 2009 (ECE/MP.EIA/IC/2010/2, annex);

27. *Urges* 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;

Denmark (mention of any commercial firm in this document does not imply endorsement by the United Nations).

IV. Committee initiative

Regarding Azerbaijan

28. *Encourages* Azerbaijan to implement the recommendations of the second Environmental Performance Review (ECE/CEP/158) with respect to environmental impact assessment and strategic environmental assessment;

29. *Welcomes* the [ongoing]/[outcomes of the] technical advice for the review of Azerbaijan's legislation on environmental impact assessment.

Annex

Amendment of the operating rules of the Implementation Committee

Replace rule 16, paragraph 4, by the following paragraphs:

4. A submission and any reply to the submission should be made available through the Convention website within one month of receipt.
5. The following documents and information should be made available through the Convention website, once the Committee has concluded its consideration of the issue:
 - (a) Information by which the Committee becomes aware of a possible non-compliance;
 - (b) Any reply to a Committee initiative;
 - (c) Corroborating or supporting information;
 - (d) Correspondence by the Committee;
 - (e) Draft findings and recommendations, and ensuing representations from the Parties involved.
6. Documents and information other than those identified in paragraphs 4 and 5 should be available upon request if agreed by the Committee.
7. Paragraphs 4, 5 and 6 should not apply to parts of documents and information that have been provided to the Committee requesting confidentiality.
8. Paragraphs 4, 5 and 6 should not apply to the following documents and information that relate to a self-referral in accordance with paragraph 5 (b) of the appendix to decision III/2, unless agreed by the Committee and by the submitting Party:
 - (a) A submission;
 - (b) Corroborating or supporting information;
 - (c) Correspondence by the Committee;
 - (d) Draft findings and recommendations, and ensuing representations from the submitting Party.
9. Pending consideration by the Committee, a short summary of the issue should be available on the Convention website, once agreed by the Committee, together with a list of relevant documents and information, but not their content. The summary should be prepared by the secretariat to include in particular:
 - (a) The names of the Party or Parties involved;
 - (b) The date of the submission, information or Committee initiative;
 - (c) The name and type of the activity in question, in the case of a submission or Committee initiative.
10. Any progress report from a Party requested by the Meeting of the Parties or by the Implementation Committee should be made available through the Convention website as soon as possible and at the latest within one month of receipt.