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

### Implementation Committee

Twenty-sixth session  
Geneva, 26–28 November 2012

## Report of the Implementation Committee on its twenty-sixth session

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## **I. Introduction**

1. The twenty-sixth session of the Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment (Protocol on SEA) was held from 26 to 28 November 2012 in Geneva, Switzerland.

### **A. Attendance**

2. The following members of the Implementation Committee for Convention and Protocol matters attended the session: Ms. E. Grigoryan (Armenia); Ms. A. Babayeva (Azerbaijan); Ms. S. Dimitrova (Bulgaria); Mr. M. Prieur (France); Mr. J. Brun (Norway); Mr. J. Jendroška (Poland); Ms. T. Plesco (Republic of Moldova); Mr. F. Zaharia (Romania); Ms. L. Papajová Majeská (Slovakia); Ms. V. Kolar-Planinšič (Slovenia); and Ms. L. A. Hernando (Spain).

3. The session was attended by delegations from Armenia and Azerbaijan during the Committee's consideration of a submission by Armenia (see section II.B below).

### **B. Organizational matters**

4. The Chair of the Committee, Ms. Kolar-Planinšič, opened the session. The Committee adopted its agenda (ECE/MP.EIA/IC/2012/5).

5. The Committee member nominated by Armenia made a short statement.

## **II. Submissions**

6. Discussions concerning submissions were not open to observers, according to rule 17, paragraph 1, of the Committee's operating rules.

### **A. Belarus**

7. The Committee continued its consideration of the submission by Lithuania regarding its concerns about compliance by Belarus with its obligations under the Convention (EIA/IC/S/4),<sup>1</sup> received on 16 June 2011. In line with the rule 13 of its operating rules, the Committee reviewed and revised its draft findings and recommendations further to the submission, taking into account the comments and representations received from Lithuania and Belarus on 9 November 2012.

8. The Committee decided to finalize its findings and recommendations at its twenty-seventh session (12–14 March 2013), taking into account also the information transmitted by Belarus on 22 and 26 November 2012. The Committee invited the curator to prepare a revised draft by 5 January 2013 to provide the basis for its further deliberations.

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<sup>1</sup> Information on submissions to the Committee is available from [http://www.unece.org/env/eia/implementation/implementation\\_committee\\_matters.html](http://www.unece.org/env/eia/implementation/implementation_committee_matters.html).

## B. Azerbaijan

9. The Committee considered the submission by Armenia expressing concerns about compliance by Azerbaijan with its obligations under the Convention (EIA/IC/S/5), received on 31 August 2011. The Committee also considered a reply from the Government of Azerbaijan to the submission, dated 29 November 2011; the clarifications provided by the Governments of Azerbaijan and of Armenia, dated 15 August and 15 June 2012 respectively; as well as the written responses from the two Parties to the Committee's questions dated 9 November 2012. The Committee welcomed the delegations of Armenia and Azerbaijan, and invited them to describe the submission and the reply, respectively. The Committee then questioned the two delegations.

10. The Committee agreed to consider the matter further and to prepare its draft findings and recommendations at its twenty-seventh session (12–14 March 2013) on the basis of a revised version to be prepared by the curator by 12 December 2012.

## C. Armenia

11. Further to its twenty-fifth session, the Committee considered the submission by Azerbaijan regarding its concerns about Armenia's compliance with its obligations under the Convention (EIA/IC/S/3), received on 5 May 2011. The Committee finalized its findings and recommendations, taking into account the advice provided by the Bureau at the request of the Committee.

12. Having completed its findings and recommendations (annex I), the Committee requested the secretariat to bring them to the attention of the concerned Parties, once issued as an official document. The secretariat was also requested to subsequently transmit the findings and recommendations for consideration by the Meeting of the Parties to the Convention at its sixth session in 2014.

13. In parallel, the Committee decided to invite the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment, in consultation with the Bureau, to consider establishing an ad hoc group to prepare proposals for the sixth session of the Meeting of the Parties regarding the implementation of the Convention by Armenia and Azerbaijan, including notably the possible designation of an intermediary and the use of new communication technologies to assist Armenia and Azerbaijan in implementing the Convention regarding the construction of the nuclear power plant in Metsamor.

14. The Committee based its decision on the following provisions:

(a) Article 11, paragraph 2, of the Convention requiring that the Parties shall keep under continuous review the implementation of the Convention;

(b) Paragraph 4 (a) of the structure and functions of the Committee, which determines that the Committee shall secure "a constructive solution" to "assist Parties to comply fully with their obligations";

(c) Decision I/2 of the Meeting of the Parties on mechanisms for the implementation of the Convention, which established the Working Group on Environmental Impact Assessment (later replaced by the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment) and mandated it to make recommendations for consideration at the meetings of the Parties on further work on, inter alia, legal, administrative and technical aspects necessary to ensure the effective implementation of the Convention and international cooperation in environmental impact assessment in a transboundary context, bearing in mind the special needs of countries in transition;

(d) The proposal by the delegation of Armenia, supported by the Armenian non-governmental organization Ecoglobe, at the first session of the Working Group (24–26 April 2012), to establish an ad hoc group to examine how to apply the Convention between Parties that had no diplomatic relations, and the decision of the Working Group that it might come back to that proposal, following the finalization by the Implementation Committee of its findings and recommendation on related submission.

15. To facilitate the deliberations by the Working Group and the Bureau, the Committee agreed to prepare by e-mail a draft terms of reference for the possible intermediary, building on the elements proposed by Mr. Jendroška at the request of the Chair.

### **III. Committee initiative**

16. The discussion on the Committee initiative was not open to observers, in accordance with rule 17 of the Committee's operating rules.

#### **Albania**

17. Further to its twenty-fourth session, and to paragraph 6 of the Committee's structure and functions, the Committee considered its initiative on Albania (EIA/IC/CI/3),<sup>2</sup> following Albania's failure to report on its implementation of the Convention in the period from 2006 to 2009.

18. The Committee finalized its findings and recommendations (annex II), taking into account the information received from Albania on 15 September 2012 that it was in agreement with the draft findings and recommendations. The Committee requested the secretariat to bring the findings and recommendations to the attention of the concerned Party once issued as an official document and to subsequently submit them to the Meeting of the Parties to the Convention at its sixth session.

### **IV. Follow-up to decision V/4 regarding individual Parties**

19. The discussion on follow-up to decision V/4 by the Meeting of the Parties to the Convention regarding Ukraine was not open to observers, in accordance with rule 17 of the Committee's operating rules.

20. The Committee decided that it would draft recommendations to assist Ukraine in complying with its obligations under the Convention at its twenty-eighth session (10–12 September 2013), on the basis of the next report to be provided by Ukraine as requested by the Meeting of the Parties at its fifth session. The Committee asked its Chair to write to the Government of Ukraine to invite it to provide the Committee with the report on the steps it had taken to bring about compliance with its obligations under the Convention in accordance to decision V/4. In addition to that report, with a view to formulating its recommendations, the Committee wished to receive updated information from Ukraine in advance of its twenty-eighth session, by 27 August 2013. The report and the additional information should be provided in English.

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<sup>2</sup> Information on Committee initiatives is available from <http://www.unece.org/environmental-policy/treaties/environmental-impact-assessment/areas-of-work/review-of-compliance/committee-initiative.html>.

## **V. Presentation of the main decisions taken and closing of the session**

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

22. The Committee decided that it would next meet from 12 to 14 March 2013. The Chair then closed the twenty-sixth session.

## Annex I

### **Findings and recommendations further to a submission by Azerbaijan regarding Armenia (EIA/IC/S/3)**

#### **I. Introduction — submission and the Committee’s procedure**

1. On 5 May 2011, the Government of Azerbaijan made a submission to the Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) expressing concerns about Armenia’s compliance with its obligations under the Convention with respect to the planned building of a nuclear power station at Metsamor, Armenia.

2. The submission claimed that the planned activity was an “activity of the type listed in item 2 of appendix I to the Convention, i.e. could cause significant transboundary impact”. Furthermore, the submission claimed that Armenia “has decided to terminate the environmental impact assessment (EIA) procedure under the Convention while proceeding with the decision-making on the planned activity”, and that consequently it had failed to comply with its obligations under article 3, paragraphs 5 and 8, article 4, paragraph 2, and articles 5 and 6 of the Convention. These obligations relate to:

- (a) Notification, and in particular to the provision of information to and public consultation in the affected Party (article 3, paras. 5 and 8);
- (b) Preparation of the EIA documentation (article 4, para. 2);
- (c) Consultations on the basis of the EIA documentation (article 5);
- (d) Final decision (article 6).

3. On 5 May 2011, the secretariat, further to paragraph 5 (a) of the appendix to decision III/2 (ECE/MP.EIA/6, annex II), forwarded by e-mail a copy of the submission to the Convention’s focal point in Armenia requesting that Armenia send any reply and information in support thereof to the secretariat and to the focal point in Azerbaijan within three months (i.e., not later than 5 August 2011). In addition, on 9 May 2011, the Executive Secretary of the United Nations Economic Commission for Europe (ECE) sent a letter to the Minister for Nature Protection of Armenia forwarding the submission.

4. At its twenty-first session (20 June 2011), the Implementation Committee took note of the submission by Azerbaijan and the message sent by the secretariat (ECE/MP.EIA/IC/2011/4, para. 12).

5. The Government of Armenia provided its reply to the submission on 2 August 2011. The Committee noted the reply from Armenia at its twenty-second session (5–7 September 2011). It decided to invite the two Parties to its next session where it would consider the case. The Committee also agreed that Mr. M. Prieur, its member nominated by France, would act as curator for the submission (ECE/MP.EIA/IC/2011/6, paras. 16–21).

6. At its twenty-third session (5–7 December 2011), the Committee began its consideration of the submission. It took note of the clarifications provided by the secretariat in response to questions posed by Armenia and Azerbaijan on the Committee’s role as intermediary in the indirect notification process regarding the planned activity. It also noted the presentation by the delegation of Azerbaijan of its submission, as well as the statement made by the delegation of Armenia. It decided to postpone the questioning of the Parties as well as the drafting of its findings and recommendations to its next session. The Committee

revised its draft questions and invited the two Parties to respond to them in writing by 20 February 2012, as well as to be prepared to be questioned at that session. Both Parties provided their responses on 20 February 2012.

7. At its twenty-fourth session (20–23 March 2012), the Committee continued its consideration of the submission, inviting the delegations of Azerbaijan and Armenian to briefly 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 appendix to decision III/2, the Committee sent the draft findings and recommendations to the two Parties, inviting their comments or representations by 15 August 2012. At its twenty-sixth session (26–28 November 2012), the Committee finalized its findings and recommendations taking into account representations and comments received from the two Parties.

## **II. Summary of facts, information and issues**

### **A. Background**

9. Armenia intends to construct a new nuclear power plant unit on an already existing nuclear power plant site, 4.6 kilometers from the town of Metsamor and 9.2 kilometers from the city of Armavir. The new unit will be located on land owned by the Government of Armenia where two nuclear reactor units were built in the 1970s. One of the units was shut down permanently in 1988 after the Spitak earthquake, whereas the second (unit 2) was shut down in 1988 but restarted in 1995. The new reactor was planned to replace unit 2, which is commissioned to be shut down in 2016.

10. The countries neighbouring Armenia are Azerbaijan, Georgia, the Islamic Republic of Iran and Turkey. Only Armenia and Azerbaijan are Parties to the Convention, since 1997 and 1999, respectively (see para. 24 below). Armenia and Azerbaijan do not have diplomatic relations and their relationship is characterized by confrontations and the absence of direct contacts and cooperation.

### **B. Armenia's initiative to notify**

11. Armenia decided to notify all four of the neighbouring countries about the planned construction of the nuclear power plant in line with article 3 and appendix I of the Convention. It had the legal obligation under the Convention to notify Azerbaijan, the only neighbouring country that was a Party to the Convention. The notification of the other neighbouring countries, which were not Parties to the Convention, was done on a voluntary basis.

### **C. The notification process**

12. Armenia, as a Party of origin, considered that it was not in a position to notify directly the point of contact of Azerbaijan. Instead, Armenia asked the Convention's secretariat to send the notification on its behalf to Azerbaijan, as well as to Georgia, Turkey and the Islamic Republic of Iran. On 27 August 2010, following a prior oral agreement as mentioned in the covering e-mail message, Armenia sent to the Secretary to the Convention by e-mail a letter from the Minister of Nature Protection of Armenia, together with the

documentation provided for in article 3, paragraph 2, of the Convention and a completed notification form.

13. The notification form used was that adopted in decision I/4 by the Meeting of the Parties (ECE/MP.EIA/2, annex IV) and included in the *Guidance on notification according to the Espoo Convention* (ECE/MP.EIA/2). In the notification form, under the section on the points of contact for the possible affected Party or Parties, Armenia stated that “it is desired that neighbouring countries be notified by the Espoo Convention secretariat”. For the deadline for response, it indicated “according to the date of receipt of the notification, within 45 days”.

14. On 1 September 2010, the Executive Secretary of ECE sent notification letters on behalf of Armenia to the Ministries of Foreign Affairs of Azerbaijan, Georgia, the Islamic Republic of Iran and Turkey, through the respective Permanent Representatives in Geneva, stating that “I have been requested by the Government of Armenia to facilitate a notification (...)” The letters indicated that the response from the Governments of the countries in question “should be sent to the Secretary to the Espoo Convention, whose contact details are provided in the annex, to arrive no later than 15 October 2010”.

15. Three States responded to the Convention secretariat indicating their wish to participate in the transboundary EIA procedure under the Convention. The first country to respond, on 6 October 2010, was Azerbaijan. In its response, Azerbaijan also mentioned that “the issue is currently being reviewed by the Government of Azerbaijan and the official position of the Republic of Azerbaijan regarding the development of a new nuclear power plant in Armenia will be submitted to the ECE secretariat soon”. The fax from Azerbaijan that was dated and sent on 6 October 2010 reached the Convention secretariat only on 11 October 2010 because it had been sent to the general fax number of ECE (information service) instead of the fax number provided in the letter by the Executive Secretary. Georgia responded on 13 October and Turkey on 15 October 2010.

16. The Secretary to the Convention informed the Armenian focal point that three countries had responded positively, but without forwarding copies of the responses themselves, as follows:

(a) On 11 October 2010, he informed the Armenian focal point by e-mail about the contents of the response by Azerbaijan;

(b) On 13 October 2010, the Secretary to the Convention informed the Armenian focal point by e-mail about the contents of the positive reply by Georgia received that same day, and on 15 October 2010 about the one received from Turkey on that same day;

(c) On 12 October 2010, the Secretary to the Convention sent an e-mail to the Permanent Representative of Azerbaijan acknowledging receipt of the 6 of October 2010 response;

(d) On 13 October 2010, Armenia’s focal point replied to the Secretary to the Convention by e-mail with reference to Azerbaijan’s response: “thank you very much for the information. In this regard, please note that the Republic of Armenia in its further actions will be guided by the obligations within the EIA Convention”.

17. On 19 October 2010, the Secretary to the Convention received, attached to an e-mail, a letter from the Armenian Minister of Nature Protection. This letter conveyed that, within the specified deadline of 14 or 15 October 2010, “Armenia had not received an official response” from Azerbaijan, its only neighbouring country that is Party to the Convention, but only related informal e-mail messages from the secretariat “which cannot be considered as an official reply for the Republic of Armenia”. Therefore, in line with article 3, paragraph 4, of the Convention, Armenia considered that in the absence of a response within the time specified in the notification, the provisions in article 3,

paragraphs 3 to 8, and in articles 4 to 7 would not apply. Furthermore, regarding Georgia and Turkey, the letter specified that as these two countries were not Parties to the Convention, Armenia had no obligations towards them under the Convention.

18. On 21 October 2010, the ECE Executive Secretary sent a letter to the Armenian Minister of Nature Protection forwarding him the original responses received from the neighbouring countries. The Chair of the Implementation Committee was also copied on this correspondence. The letter communicated to the Armenian Minister that “as his staff had previously been informed by-email, Azerbaijan, Georgia and Turkey had indicated their wish to participate in the EIA procedure”. The Executive Secretary invited the Armenian Minister to consider his letter with its attachments as an official reply.

19. The response from the Armenian Minister of Nature Protection of 10 November 2010 was transmitted to the secretariat via the Armenian Ministry of Foreign Affairs on 17 November. The letter contained critical comments on the content of the Turkish response and reiterated that Armenia had no obligations towards Georgia and Turkey. With regard to Azerbaijan, Armenia considered that the letter from Azerbaijan did not “comply with the Convention format” and indicated that the Government of Azerbaijan was still considering its official position, and that therefore, in line with article 3, paragraph 4, of the Convention, Armenia had “no further obligations towards Azerbaijan in its actions within the Convention”. Furthermore, Armenia reconfirmed that it considered the procedure within the Convention as being “exhausted”.

#### **D. The submission**

20. On 5 May 2011, Azerbaijan transmitted to the secretariat a submission to be brought before the Implementation Committee expressing concerns about the compliance of Armenia with its obligations under the Convention. Azerbaijan considered that it had responded positively to the notification by Armenia and that Armenia had failed to comply with its obligation under article 3, paragraphs 5 and 8, article 4, paragraph 2, article 5 and article 6 of the Convention. The submission was forwarded to the Armenian focal point by e-mail the same day. In addition, on 9 May, the ECE Executive Secretary sent a letter to the Armenian Minister of Nature Protection forwarding the submission to him through diplomatic channels.

21. In its response to the submission of 21 July 2011, Armenia reiterated its position of 10 November 2010: that it considered it had not received “a substantial official response” from Azerbaijan on its intention to participate in the transboundary EIA within the fixed time frame and, on that basis, it had no obligations towards Azerbaijan. Moreover, Armenia confirmed its intention to pursue the application of the EIA procedure according to its national legislation and practice.

### **III. Consideration and evaluation**

#### **A. General observations**

22. 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.

23. The Committee considered that, in essence, the submission was about procedural issues. These related mainly to the application of article 3 of the Convention regarding the notification procedure concerning a proposed activity listed in appendix I that is likely to

cause a significant adverse transboundary impact. In addition, the Committee considered that the content of the answer by the affected Party was a key element in the submission.

## **B. Legal basis**

24. Armenia deposited its instrument of accession to the Convention on 21 February 1997 and it entered into force 90 days later. Azerbaijan deposited its instrument of accession to the Convention on 25 March 1999 and it entered into force 90 days later.

25. Among activities in appendix I for which the provisions of the Convention apply if likely to cause a significant adverse transboundary impact are “thermal power stations and other combustion installations with a heat output of 300 megawatts or more . . . and nuclear power stations and other nuclear reactors . . . (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load)” (item 2).

26. The Committee examined the provisions of article 3 and their application in the context of the submission. It pointed out that, in line with article 3, the Party of origin has the responsibility to notify the affected Party and that, as decided by the Meeting of the Parties (decision I/3 on Points of contact), the notification “shall be transmitted to the relevant point of contact”.

## **C. Main issues**

27. The Committee considered that the following main issues regarding the notification procedure under the Convention should be further clarified, also with a view to facilitating the future implementation of the Convention by its Parties:

(a) The potential role and responsibilities of the secretariat or another intermediate body in the notification process, and notably its ability to be in charge of the notification on behalf of the Party of origin;

(b) The use of different means of communication (letter, fax, e-mail messages and attachments to them sent from an official or an unofficial account, telephone, text message, diplomatic channels) and their legal status for the purposes of implementing the Convention;

(c) The date of the response to a notification in the framework of a notification;

(d) Requirements relating to the content and the format of a response.

28. With a view to formulating its findings and recommendations, the Committee examined more in-depth the following questions relating to the notification procedure, basing itself on the provisions in the Convention, the practical guidance issued under the Convention and good practices by the Parties to the Convention:

(a) In line with article 3, paragraph 1, it is for the Party of origin to notify potentially affected Parties. However, is the secretariat entitled to exceptionally do this on behalf of a Party of origin, and if yes, under which conditions?

(b) What are the acceptable means of notification and response using different means of communication and taking into account new technologies?

(c) What is the content of the notification in accordance with article 3, paragraph 2?

(d) How is the deadline for a response determined and when does it expire?

(e) What is the content of the answer by an affected Party under article 3, paragraph 3: is it a formal expression of the will to participate and/or an expression of an opinion on the substance and on the merits of the planned activity notified?

(f) How could Parties be assisted to comply with the Convention with respect to their obligation to notify, if appropriate?

29. The Committee noted that the *Review of implementation of the Espoo Convention* (ECE/MP.EIA/11) and the *Guidance on notification according to the Espoo Convention* failed to provide clear guidance on the above issues. The Committee at its eighteenth session had referred to “means of communication” leaving open the choice of such means (ECE/MP.EIA/IC/2010/2, paras. 42–43). The Meeting of the Parties, taking into account the opinions of the Committee, simply recommended sending in parallel communications by post and by e-mail, but leaving open the choice of the means of communication (ECE/MP.EIA/15, Part Two, decision V/4, para. 8 (a)).

#### IV. Findings

30. 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.

31. The Committee notes that the submission before it concerns a situation that it has never encountered in the past. The Parties had early recognized that the Convention did not include a clear provision as to which authority in the affected Party the notification would have to be sent to, and for this reason the first Meeting of the Parties had established, by its decision I/3, the points of contact. Furthermore, while acknowledging that a decision of the Meeting of the Parties does not constitute a legally binding obligation and thus would not be subject to compliance review, the Committee reiterates its earlier conclusion that a Party of origin would have fulfilled its obligations under the Convention when the notification was sent to the authority nominated for this purpose by the affected Party (MP.EIA/WG.1/2003/3, para. 10). In the view of the Committee, this was relevant for the good functioning of the Convention.

32. Further to this view, the Committee notes the fact, confirmed by Azerbaijan during the hearing before the Committee (22 March 2012), that Azerbaijan had a point of contact for notification under the Espoo Convention which had not been changed in the past two years.

33. The Committee notes also that the Convention does not set out obligations as to specific means of communication or other procedural aspects for implementing the Convention, including with respect to notification and to responses to it. In line with article 8 and appendix VI to the Convention, where appropriate, Parties may agree on including such specific procedural requirements in bilateral or multilateral agreements. In the present case, such agreements did not exist. In general, the Committee considers e-mail to be a widely used, commonly acceptable and rapid means of communication and information exchange, including in public international relations, and it acknowledges the legal validity of electronic means of communication for the purposes of notifying. Furthermore, it considers that a Party that responded by electronic means to a notification within the time specified for response would have fulfilled its obligation under article 3, paragraph 3, as regards the timeliness of the response. The Committee estimates that, in the exceptional case of a notification through an intermediary, the intermediary must inform the Party of origin of the contents of the response by the affected Party as set out in article 3, paragraph 3, in a timely manner. This may be done by e-mail, with a copy of the response either attached to the e-mail correspondence or sent subsequently by post.

34. The Committee notes furthermore that, beyond the provisions of article 3, paragraph 3, the Convention does not set out requirements as to the content or the format of a response to a notification. These may again be specified by Parties in bilateral agreements. The Committee considers that the affected Party must clearly express its will to participate in the transboundary environmental assessment procedure. In addition, the affected Party may or may not express an opinion on the substance or the merits of the proposed activity which was the subject of the Party of origin's notification, without this causing prejudice to the future exchanges and consultation between the two Parties.

35. The Committee is aware of the special nature of the relations between Armenia and Azerbaijan, which, in its view, can be considered as exceptional circumstances. The Committee also acknowledges that in all circumstances the implementation of the Convention requires contacts between the Parties. Nevertheless, in the view of the Committee, these exceptional circumstances referred to above, including the lack of diplomatic relations, do not prevent the two Parties from implementing the Espoo Convention. The Committee finds that under such circumstances, Armenia's decision, as the Party of origin, to notify Azerbaijan through the secretariat of the Convention was in compliance with the provisions of the Convention. It notes, furthermore, that this decision was not challenged by Azerbaijan. Moreover, Azerbaijan acknowledged the receipt of the Armenian notification transmitted through a letter signed by the Executive Secretary of ECE, and indicated its intention to participate in the EIA procedure within the time specified in the above-mentioned letter.

36. In relation to the notification, Armenia confirmed during the hearing (22 March 2012) that it had informed its own public about the proposed activity on 10 and 13 August 2010 and had held a public hearing on 24 August 2010, three days before it transmitted the request for notification to the Convention secretariat and one week before the actual notification was sent to the potentially affected countries. In the light of the above, the Committee notes that as Armenia notified the affected Party only after informing its own public about the new unit it intends to build at its nuclear power plant at Metsamor, it is in non-compliance with article 3, paragraph 1 of the Convention.

37. Having considered whether the fact that it was the secretariat, acting exceptionally as an intermediary, that had informed Armenia of Azerbaijan's response on 11 October 2010 (which was confirmed by Armenia on 13 October 2010 and during the hearing before the Committee) and that had transmitted the original response on 21 October 2010 influenced in any way the application of the provisions of the Convention, the Committee expresses the following opinions:

(a) The Committee does not agree that this situation entitles Armenia to avail itself of the provisions of article 3, paragraph 4, of the Convention; on the contrary, regardless of the fact that the secretariat served as an intermediary, this does not release Armenia from its obligations under the Convention;

(b) In the view of the Committee, when a Party of origin entrusts the notification procedure to an intermediary, the fulfilment of the conditions set out in article 3, paragraph 3, is to be established from the correspondence between the affected Parties and the intermediary;

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

(d) The Party of origin retains responsibility for any actions or omissions of the intermediary in the process of notification.

38. As a general rule, the Committee is of the opinion that the obligation in article 3 of the Convention to notify potentially affected Parties rests solely with the Party of origin. If,

under exceptional circumstances, the Party of origin seeks the assistance of an intermediary in fulfilling its obligations in this respect, the Committee considers that that Party of origin retains full responsibility for any actions or omissions of the intermediary in that regard, unless otherwise agreed upon between the Parties concerned and the intermediary. However, article 13 of the Convention cannot be interpreted as providing an obligation on the secretariat to act as an intermediary in the procedures set out in the Convention.

39. On the response from Azerbaijan, the Committee finds that, by transmitting its response on 6 October to the ECE secretariat (received by the Convention secretariat on 11 October 2010), that is, before the deadline specified in the notification, Azerbaijan fulfilled its obligations under article 3, paragraph 3, of the Convention, giving rise to further obligations of Armenia in accordance with article 3, paragraph 5, and following.

40. However, the Committee also acknowledges that, as it was the first time an intermediary was used in the notification procedure, inherent miscommunications appeared that led Armenia to believe that it could avail itself of the provisions of article 3, paragraph 4.

41. Based on the above, the Committee considers that the content of the letter of Armenia of 19 October 2010 should not be considered as a manifestation of Armenia's intention not to comply with the provisions of the Convention. At the moment of the transmittal of the letter, and thereafter, Armenia was under the impression that it could carry out an EIA on the sole basis of its national law. This impression has been corrected by the Committee as set out in the present findings.

42. The Committee also notes that, based on the information provided by Armenia, the final EIA report has not been issued, nor the final decision taken, which allows Armenia to complete the transboundary EIA procedure in line with the provisions of the Convention.

43. In conclusion, on the basis of the information provided, the Committee finds that the claims in the submission by Azerbaijan proved to be substantiated with respect to the provisions of article 3, paragraph 1, of the Convention.

44. 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.

45. Based on the information provided by Armenia, that the final decision on the construction of the nuclear power plant has not yet been taken and the works not yet initiated, the Committee concludes that there is still a possibility for Armenia to continue the implementation of the subsequent steps in the transboundary EIA procedure in conformity with article 3, paragraphs 5 and 8, article 4, paragraph 2, article 5 and article 6 of the Convention. Consequently, the Committee finds that Armenia is not in non-compliance with these provisions of the Convention.

46. The Committee acknowledges the presence of exceptional circumstances, involving the lack of diplomatic relations between the two Parties, referred to above. However, it finds that neither the Convention itself nor the applicable international rules provide for such an exception and therefore finds that absence of diplomatic relations cannot be considered a legitimate reason for not applying the Convention.

47. In the light of the responses provided by Armenia and Azerbaijan on 15 August 2012 to the Committee's inquiry on how they intended to continue the transboundary EIA procedure with respect to the construction of the nuclear power plant in Metsamor, the Committee welcomes the fact that both Parties expressed their willingness to continue implementing the provisions of the Convention. However, it notes that neither of them proposed concrete ways to implement these provisions under the exceptional circumstances.

48. Azerbaijan informed the Committee that it is “ready to engage in consultations with the Armenian side with the participation of an intermediary body”, in this case in reference to the Convention secretariat. Armenia, for its part, informed the Committee that “further compliance with the provisions of the Convention would have been possible only through mediation” but that “at this stage there are serious obstacles for direct contacts and consultations with Azerbaijan, which would have required a great deal of detailed and scrupulous preparation and acceptance of the ad hoc rules and procedures by the both sides”.

49. Despite the technical difficulties caused by the lack of diplomatic relations, the Committee deems that there could still be ways to implement the Convention, in particular in relation to notification, exchange of information, public participation and consultations.

50. Considering the willingness of the Governments of Armenia and Azerbaijan to continue implementing the provisions of the Convention and the presence of the exceptional circumstances, the Committee finds that for the proper implementation of the Convention the designation of an intermediary as well as the use of new technologies and innovative approaches for communication (such as automated e-mail functions and videoconferences) by the two Parties could be ways to solve the difficulties in communication.

## V. Recommendations

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

(a) Endorse the finding of the Implementation Committee that Armenia was in non-compliance with its obligation under the article 3, paragraph 1, of the Convention to notify Azerbaijan as early as possible and no later than when informing its own public, with respect to the construction of the nuclear power plant in Metsamor;

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

(c) Considering the willingness of the Governments of Armenia and Azerbaijan to continue implementing the provisions of the Convention and the presence of the exceptional circumstances, encourage both Parties to find practical ways to fully implement the provisions;

(d) Endorse the proposals expected to be submitted to its sixth session by an ad hoc group to the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment and the Bureau regarding the implementation of the Convention by Parties with no diplomatic relations, including the possible designation of an intermediary and the use of new technologies and innovative approaches for communication between the two Parties, and request Armenia and Azerbaijan to implement these proposals.

## Annex II

### Findings and recommendations further to a Committee initiative on Albania (EIA/IC/CI/3)

#### I. Introduction — the Committee's procedure

1. At its fifth session, in June 2011, the Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) adopted the *Third Review of Implementation* (ECE/MP.EIA/16),<sup>3</sup> which had been undertaken based on national responses to a questionnaire on Parties' implementation of the Convention in the period from 2006 to 2009 (decision V/3, ECE/MP.EIA/15). The Meeting requested that the secretariat bring to the attention of the Implementation Committee general and specific compliance issues identified in the Third Review and that the Committee take these into account in its work. In addition, the Meeting regretted that one Party had not responded to the questionnaire. This Party was Albania.

2. At its twenty-second session (5–7 September 2011), as part of its consideration of the compliance issues arising from the Third Review, the Committee noted the failure of Albania to respond to the questionnaire and to the letter from the Committee of 18 January 2011 urging it to do so. It decided to request Albania once again to respond to the questionnaire without delay and by no later than 15 November 2011. It also decided to begin, in parallel, a Committee initiative, further to paragraph 6 of the appendix to Meeting of the Parties decision III/2 (ECE/MP.EIA/6, annex II). Albania did not provide its responses further to the Committee's letter.

3. At its twenty-third session (5–7 December 2011), the Committee noted that Albania had not responded to its letters of 18 January and 13 September 2011. It decided to invite Albania to its next session, where it would continue the consideration of the case. The Committee's Chair addressed the Committee's invitation letter of 26 January 2012 to the Minister of the Environment of Albania, attaching the Committee's draft questions to the letter.

4. At its twenty-fourth session (20–23 March 2012), the Committee considered the presentation of Albania of its position and its replies to questions posed by members of the Committee. The Committee then drafted its findings and recommendations.

5. Before finalizing the findings and recommendations, in accordance with paragraph 9 of the appendix to decision III/2, the Committee sent the draft findings and recommendations to Albania, inviting its comments or representations by 15 September 2012. At its twenty-sixth session (26–28 November 2012), the Committee finalized its findings and recommendations taking into account the representations provided.

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<sup>3</sup> Publication available online from <http://www.unece.org/fileadmin/DAM/env/documents/2011/eia/ece.mp.eia.16.e.pdf>.

## **II. Summary of facts, information and issues**

### **A. Background**

6. Albania has been a Party to the Convention since its entry into force in 1997.

### **B. Reporting and review of implementation under the Convention**

7. With a view to making the Convention more effective, the Meeting of the Parties decided at its second session in 2001 to undertake the first review of its implementation based on experience gained by Parties and taking into account recent developments in transboundary EIA at the national and international levels (ECE/MP.EIA/4, annex X, decision II/10). In November 2001, the Convention's Working Group on Environmental Impact Assessment adopted a reporting system with a detailed questionnaire to elicit the information necessary for the production of the review report.

8. The First Review of Implementation, prepared based on Parties' responses to the questionnaire, was adopted by the Meeting of the Parties at its third session, in 2004 (ECE/MP.EIA/6, annex I, decision III/1). At that session, the Meeting also adopted a second amendment to the Convention, which provided in article 14 bis an obligation to report. Article 14 bis, paragraph 1, specifies that the Meeting of the Parties shall decide on the frequency of regular reporting required by the Parties and the information to be included in those regular reports. The Meeting also decided on the preparation of a second review of implementation covering the period 2003–2005. To this end, it requested the Implementation Committee in consultation with the Working Group to prepare a revised and simplified questionnaire for Parties to complete.

9. At its fourth session, in 2008, the Meeting of the Parties adopted the Second Review of Implementation and requested the secretariat to bring to the attention of the Implementation Committee general and specific compliance issues identified in the Review for the Committee to take these into account in its work (ECE/MP.EIA/10, Part Two, decision IV/1). The Committee was asked to modify the questionnaire for consideration by the Working Group and circulation by the secretariat thereafter. The Meeting also requested Parties to complete the revised questionnaire so that their responses might be used to produce a third review of implementation, for the period 2006–2009. Moreover, the Meeting specified that Parties should "complete the questionnaire as a report on their implementation of the Convention, taking note of the obligation arising from article 14 bis as adopted by decision III/7, and that a failure to report on implementation might be a compliance matter to be considered by the Implementation Committee" (*ibid.*, para. 8).

### **C. Albania's failure to report on its implementation**

10. Albania was among the Parties that did not respond to the questionnaire for the First Review of Implementation. However, the overall rate of responses by the Parties at the time was low: to a questionnaire that was sent out late in 2002 and again, following some minor modifications, in mid-2003, 14 out of 29 States that were Parties to the Convention failed to provide completed questionnaires by the end of 2003.

11. For the Second Review of Implementation, Albania provided the requested information with a delay of over two years. At the outset, a questionnaire had been sent out in October 2005 for Parties to fill in by the end of October 2006. In February 2007, as a follow-up to its eleventh meeting, the Committee wrote to Albania and to five other Parties that had not returned the questionnaire by that time, requesting them to complete the

questionnaire and explain why they had not completed it in time. The Committee also indicated that it might look into those Parties' compliance with the Convention. The Committee's letter led to further information, including completed questionnaires from four Parties during the period May to July 2007 and from one Party in February 2008, but not from Albania. Prompted by yet another letter from the Committee in November 2008, Albania finally completed the questionnaire in February 2009.

12. At its sixteenth session in March 2009, the Committee examined the completed questionnaire from Albania. It decided to write again to the focal point for Albania to seek clarification on, *inter alia*, the status of the legislation to implement the Convention, reportedly planned for 2008. The Committee also considered that Albania might have had experience in the application of the Convention to energy projects in the period covered by the questionnaire and, noting that Albania's completed questionnaire did not report on such activities, agreed to request clarification.

13. In the absence of a response to its letter of April 2009, the Committee decided at its seventeenth session in September 2009 to write again to Albania. It also decided that it might consider further steps if the Government of Albania failed to reply before the next Committee session.

14. Albania submitted its revised responses to the questionnaire on 8 January 2010. At its eighteenth session, in February 2010, The Committee considered the revised questionnaire responses, or national report, on Albania's implementation of the Convention. 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.

15. For the Third Review of Implementation, Albania was the only Party that did not provide its responses to the questionnaire covering the period 2006–2009. As decided by the Working Group at its twelfth meeting in May 2009, the secretariat had distributed the questionnaire to the Parties on 30 September 2009, for completion and return by the end of June 2010.

16. At its nineteenth session, in August/September 2010, noting that only 30 of the 44 Parties had completed and returned the questionnaire by 31 August 2010, the Committee asked the secretariat to write to the focal points in those Parties that had not reported on their implementation, informing them that the Committee took note of their failure to report, recalled its earlier conclusion that a failure to report might be considered an issue of non-compliance and urged all Parties to complete and return the questionnaire immediately for processing.

17. At its twentieth session, in January 2011, the Committee was pleased that almost all Parties that were Parties to the Convention in the period from 2006 to 2009 had submitted completed questionnaires on their implementation of the Convention during that period. The Committee took note that only Albania and one other Party had not responded by the deadline of 31 December 2010, and that the other Party had submitted a completed questionnaire on 11 January 2011. The Committee therefore wrote again to the Government of Albania (letter of 18 January 2011), indicating that the Committee would bring Albania's failure to report to the attention of the Meeting of the Parties at its fifth session, and urging Albania to submit the completed questionnaire. The Committee would later consider whether Albania's failure to report was an issue of non-compliance with the Convention.

18. As a follow-up to the Committee's twenty-second session, in September 2011, in addition to forwarding to the Albanian focal point the Committee's letter of 13 September requesting Albania once again to fill in the questionnaire on its implementation of the Convention 2006–2009 (see para. 2), the Convention secretariat sent the focal point

reminders by e-mail on 24 November 2011 and on 2 December 2011. Enclosed to the e-mail of 24 November, the secretariat again sent the questionnaire to be completed. It was made clear to Albania that the Committee expected to consider the responses from Albania at its twenty-third session, starting on 5 December 2011.

19. The Albanian focal point responded on 25 November 2011 by e-mail informing the secretariat that he had been out office for some weeks and that he would provide the questionnaire responses the following week. Prompted by the secretariat's reminder of 2 December 2011, the focal point wrote back the same day apologizing for the delay but without sending the responses as promised. After the secretariat requested clarifications regarding Albania's intentions with respect to the questionnaire, the focal point replied on 5 December 2011, asking the secretariat to send him again the questionnaire to be completed. The secretariat informed the Committee about the above correspondence during its twenty-third session.

### **III. Consideration and evaluation**

#### **A. General observations**

20. 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.

21. The Committee noted that its initiative aimed mainly at examining whether Albania had failed to comply with its obligations under the Convention, and at assisting Albania to report on its implementation of the Convention, as needed.

#### **B. Legal basis**

22. Albania deposited its instrument of accession to the Convention on 4 October 1991 and became Party to the Convention upon its entry into force on 10 September 1997.

23. Article 14 bis, introduced as an amendment to the Convention as adopted by the Meeting of the Parties through decision III/7, provides for a legal obligation on Parties to report on their implementation of the Convention. The amendment is not in force.

#### **C. Main issues**

24. The Committee considered that the following issues should be further clarified, also with a view to facilitating the future implementation of the Convention by its Parties:

(a) Whether a Party's failure to report on its implementation of the Convention is a compliance matter;

(b) How to best promote reporting under the Convention and assist Parties in their reporting.

25. With a view to formulating its findings and recommendations, the Committee also discussed the objective and value added of reporting under the Convention, as well as the role and responsibilities of the focal points with respect to the requests from the Convention bodies arising from the implementation of the Convention.

26. The Committee noted that, since the decision by the Meeting of the Parties to the Convention at its second session to undertake a first review of the implementation of the Convention on the basis of responses to a questionnaire, the Parties had in their subsequent

meetings considered it important to repeat the exercise. The Committee observed that the review of implementation was not only a key tool for the Committee's review of compliance by Parties with their obligations under the Convention, but that it also provided valuable information for Parties wishing to strengthen their implementation of the Convention, for States considering acceding to the Convention in their legal and administrative preparations, and for others wishing to understand better how the Convention is implemented in national legislation and applied in practice.

27. When considering the question of whether there is a legal obligation for the Parties to the Convention to report, the Committee recalled its position at its sixth session: "The second amendment to the Convention, adopted at the third meeting of the Parties, provides in article 14 bis an obligation to report . . . Though the amendment was not yet in force, the Committee considered that the Meeting of the Parties had expressed a strong wish for Parties to report. Therefore, the failure to submit reports, or inadequate reporting, might be considered as a compliance matter in the future" (MP.EIA/WG.1/2005/3, para. 8). The Committee also recalled the decision by the Meeting of the Parties at its fourth session "that Parties shall complete the questionnaire as a report on their implementation of the Convention, taking note of the obligation to report arising from article 14 bis as adopted by decision III/7, and that a failure to report on implementation might be a compliance matter to be considered by the Implementation Committee" (decision IV/1, para. 8).

#### **IV. Findings**

28. Having considered the above, the Committee adopted 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.

29. On the basis of the information provided, the Committee noted that Albania had failed to report on its implementation of the Convention in the period 2006–2009 in line with decision IV/1 of the Meeting of the Parties in spite of the repeated requests by the Committee and the secretariat.

30. Although Albania had not complied with the decision III/7 of the Meeting of the Parties, the Committee found that in absence of a legal obligation to report, this mere fact did not mean that Albania was in non-compliance with the Convention.

#### **V. Recommendations**

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

(a) Endorse the finding of the Implementation Committee that Albania is not in non-compliance with the Convention in relation to its obligation to report on its implementation of the Convention;

(b) Encourage Albania to create the necessary institutional framework to ensure proper implementation of the requirement to report on its implementation.