

Decision IV/2

Review of compliance

The Meeting of the Parties,

Recalling Article 11, paragraph 2, of the Convention and decision III/2 on the review of compliance,

Recalling Article 14 bis of the second amendment to the Convention,

Determined to promote and improve compliance with the Convention,

Having considered the analysis made by the Implementation Committee on general compliance issues in the Review of Implementation 2003, as summarized in the appendix to decision III/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 annex I to this decision, and also having noted the letter of 19 May 2008 from the Deputy Prime Minister of Ukraine to the Executive Secretary of the United Nations Economic Commission for Europe, and the announcement by the Ukrainian delegation made during the fourth meeting of the Parties,

Having further considered the findings and recommendations of the Implementation Committee further to its initiative in accordance with paragraph 6 in the appendix to decision III/2 (ECE/MP.EIA/6, annex II) as set out in annex II to this decision,

Having reviewed the structure and functions of the Implementation Committee, as described in the appendix to decision III/2, bearing in mind the possible involvement of the public 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,

Recognizing the importance of rigorous reporting by Parties of their compliance with the Convention, and noting the second review of the implementation of the Convention in the annex to decision IV/1 based on Parties' answers to the revised and simplified questionnaire on the implementation of the Convention,

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/2008/5), welcomes the reports of the meetings of the Committee in the period after the third 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. *Encourages* Parties to bring issues concerning their own compliance before the Implementation Committee;
3. *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 IV/6 on the workplan;
4. *Urges* Parties to take into account in their further work the recommendations for further improving the implementation of and compliance with the Convention, based on but not limited to the analysis on general compliance issues from the Review of Implementation 2003 as requested by the Meeting in its decision III/1, and as presented in section V of the Implementation Committee's report on its activities as set out in annex III to this decision;
5. *Adopts* the operating rules of the Implementation Committee set out in annex IV to this decision including sources and criteria for dealing with information other than submissions from Parties, which should be applied to any meeting and to any other conduct of business of the Committee and should be read together with and in furtherance of the structure, functions and procedures described in the appendix to decision III/2;
6. *Decides* to keep under review and develop if necessary the structure and functions of the Implementation Committee as well as the operating rules at the fifth meeting of the Parties in the light of experience gained by the Committee in the interim, and in this context requests the Committee to prepare any necessary proposals for the fifth meeting of the Parties;

II. Regarding Ukraine

7. *Endorses* the findings of the Implementation Committee that Ukraine has been in non-compliance with its obligations under the Convention, in particular Articles 2, 3, 4, 5 and 6;
8. *Decides* to issue a declaration of non-compliance to the Government of Ukraine;
9. *Takes note* of the commitment by the delegation of the Government of Ukraine made during the fourth meeting of the Parties to reconsider the final decision of 28 December 2007, and urges the Government of Ukraine to repeal without delay the final decision of 28 December 2007 concerning the implementation of the project for the Danube-Black Sea Deep-

Water Navigation Canal in the Ukrainian sector of the Danube Delta, and not to implement Phase II of the project before applying fully the provisions of the Convention to the project, taking into account the findings of the Implementation Committee, and to report to the Committee at its fifteenth meeting (October 2008) and at subsequent meetings if necessary;

10. *Decides* to issue a caution to the Government of Ukraine to become effective on 31 October 2008 unless the Government of Ukraine stops the works, repeals the final decision and takes steps to comply with the relevant provisions of the Convention;

11. *Requests* the Government of Ukraine to ensure that its legislation and administrative measures are able to implement fully the provisions of the Convention, and agrees to support the Government of Ukraine in the undertaking of an independent review of its legal, administrative and other measures to implement the provisions of the Convention for consideration by the Implementation Committee in the first half of 2009. This independent review shall be undertaken by a consultant to be nominated by the Committee and financed from the budget of the Convention;

12. *Also requests* the Government of Ukraine to submit to the Implementation Committee by the end of 2009 a strategy, taking into account the efforts by the Government of Ukraine to implement the provisions of the Convention and based on the outcome of the independent review, including its time schedule and training and other actions to bring about compliance with the Convention, and thereafter to report to the Committee on the implementation of the strategy;

13. *Further requests* the Implementation Committee to report to the fifth meeting of the Parties on the strategy and its implementation and to develop, if appropriate, further recommendations to assist Ukraine in complying with its obligations under the Convention;

14. *Invites* the Government of Ukraine to enter into negotiations with its neighbouring Parties to cooperate in the elaboration of bilateral agreements or other arrangements in order to support further the provisions of the Convention, as set out in Article 8, and to seek advice from the secretariat. The Government of Ukraine is invited to report on progress with the elaboration of such agreements, particularly with Romania, to the Implementation Committee by the end of 2010 and to the fifth meeting of the Parties.

III. Regarding Armenia

15. *Endorses* the findings of the Implementation Committee regarding Armenia (ECE/MP.EIA/2008/7);

16. *Requests* Armenia to revise its legislation in accordance with the Implementation Committee's findings to ensure full implementation of the Convention;

17. *Includes* in the workplan an activity supporting Armenia through technical assistance in drafting the necessary legislation. This technical assistance shall be undertaken by a consultant to be nominated by the Implementation Committee and financed from the budget of the Convention;

18. *Welcomes* Armenia's plan to carry out a pilot project on transboundary environmental impact assessment and to elaborate a bilateral agreement in support to implementation of Convention, further to the outcome of the capacity-building workshop held in Yerevan in September 2007;

19. *Requests* Armenia to report to the Implementation Committee, if possible by the end of 2009, on actions taken to implement the above recommendations.

Annex I

Implementation Committee's findings and recommendations further to a submission by Romania regarding Ukraine

I. INTRODUCTION – SUBMISSION AND THE COMMITTEE'S PROCEDURE

A. Until the fourteenth meeting of the Implementation Committee

1. On 26 May 2004, the Government of Romania made a submission to the Implementation Committee expressing concerns about Ukraine's compliance with its obligations under the Convention with respect to the Danube-Black Sea Deep-Water Navigation Canal in the Ukrainian Sector of the Danube Delta (the "Bystroe Canal Project").¹² The submission also made reference to paragraph 5(a) of the appendix to decision III/2.
2. On 19 August 2004, the Government of Romania requested the establishment of an inquiry commission under Article 3, paragraph 7, of the Convention, with respect to the same project.¹³
3. At its sixth meeting (3–5 November 2004), the Committee noted paragraph 15 of the appendix to decision III/2, which stipulates that where a matter is being considered under an inquiry procedure it may not be the subject of a submission. Thus, the Committee decided that it was not in a position to consider the submission of Romania (MP.EIA/WG.1/2005/3, para. 14).
4. The Inquiry Commission completed its work on 10 July 2006 and handed over its final opinion on the environmental impact of the project to the Ambassadors of Romania and Ukraine in Geneva and to the Executive Secretary of UNECE. The Commission's unanimous opinion was that the project was likely to have a significant adverse transboundary impact on the environment.¹⁴
5. Following the final opinion of the Inquiry Commission, Romania sent five notes (of 10 July 2006, 3 and 26 October 2006, 13 November and 8 December 2006) expressing its desire to participate in the environmental impact assessment (EIA) procedure for the project and its availability to assist in conducting public consultations in Romania. Ukraine stated in a letter to the Executive Secretary of UNECE, received on 30 May 2007, that it was studying further the issues raised in the final opinion of the Inquiry Commission.
6. On 23 January 2007, the Government of Romania made a second submission expressing concerns about Ukraine's compliance with its obligations under the Convention, with respect to the Bystroe Canal Project, and in the light of the final opinion of the Inquiry Commission on the

¹² A summary of the submission is available at:

http://www.unece.org/env/eia/implementation_committee_matters.htm.

¹³ A description of the inquiry procedure and of the work of the Inquiry Commission is available at:

<http://www.unece.org/env/eia/inquiry.htm>.

¹⁴ The Inquiry Commission's opinion is set out in its report, also available at:

<http://www.unece.org/env/eia/inquiry.htm>.

environmental impact of the project.¹⁵ The submission alleged that, in spite of repeated démarches, Ukraine did not indicate that it was considering applying the relevant provisions of the Convention and in particular that no EIA documentation had been made available to Romania.

7. On 23 January 2007, the secretariat, further to paragraph 5 (a) of the appendix to decision III/2, forwarded a copy of the submission to the Convention's focal point in Ukraine requesting that Ukraine send any reply and information in support thereof to the secretariat and to the focal point in Romania within three months (i.e. before 23 April 2007).

8. At its eleventh meeting (13–14 February 2007), the Committee agreed that the second submission by Romania superseded Romania's first submission, which was considered closed (ECE/MP.EIA/WG.1/2007/4, para. 23). The Committee also agreed to consider the second submission, with the participation of representatives of the two Parties concerned, at its twelfth meeting (26–28 June 2007).

9. The secretariat received information on 19 April 2007 from the Permanent Mission of Ukraine to the United Nations Office and the other international organizations in Geneva. This information included, inter alia, a notification, without date or signature. The secretariat requested on 20 April 2007 a clarification from the Convention's focal point in Ukraine as to whether this information was the reply to the submission by the Government of Romania.

10. On 11 May 2007, the secretariat received the following information from the Convention's focal point in Ukraine:

“Let me inform you that Ukraine presented to the Romanian Party the following documents in accordance with Article 3 of the EIA Convention:

1. Notification for the Project on the Deep-Water Navigable Canal in Danube Delta with cover[ing] letter of 18 April 2007, No. 4430/11-7 signed by Minister V. Dzharty.

2. Analytical material and EIA report on CD[-ROM].

Please note that these documents should be considered as the reply to the submission of Romania from 23 January 2007.”

11. The above-mentioned analytical information and CD-ROM were submitted to the secretariat on 31 May 2007 together with the original and an unofficial translation of a letter from the Minister of the Environment of Ukraine to the Executive Secretary of UNECE dated 18 April 2007.

12. Some additional views were presented by the Government of Romania (in a letter dated 20 June 2007) and by the Government of Ukraine (in a letter dated 22 June 2007).

¹⁵ A summary of the submission is available at:

http://www.unece.org/env/eia/implementation_committee_matters.htm.

13. At its twelfth meeting, the Committee considered the matter of the submission, first inviting the Romanian delegation and thereafter the Ukrainian delegation to present 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.

14. The delegation of Romania presented a written statement summarizing its allegations and responding to some of the views presented by the Government of Ukraine in the above-mentioned letter of 22 June 2007, with the translations of the notes between the Ministries of Foreign Affairs of the two countries being attached. In its oral presentation, the delegation of Romania provided information on the environmental importance of the Danube Delta, indicating that information about the construction of the Bystroe Canal became known in 2002 and that since then the Government of Romania had contacted the Government of Ukraine several times requesting to be properly notified and involved in the transboundary procedure as envisaged under the Convention. The delegation of Romania also indicated that it had submitted this issue to the Committee on 23 January 2007 (see para. 6 above) because no follow-up had been undertaken by Ukraine regarding the final opinion of the Inquiry Commission.

15. The delegation of Ukraine presented a set of materials describing the project.¹⁶ In its oral presentation, the delegation of Ukraine indicated that the works on the Bystroe Canal were aimed at restoring waterway traffic. It also provided information that the outcome of the Inquiry Procedure was reflected in the EIA report. The delegation of Ukraine gave assurances that the entire project would be conducted in line with relevant international obligations.

16. For the preparation of its draft findings and recommendations at its thirteenth meeting (30 October–1 November 2007), the Committee considered the information brought to its attention prior to and during its twelfth meeting.

17. Before finalizing the findings and recommendations, in accordance with paragraph 9 of the description of the Committee's structure and functions (appended to decision III/2), the Committee sent the draft findings and recommendations to the two parties, inviting their comments or representations within a period of five weeks, between 8 November and 14 December 2007. At its fourteenth meeting (15–17 January 2008), the Committee finalized its findings and recommendations taking into account representations received from the two parties (ECE/MP.EIA/2008/6).

18. The Committee welcomes the cooperative spirit in which the Governments of Romania and Ukraine worked with the Committee in its deliberations on the matter.

B. After the fourteenth meeting of the Implementation Committee

19. The findings and recommendations, as finalized on 17 January 2008, were based on the declaration made by the Ukrainian delegation in the Committee's twelfth meeting (June 2007), that the final decision was not the approval by the Cabinet of Ministers but a construction permit

¹⁶ The materials included a document entitled "Ukraine's Report Materials Regarding Execution of Espoo Convention Provisions; Geneva, 2007".

to be granted by local authorities, which had not yet been granted (ECE/MP.EIA/2008/6, para. 27). The Committee, when considering the extent of Ukraine's non-compliance with its obligations under the Convention, did not challenge this declaration and assumed that, at the time of finalization of the findings and recommendations, the final decision had not been taken.

20. Consequently, some of the findings regarding Phase II of the Project were conditional upon actions being taken prior to the final decision. The Committee found that, in relation to Phase II of the project, Ukraine could not be considered as being in non-compliance with the Convention as long as the final decision regarding Phase II was not taken and, as long as before the final decision regarding Phase II was taken, all the necessary steps envisaged by the Convention were followed (ECE/MP.EIA/2008/6, para. 65(b)).

21. On 7 February 2008 the secretariat was informed by the Permanent Mission of Ukraine to the United Nations Office and Other International Organizations in Geneva that the final decision on Phase II of the Project had been taken by the Government of Ukraine on 28 December 2007.¹⁷ The final decision included approval of the implementation of the Project, and had been provided to the Government of Romania.

22. The Committee was not provided by Ukraine with information to prove that all necessary steps listed by the Committee in its draft findings and recommendations to be followed before taking the final decision on Phase II were indeed taken.

23. Bearing in mind the above developments, the Committee elaborated, by way of electronic decision-making, addendums to its findings and recommendations with a view to bringing them to the attention of the fourth meeting of the Parties for formal adoption in accordance with paragraph 13 of the appendix to decision III/2. The addendums have been incorporated into the findings and recommendations below.

II. SUMMARY OF FACTS, INFORMATION AND ISSUES

A. Project

24. The Bystroe Canal Project was divided into Phases I and II, each being subject to a separate national authorization procedure, including environmental authorization procedure (or "State ecological examination").

25. The delegation of Ukraine indicated at the Committee's twelfth meeting that it had informed its own public about the project in accordance with its national legislation in 2003, 2004 and 2005.

¹⁷ Final Decision taken by Ukraine concerning the Full-scale Implementation of the Danube-Black Sea Navigation Route Project in the Ukrainian Part of the Danube Delta.

B. Phase I

26. In 2002, the procedure for authorizing Phase I was initiated with a feasibility study and an EIA report being submitted to the competent Ukrainian authorities. The final decision was taken in April 2004 and the works initiated the following month.

27. The Government of Ukraine maintained that it had notified Romania about the project with a number of notes, starting with a note of 18 December 2002, and had in addition provided Romania with the EIA report concerning Phase I on 5 August 2004.

28. The Government of Romania acknowledged receiving the two above-mentioned documents, but maintained that neither of them met the requirements of the Convention. Moreover, the Government of Romania asserted that, despite its démarches, Ukraine failed to undertake all the steps envisaged in the Convention to allow the Romanian authorities and public to participate in the EIA procedure before the decision on Phase I was taken.

29. The Government of Ukraine maintained that while it had informed Romania about the project it did not consider it likely to have a significant adverse transboundary impact and therefore did not consider it necessary to follow in detail the requirements of the Convention.

30. Works concerning the project were suspended in June 2005, but resumed in November 2006.¹⁸

C. Phase II

31. Work on the design of Phase II commenced in 2004 and, on the basis of an EIA report, an environmental authorization was given in 2006. The precise date and details of the authorization vary in communications from the Government of Ukraine: according to the above-mentioned letter of 18 April 2007, it was the decision No. 345 of 19 April 2006, but according to other information communicated to the Committee, it was the decision No. 116/04 of 26 October 2006.¹⁹

32. The Government of Romania alleged that the final decision on Phase II was taken when the Cabinet of Ministers of Ukraine approved Phase II on 30 May 2007, whereas the Ukrainian delegation in the Committee's twelfth meeting maintained that the final decision was not the approval by the Cabinet of Ministers but a construction permit to be granted by local authorities, which had not yet been granted. According to a press release by the Ministry of Transport of Ukraine, the official opening of the Canal was celebrated on 2 May 2007.

33. A notification dated 18 April 2007 was submitted to Romania on 24 April 2007. An EIA report was submitted later.

¹⁸ "Ukraine's Report Materials", pp. 11–12.

¹⁹ "Ukraine's Report Materials", p. 14.

34. On 15 June 2007, Romania responded to the notification from Ukraine, confirming its desire to participate in the procedure, and sent preliminary observations on the information provided by Ukraine. However, the Government of Romania alleged that the notification failed to meet the requirements of the Convention by not indicating “the nature of the possible decision” as required by Article 3, paragraph 2, of the Convention. The Government of Romania also alleged that the EIA report failed to meet the requirements of the Convention on a number of counts, in particular by not sufficiently addressing transboundary issues, by disregarding the report of the Inquiry Commission and by failing to provide a non-technical summary.

35. The Government of Ukraine undertook to organize an event on 18 June 2007 in Vilkove (Ukraine), which Ukraine announced to Romania on 4 June 2007 as constituting “consultations regarding the environmental impact of the project”. The event was understood by the Government of Romania as serving public participation purposes, whereas the Government of Ukraine considered it as also serving the purpose of intergovernmental consultations under Article 5 of the Convention. The Committee was not informed of the substantial outcome of the event.

III. CONSIDERATION AND EVALUATION

A. General observations

36. The Committee considers that Ukraine’s national regulatory framework for authorizations of projects and EIA seems to be extremely complicated. In particular, it is difficult to identify which of a number of consecutive decision-making procedures should be considered as the final “decision to authorize a proposed activity” as stipulated in Article 2, paragraph 3, of the Convention. Moreover, there seems to be no clear legal framework for transboundary EIA procedures. It is the Committee’s understanding that, according to the Constitution of Ukraine, international treaties ratified by Ukraine are integral parts of the national legal system and have supremacy over national laws.

37. The project has been subject to investigations under various international agreements. In particular, the UNECE Aarhus Convention²⁰ Compliance Committee, and subsequently the Meeting of the Parties to the Aarhus Convention, noted an insufficiently clear regulatory framework for public participation in relation to the project.²¹

38. The lack of a clear national legal framework has had a bearing on the information and documents provided by the Government of Ukraine, which have not always been sufficiently consistent and clear. References to file numbers and dates of certain evidence sometimes differed, and the reasoning and explanations given sometimes differed significantly.

²⁰ The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

²¹ Decision II/5b by the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998). Further information is available at: <http://www.unece.org/env/pp>.

39. 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 Espoo Convention, despite difficulties in grasping all the legal and factual details pertaining to the procedures involved in authorizing the project in Ukraine.

B. Legal basis

40. Romania deposited its instrument of ratification of the Convention on 29 March 2001. Ukraine deposited its instrument of ratification of the Convention on 20 July 1999. Thus, Romania and Ukraine were both Parties to the Convention when the Bystroe Canal Project was initiated.

41. The project is covered by item 9 in Appendix I to the Convention. Although the Bystroe Canal already existed and therefore it could not be considered as a new activity, the Committee is of the opinion that according to the definition of “Proposed activity” (as included in Article 1 (v)) the project falls under the scope of “major change”. The Committee is of the opinion that for the purpose of the procedures under the Convention, in particular Article 2, paragraph 3, such an activity includes not only construction but also operation and maintenance works.

42. The final opinion of the Inquiry Commission, in accordance with Article 3, paragraph 7, of the Convention, was that the project is likely to have a significant adverse transboundary impact. In such a situation, the requirements of the Convention do apply to the project and the opinion of the Committee is that Romania should be considered as the “affected Party”.

43. The final opinion of an inquiry commission is a matter of fact and takes effect immediately; in particular the Convention does not provide for the Parties to “study” such an opinion (see para. 5 above). The final opinion of an inquiry commission cannot be challenged and should lead to notification if the opinion is that a significant adverse transboundary impact is likely. The Convention requires notification as early as possible and no later than when informing the public of the Party of origin (Article 3, para. 1). If the public of the Party of origin has already been informed about the proposed activity, the notification should be sent immediately.

44. The likelihood of a significant adverse transboundary impact applies to both Phases I and II, and the Inquiry Commission stated that in some respects the adverse transboundary impact of Phase II could be even greater.²²

45. Phase I was authorized and largely implemented before the Inquiry Commission concluded that the project was likely to have a significant adverse transboundary impact.

46. The procedure for authorization of Phase II was initiated when establishment of the Inquiry Commission had already been requested.

²² Report of the Inquiry Commission, p. 60.

47. The Committee is of the opinion that the above facts have a bearing on its findings regarding the application of the Convention in relation to Phases I and II.

C. Phase I

48. The information provided shows that in relation to Phase I, Ukraine did not follow the requirements of the Convention in relation to assuring the proper involvement of the Romanian authorities and public in the respective EIA procedures. In particular, Ukraine:

- (a) Did not notify Romania as envisaged in Article 3, paragraph 2;
- (b) Did not submit information as envisaged in Article 3, paragraph 5(a);
- (c) Did not take steps to ensure, together with Romania, that the Romanian public in the areas likely to be affected was informed and provided with possibilities for making comments, as required under Article 3, paragraph 8;
- (d) Did not furnish, as envisaged in Article 4, paragraph 2, and Article 2, paragraph 3, the EIA documentation to Romania before the decision was taken (as the decision was taken in April 2004, whereas the EIA documentation was furnished on 5 August 2004);
- (e) Did not take steps to arrange, together with Romania, for the distribution of the EIA documentation to the Romanian public as required under Article 4, paragraph 2;
- (f) Did not enter into consultations with Romania concerning the potential transboundary impact and measures to reduce or eliminate such impact, as required under Article 5, and did not take steps to agree with Romania on a time frame for such consultations, as also required under Article 5;
- (g) Did not ensure that the final decision authorizing implementation of Phase I had taken into account the outcome of the consultations with Romania, as required under Article 6, paragraph 1;
- (h) Did not provide Romania with the text of the final decision authorizing implementation of Phase I, along with the reasons and considerations on which it was based, as required under Article 6, paragraph 2.

49. The Government of Ukraine in some of the documents suggested that it was “aiming to fulfil the provisions of the Convention” through the exchange of notes with Romania²³, while at the Committee’s twelfth meeting it confirmed that it was not following the Convention due to its initial conviction of the lack of a significant adverse transboundary impact of the project.

50. The Convention does not clearly stipulate what are the legal consequences of the final opinion of the Inquiry Commission, in particular whether it has a retroactive effect (a so-called

²³ “Ukraine’s Report Materials” p. 7.

ex tunc effect) or whether the obligations stemming from the Convention apply in such a case only after the Inquiry Commission has found the activity likely to have significant adverse transboundary impacts (a so-called *ex nunc*, or non-retroactive, effect), and whether the request for establishment of the Inquiry Commission has any suspensive effect in relation to an activity.

51. The Committee is of the opinion that, in the absence of clear legal grounds in the Convention for accepting *ex tunc* effect, the final opinion of the Inquiry Commission should be understood as having only *ex nunc* effect.

52. The Convention did not clearly require implementation of Phase I to be immediately suspended as a result of the request for establishment of the Inquiry Commission in August 2004.

53. The immediate suspension of implementation can, however, be invoked from the objective and purpose of the Convention. As set out in the Preamble and in Article 2, paragraph 1, the Convention is based on the principle of prevention, which is well embedded into international environmental law²⁴. Therefore, Ukraine should have taken all appropriate and effective measures to, first of all, prevent a significant adverse transboundary environmental impact from the project. Indispensable to the prevention of such effects occurring in the case of activities likely to have a significant adverse transboundary environmental impact is the carrying out of the transboundary procedure under the Convention. Bearing in mind that the final opinion of the Inquiry Committee was that the project is likely to have a significant adverse transboundary impact, the Committee is of the opinion that, by continuing the implementation of the project after the matter had been submitted to the inquiry procedure and without carrying out the transboundary procedure, Ukraine defeated the object and purpose of the inquiry procedure and made it impossible to achieve its obligation to prevent significant adverse transboundary environmental impact from Phase I of the project.

54. Article 3, paragraph 1, of the Convention stipulates that Parties shall notify any Party of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact. The Committee is of the opinion that, while the Convention's primary aim, as stipulated in Article 2, paragraph 1, is to "prevent, reduce and control significant adverse transboundary environmental impact from proposed activities", even a low likelihood of such an impact should trigger the obligation to notify affected Parties in accordance with Article 3. This would be in accordance with the *Guidance on the Practical Application of the Espoo Convention*, paragraph 28, as endorsed by decision III/4 (ECE/MP.EIA/6, annex IV). This means that notification is necessary unless a significant adverse transboundary impact can be excluded.

55. Acknowledging the likelihood of a "significant adverse transboundary environmental impact from proposed activities" for the purpose of triggering the Convention's procedures

²⁴ As the International Court of Justice put it, "Existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States ... is now part of the corpus of international law" (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, International Court of Justice Reports 1996, para. 29) and "Vigilance and prevention are required on account of often irreversible character of damage to the environment" (Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, International Court of Justice Reports 1997, para. 140).

should be treated as willingness to cooperate with the Parties concerned to “prevent, reduce and control” such impact before the activity is authorized. Thus, initiation of the transboundary procedure under the Convention does not prevent the Party of origin from undertaking such proposed activities after having carried out the transboundary procedure, provided that due account is taken of the transboundary procedure’s outcome in the final decision (Article 6, para. 1).

56. The information provided shows that after the Inquiry Commission delivered its final opinion, and contrary to the conclusions in the above paragraphs, Ukraine did not notify Romania immediately regarding Phase I, and some work was resumed on Phase I.

D. Phase II

57. The information provided shows that Ukraine sent a formal notification to Romania in April 2007, more than 10 months after the Inquiry Commission delivered its final unanimous opinion in July 2006.

58. The notification of April 2007 was not only late, but also did not meet all the requirements of Article 3, paragraph 2; in particular, it did not properly indicate the nature of the possible decision. The Committee also noted that the notification was not made in accordance with decisions I/3 and I/4 (ECE/MP.EIA/2, annexes III and IV, respectively).

59. The information provided shows that, after the Inquiry Commission delivered its final opinion, decision-making procedures concerning Phase II were carried out with the decision on the conclusion of the State ecological examination being taken in October 2006 on the basis of EIA documentation that denied a significant adverse transboundary impact.

60. The Committee is of the opinion that immediately after the final opinion of the Inquiry Commission was delivered, the authorization for Phase II should have been suspended until:

- (a) Romania is given proper possibility to submit comments, in particular regarding potential transboundary impact to be assessed in the EIA documentation;
- (b) The public in Romania is given an opportunity to deliver its comments;
- (c) Proper consultations between Ukraine and Romania on the basis of the EIA documentation have taken place.

61. The above procedures envisaged by the Convention should precede the final decision on the proposed activity. The Committee is of the opinion that, while the Parties are free to decide which of the multitude of decisions required within their regulatory framework should be considered final for the purpose of the Convention, their discretion in this respect is limited to those decisions that in real terms set the environmental conditions for implementing the activity. In this respect, the Committee doubts whether the decision of the local authorities in Ukraine may significantly vary from the preceding respective decisions taken by the central authorities.

62. The Committee notes a positive approach and efforts of the Government of Ukraine to undertake consultations with the Romanian public and authorities.

IV. FINDINGS

63. 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.

64. The provision in the Constitution to directly apply international agreements (see para. 31 above) is considered by the Committee as being insufficient for proper implementation of the Convention without more detailed provisions in the legislation. In particular, the national regulatory framework should clearly indicate:

(a) Which of the decisions for approving the activities should be considered the final decision for the purpose of satisfying the requirements of the Convention;

(b) Where in the decision-making process there is a place for a transboundary EIA procedure and who is responsible for carrying it out and by which means.

65. The information provided by the delegation of Ukraine leads the Committee to conclude that Ukraine has established a domestic EIA system, but that Ukraine does not comply fully with Article 2, paragraph 2, of the Convention because it does not provide sufficiently clearly in its regulatory framework the information referred to in paragraph 59.

66. Furthermore, Ukraine has not implemented decisions I/3 and I/4 taken by the Meeting of the Parties.

67. In the absence of an adequate regulatory framework, it is particularly important that officials are sufficiently aware of the obligations stemming from the Convention. However, the information provided by the delegation of Ukraine did not convince the Committee that these obligations are sufficiently understood by all officials in Ukraine involved in the transboundary EIA procedure and related decision-making.

68. Further to paragraph 38 above, the Committee is convinced that immediately after the final opinion of the Inquiry Commission was delivered, the transboundary procedure for this project should have been initiated with the sending of the notification according to Article 3, paragraph 2, of the Convention.

69. In relation to Phase I:

(a) The Committee finds that the fact of authorizing and implementing Phase I cannot be considered as being in clear non-compliance with the Convention at the time of the decision-making, because Ukraine assumed that the project was not likely to have a significant adverse transboundary impact;

(b) However, the Committee is of the opinion that, in the light of the reasons stated in paragraph 48 above, Ukraine should have suspended the project, including its maintenance and operation (see para. 36 above), immediately after Romania requested the establishment of the Inquiry Commission in August 2004. Further, with the final opinion of the Inquiry Commission (see para. 4 above), the project, including its maintenance and operation, should have continued to be suspended pending the completion of the procedures under the Convention;

(c) Further to paragraph 38 above, the Committee finds that not notifying Romania immediately after the final opinion of the Inquiry Commission should be considered as non-compliance with the Convention.

70. In relation to Phase II of the project:

(a) The Committee finds that, by failing to timely and sufficiently notify Romania after the final opinion of the Inquiry Commission, Ukraine was not in compliance with its obligations under Article 3 of the Convention;

(b) The Committee finds that Ukraine cannot be considered as being in non-compliance with the Convention:

- (i) As long as the final decision regarding Phase II is not taken; and
- (ii) As long as before the final decision regarding Phase II is taken all the necessary steps envisaged by the Convention are followed, in particular:
 - a. EIA documentation is prepared following all the requirements of Appendix II including properly addressing transboundary impacts;
 - b. Romania is given a proper possibility to submit comments on the EIA documentation;
 - c. The public in Romania is given an opportunity to deliver its comments;
 - d. Proper consultations between Ukraine and Romania take place concerning, inter alia, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact; and
- (iii) If Ukraine, subsequently to the steps in (ii):
 - a. Submits the final decision to Romania, having taken due account of the comments so received;
 - b. If then requested by Romania, determines together with Romania whether to carry out a post-project analysis.

71. Ukraine, despite the pending procedure before the Implementation Committee and despite a clear indication included in the draft findings and recommendations, did take the final decision on Phase II without taking all necessary steps envisaged by the Convention, in particular:

(a) EIA documentation had not been prepared following all the requirements of Appendix II, including properly addressing transboundary impacts;

- (b) Romania had not been given a proper possibility to submit comments on EIA documentation described in item (a);
- (c) The public in Romania had not been given sufficient opportunities to deliver its comments;
- (d) Proper consultations between Ukraine and Romania did not take place concerning, inter alia, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact.

72. Although Ukraine did submit the final decision to Romania, Ukraine could not take due account of the comments by Romania further to paragraph 65 bis, items (b), (c) and (d).

73. By failing to take the above steps, Ukraine was not in compliance with its obligations under Articles 2, 3, 4, 5 and 6 of the Convention.

V. RECOMMENDATIONS

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

- (a) Endorse the findings of the Implementation Committee that Ukraine has been in non-compliance with its obligations under the Convention, in particular Articles 2, 3, 4, 5 and 6;
- (b) Urge the Government of Ukraine to suspend the final decision of 28 December 2007 concerning the implementation of the project for the Danube-Black Sea Deep-Water Navigation Canal in the Ukrainian sector of the Danube Delta, and not to implement Phase II of the project before applying fully the provisions of the Convention to the project, taking into account the findings of the Implementation Committee, and to report to the Implementation Committee at its fifteenth meeting (October 2008) and subsequent meetings if necessary;
- (c) Decide to issue a caution to the Government of Ukraine;
- (d) Request the Government of Ukraine to ensure that its legislation and administrative measures are able to implement fully the provisions of the Convention, and agree to support the Government of Ukraine in the undertaking of an independent review of its legal, administrative and other measures to implement the provisions of the Convention for consideration by the Implementation Committee in the first half of 2009. This independent review shall be undertaken by a consultant to be nominated by the Committee and financed from the budget of the Convention;
- (e) Request the Government of Ukraine to submit to the Implementation Committee, by the end of 2009, a strategy taking into account the efforts by the Government of Ukraine to implement the provisions of the Convention and based on the outcome of the independent review, including its time schedule and training and other actions to bring

about compliance with the Convention, and thereafter report to the Committee on the implementation of the strategy;

(f) Request the Implementation Committee to report to the fifth meeting of the Parties on the strategy and its implementation and to develop, if appropriate, further recommendations to assist Ukraine in complying with its obligations under the Convention;

(g) Invite the Government of Ukraine to enter into negotiations with its neighbouring Parties to cooperate in the elaboration of bilateral agreements or other arrangements, in order to support further the provisions of the Convention as set out in Article 8, and to seek advice from the secretariat. The Government of Ukraine is invited to report on the progress made regarding the elaboration of such agreements, particularly with Romania, to the Implementation Committee by the end of 2010 and to the fifth meeting of the Parties.

Annex II

Implementation Committee's findings and recommendations further to a Committee initiative on Armenia

I. INTRODUCTION – THE COMMITTEE'S PROCEDURE

1. Decision III/1 on the review of implementation was based on national responses to a questionnaire on Parties' implementation of the Convention. The Implementation Committee considered compliance issues identified through the examination of the review of implementation appended to decision III/1, including issues concerning the legal implementation of the Convention in Armenia.
2. As a result of this examination the Committee entered into correspondence with Armenia to clarify its responses to the questionnaire. This correspondence culminated in a letter from Armenia dated 18 October 2006 (ECE/MP.EIA/WG.1/2007/4, para. 10). The Committee noted that Armenia, in its letter, had not made a submission regarding its own compliance, but was seeking the assistance of the Committee in implementing the Convention. At its eleventh meeting (13–14 February 2007), the Committee decided, while making reference to paragraph 6 of the appendix to decision III/2, to respond positively to the request from Armenia and to explore possibilities to provide technical advice to review the Armenian current and draft future legislation on Environmental Impact Assessment (EIA) in more detail, with reference to paragraph 7 and subject to paragraph 11 of the appendix to decision III/2.
3. With the assistance of the Organization for Security and Cooperation in Europe, and through the Environment and Security Initiative, such technical advice was provided by a consultant in September 2007.
4. At its thirteenth meeting (30 October–1 November 2007), the Committee considered a report by the consultant, which formed the main basis for the Committee's deliberations.
5. The Committee drafted findings and recommendations and sent them to the Government of Armenia further to paragraph 9 of the appendix to decision III/2. At its fourteenth meeting (15–17 January 2008), the Committee finalized its findings and recommendations taking into account representations received from Armenia.
6. The Committee welcomes the cooperative spirit with which the Government of Armenia worked with the Committee in its deliberations on the matter, and hopes that this will encourage similar approaches by other Parties to strengthen their compliance with the provisions of the Convention.

II. SUMMARY OF FACTS, INFORMATION AND ISSUES

A. Introduction

7. The legal and administrative framework for EIA in Armenia had existed since 1995 and included the main procedural elements of EIA.

8. Armenia acceded to the Convention on 21 February 1997.
9. A new draft Law on State Environmental Review (SER) had been proposed to improve the legal and administrative framework for EIA in Armenia. The draft Law would establish a new legal framework for both EIA and Strategic Environmental Assessment (SEA) processes.
10. With regard to the transboundary EIA procedure, both the current Law and the draft Law refer mostly to applicable international instruments. The draft Law also envisages, for every proposed activity likely to have a significant adverse transboundary impact, an ad hoc procedure to be established in accordance with Armenia's international agreements.

B. Review of existing legislation

11. The process of SER as well as that of EIA²⁵ in Armenia is regulated primarily by the Law on Environmental Impact Expertise, adopted in 1995. This Law regulates the legal, economic and organizational basis for expertise (or review) of the environmental impact of proposed activities and concepts. The main goal of the Law is to regulate proposed activities that are likely to have an environmental impact.
12. According to the Law on Environmental Impact Expertise, the expertise process consists of several stages. The proponent develops and submits preliminary documentation on the proposed activity to the Ministry of Nature Protection for review. The Ministry takes a decision about the necessity of carrying out the environmental impact expertise. If an expertise is necessary, the proponent prepares the EIA documentation and submits the required documentation to the Ministry for the expertise.
13. During the examination of documentation for a proposed activity, the State non-commercial organization "Environmental Expertise" collects opinions of interested state bodies (e.g. the Ministries of Urban Development, Health, Agriculture, Transport, Economic Development and Trade and the municipalities) and departments of the Ministry of Nature Protection, and solicits professional conclusions from certified experts in order to make a professional decision. "Environmental Expertise" is subordinate to the Minister of Nature Protection; it organizes environmental impact expertise activities and prepares draft expertise conclusions. On the basis of received documentation, the draft conclusion is prepared and presented to the Ministry of Nature Protection for discussion. It is then transferred to the Minister for approval.
14. The Law provides for public participation within different stages of the procedure.
15. The Law foresees adoption of a number of implementing regulations, some of which have not been adopted including a procedure on public hearings.

²⁵ The anglicized Russian acronym for EIA is OVOS.

16. The Law, in its Article 5, paragraph 1, implies a definition of impact by requiring prediction, description and assessment of possible direct and indirect impacts of a planned activity on:

- (a) Climate conditions, flora and fauna, individual elements of ecosystems, their interrelations and stability, specially protected natural areas, landscapes, geomorphological structures, air, surface and ground waters, and soil;
- (b) The health and well-being of the population;
- (c) The environment of settlements;
- (d) Use of natural resources;
- (e) Historical and cultural monuments.

Transboundary issues

17. Article 14 of the Law, entitled “Expertise of activities having transboundary impacts”, stipulates that the drafting of expertise conclusions by the authorized body, regarding a proposed activity with environmental impacts outside the borders of Armenia, shall be guided by the requirements of international treaties adopted by Armenia and that the expertise conclusions shall be approved by the Government of Armenia.

18. According to Article 6 of the Constitution of Armenia, international treaties ratified by Armenia are integral parts of the national legal system, and have supremacy over national laws.

19. The Law on Environmental Impact Expertise has one more reference to provisions on transboundary EIA regarding the deadline for issuing the Environmental Impact Expertise conclusion. Article 11, paragraph 2, allows extension of the deadline for issuing of the conclusion if this is required according to Article 14.

C. Draft Law

20. The draft Law on SER would establish a new legal and administrative framework for EIA and SEA in Armenia and, after its adoption, is intended to replace the Law on Environmental Impact Expertise and its implementing regulations.

Transboundary issues

21. The draft Law provides measures to identify transboundary impact and formally acknowledge this fact. For the rest of the procedure, the draft Law merely refers to applicable international instruments.

22. The article of the draft Law entitled “Review of the Fundamental Document and the Proposed Activity with Likely Transboundary Impact” states that, in case of likely transboundary impact on another country, the SER of the fundamental document or the proposed activity shall

be carried out in accordance with international agreements of Armenia. For every case of a transboundary impact of the fundamental document or proposed activity, the Government of Armenia shall adopt a procedure of SER in accordance with international agreements of Armenia and this Law. The decision on the fundamental document and the proposed activity with likely transboundary impact shall be made by the Government of Armenia with consideration of the SER conclusion.

23. In comparison with the current Law on Environmental Impact Expertise the draft Law on SER has fewer procedural provisions. For some EIA issues (e.g. public participation and development of EIA documentation), the draft Law does not envisage all the necessary details, but expects implementing regulations to do so within one year of adoption of the Law. No such implementing regulations had been drafted by the Committee's thirteenth meeting. However, in the representations to the Committee provided by Armenia in response to the draft findings and recommendations, Armenia indicated that the drafting of implementing regulations on public participation was ongoing. However, the draft regulations were not made available to the Committee.

III. CONSIDERATION AND EVALUATION

24. Compliance concerns both legal implementation and practical application. In this instance, and in the absence of practical experience, the Committee has examined the legal implementation of the Convention, particularly with regard to its Article 2, paragraph 2.

25. The Committee considers that the lack of some procedural provisions and some implementing regulations, as well as insufficient control mechanisms, may reduce the effectiveness of the existing EIA legislation and may explain in part the reported lack of practical experience with EIA.

26. There are some concerns regarding the adequacy of the draft Law, especially with respect to the transboundary procedure. For some other EIA issues (see para. 23 above), the draft law does not envisage all the necessary details, but expects implementing regulations to do so.

IV. FINDINGS

27. 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.

28. The provision in the Constitution to directly apply international agreements is considered by the Committee as being insufficient for proper implementation of the Convention without more detailed provisions in the legislation.

29. Furthermore, the Committee is not convinced that the current EIA framework would be capable of identifying activities likely to have a significant adverse transboundary impact that would trigger the transboundary EIA procedure envisaged by the Convention. Nevertheless, the current Law, which provides more procedural provisions, seems better able to implement EIA for projects as foreseen by the Convention than the draft Law on SER.

30. The Committee considered that the following areas are insufficiently addressed or are unclear:
- (a) The situation in which Armenia is the affected Party, particularly regarding the reception of a notification and of EIA documentation, as neither the current legislation nor the proposed draft Law appear to address this situation;
 - (b) Identification of the responsible authorities;
 - (c) Sending a notification as a Party of origin;
 - (d) The detailed content of the EIA documentation;
 - (e) Sending the EIA documentation;
 - (f) Consultations;
 - (g) The procedure for public hearings, although the issue of regulations in this regard is envisaged by the current Law;
 - (h) Timeframes for public participation and modalities of participation at different stages;
 - (i) The definition of impact, which in the current Law is not in line with that in the Convention, but may be resolved by definitions in the proposed draft Law.

31. The Committee is of the opinion that procedural differences between EIA and SEA imply that separate provisions on EIA and SEA are preferable and that the same provisions should not attempt to address both issues.

32. The Committee is also of the opinion that details of the EIA procedure, for example regarding public participation, should rather be included in the legislation than left for implementing regulations.

V. RECOMMENDATIONS

33. The Committee recommends that the Meeting of the Parties:
- (a) Endorse the findings of the Implementation Committee regarding Armenia;
 - (b) Request Armenia to revise its legislation in accordance with the Committee's findings to ensure full implementation of the Convention;
 - (c) Include in the workplan an activity supporting Armenia through technical assistance in drafting the necessary legislation. This technical assistance shall be undertaken by a consultant to be nominated by the Implementation Committee and financed from the budget of the Convention;

- (d) Welcome Armenia's plan to carry out a pilot project on transboundary EIA and to elaborate a bilateral agreement to support implementation of the Convention, further to the outcome of the capacity-building workshop held in Yerevan in September 2007;
- (e) Request Armenia to report to the Implementation Committee by the end of 2009 on actions taken to implement the above recommendations.

Annex III

Report on the activities of the Implementation Committee

I. INTRODUCTION

A. Membership and meetings of the Implementation Committee

1. The members of the Committee and the Parties they represented were: Armenia (Ms. Margarita Korkhmazyan); Croatia (Mr. Nenad Mikulic, replaced by Ms. Vesna Montan at the twelfth meeting); Finland (Ms. Seija Rantakallio); Germany (Mr. Matthias Sauer); Kyrgyzstan (Ms. Gulfiya Shabaeva, replaced by Ms. Tatiana Filkova at the twelfth meeting and by Mr. Kubanychbek Noruzbaev at the thirteenth and fourteenth meetings); Poland (Mr. Jerzy Jendroska); Slovakia (Mr. Tomáš Černohous); and The former Yugoslav Republic of Macedonia (Ms. Menka Spirovska, until and including the eleventh meeting, replaced by Ms. Daniela Stefkova prior to the fourteenth meeting).
2. The third meeting of the Parties appointed Ms. Rantakallio as Chair of the Committee. The Committee nominated Ms. Spirovska as its Vice-Chair.
3. The Committee met nine times in the period between the third and fourth meetings of the Parties: from 3 to 5 November 2004 in Geneva (MP.EIA/WG.1/2005/3); on 3 and 4 March 2005 in Helsinki (MP.EIA/WG.1/2005/4); on 14 and 15 November 2005 in Geneva (ECE/MP.EIA/WG.1/2006/3); from 6 to 8 February 2006 in Geneva (ECE/MP.EIA/WG.1/2006/4); on 9 and 10 October 2006 in Berlin (ECE/MP.EIA/WG.1/2007/3); on 13 and 14 February 2007 in Skopje (ECE/MP.EIA/WG.1/2007/4); from 26 to 28 June 2007 in Geneva (ECE/MP.EIA/2008/1); from 30 October to 1 November 2007 in Geneva (ECE/MP.EIA/2008/2); and from 15 to 17 January 2008 in Geneva (ECE/MP.EIA/2008/3).
4. Both the workplan (appended to decision III/9) and budget (appended to decision III/10) specified that the Committee should meet six times in the period between the third and fourth meetings of the Parties. The Committee agreed to meet on three further occasions, taking into account the postponement of the fourth meetings of the Parties from 2007 to 2008 and the need to consider a submission by Romania, and having secured funding from Parties represented by members of the Committee.
5. Reports of the Committee's meetings were made available to the Working Group on Environmental Impact Assessment (EIA) and are referenced in this report.

B. Activities assigned to the Committee

6. In the workplan appended to decision III/9 on the adoption of the workplan up to the fourth meeting of the Parties, the Meeting of the Parties assigned to the Committee certain items of an activity on compliance with and implementation of the Convention. The workplan specified the following method of work, reflected in the structure of the present report:

- (a) Consideration by the Committee of received compliance submissions (see chapter II);
- (b) Examination of the Committee's structure and functions (see chapter IV);
- (c) Report on the Committee's activities to the fourth meeting of the Parties (the present report);
- (d) Examination of the outcome of the first review of implementation (see chapter V);
- (e) Preparation of a revised and simplified questionnaire (see chapter VI).

7. The Committee undertook the items above with the support of the secretariat. Additionally, the workplan included the following that were assigned to the secretariat, but progress was followed up on by the Committee:

- (a) Distribution of the questionnaire to the Parties to the Convention for them to complete and return (see Part VI);
- (b) Preparation of a draft review of implementation (see chapter VI).

8. Besides these requirements in the workplan, the Committee addressed the following issues, among others, as reported below:

- (a) Committee initiative (further to para. 6 of the Committee's structure and functions)
- (b) Encouraging Parties to bring issues concerning their own compliance before the Committee (further to para. 1 of decision III/2);
- (c) Public involvement in the activities of the Committee (further to para. 5 of decision III/2);
- (d) Criteria for dealing with information other than submissions by Parties (further to para. 7 of decision III/2);
- (e) Membership of the Committee when considering matters related to the Protocol on Strategic Environmental Assessment (SEA) (further to para. 7 of decision III/2);
- (f) Addressing compliance issues in the intersessional period;
- (g) Operating rules;
- (h) Other multilateral environmental agreements (MEAs) providing for transboundary EIA.

9. Item (a) above is covered in chapter III below. Items (b) to (g) above are addressed in chapter IV below on the examination of the Committee's structure and functions. Item (h) above is addressed in chapter VII below.

10. In addition, the Committee contributed to draft decisions proposed for adoption at the fourth meeting of the Parties to the Convention:

(a) On adoption of the workplan (ECE/MP.EIA/WG.1/2007/3, para. 29);

(b) On the review of compliance, to which the present report is annexed (ECE/MP.EIA/WG.1/2007/3, para. 28, and ECE/MP.EIA/WG.1/2007/4, para. 19);

(c) On the review of implementation (ECE/MP.EIA/WG.1/2007/3, para. 27, and ECE/MP.EIA/WG.1/2007/4, para. 20).

II. SUBMISSIONS BY PARTIES

11. Paragraph 5 of the Committee's structure and functions provides for submissions by Parties.

12. Romania made a submission to the Committee regarding the compliance of Ukraine with its obligations under the Convention with respect to the Danube-Black Sea Deep-Water Navigation Canal in the Ukrainian sector of the Danube Delta (the "Bystroe Canal Project"). The Committee prepared findings and recommendations further to the submission (ECE/MP.EIA/2008/6). Regarding the inquiry procedure, and in light of the submission by Romania, **the Committee recommended that all Parties immediately notify other concerned Parties following a positive conclusion of an inquiry commission.**

13. There were no submissions by Parties regarding their own compliance.

III. COMMITTEE INITIATIVE

14. Paragraph 6 of the Committee's structure and functions provides for a Committee initiative. On the basis of the previous review of implementation (chapter V below), the Committee considered supporting the strengthening of Armenia's capacities to comply with its obligations under the Convention. The Committee prepared findings and recommendations further to its initiative on Armenia (ECE/MP.EIA/2008/7).

IV. EXAMINATION OF THE COMMITTEE'S STRUCTURE AND FUNCTIONS

15. In paragraph 5 of decision III/2 on the review of compliance, the Meeting of the Parties decided to keep under review and develop if necessary the structure and functions of the Committee. In addition, in paragraph 7 of the same decision, the Meeting of the Parties requested the Committee to consider developing criteria for dealing with information other than submissions from Parties and proposals on membership of the Committee when considering matters under the Protocol on SEA. The issues raised in these two decisions, together with other

procedural issues identified by the Committee (see para. 8 above), are addressed in this chapter of the report.

A. Encouraging Parties to bring issues concerning their own compliance before the Committee

16. The Committee noted that in paragraph 1 of decision III/2, the Meeting of the Parties encouraged Parties to bring issues concerning their own compliance before the Committee. The Committee understood that the Meeting of the Parties wished to encourage Parties to seek assistance with their implementation of and compliance with the Convention through the Committee's function provided in paragraph 5(b) of the description of its structure and functions.

17. The Committee noted that Parties might prefer to make such a submission rather than be the subject of a submission by another Party or of a Committee initiative. In addition, such a submission might be a channel for receiving expert help. The Committee identified other remedial measures that might be offered (ECE/MP.EIA/WG.1/2006/3, para. 29).

18. Further, the Committee considered that, by changing paragraph 5 (b) of the description of its structure and functions, the Meeting of the Parties might be able to encourage Parties to make submissions regarding their own compliance with their obligations under the Convention. There should be a clear inducement to Parties to make such submissions. **The Committee concluded that it would therefore wish to come back to this matter in the light of any experience** with the activity on country-specific performance reviews that it proposed be included in the draft decision on the adoption of the workplan (ECE/MP.EIA/WG.1/2007/4, para. 17).

B. Public involvement

19. In discussing public involvement in its work, the Committee took into consideration the discussion on public participation included in the report of its third meeting (MP.EIA/WG.1/2003/8, chapter II) and the advice of the Working Group on EIA on the criteria for dealing with information other than submissions from Parties (see section C below). The Committee recalled that it had:

(a) Requested the secretariat to make publicly available on the Convention website the provisional agendas of Committee meetings and the correspondence regarding the specific compliance issues presented in chapter V, section B, below;

(b) Not received any requests for participation in its meeting from the public since the third meeting of the Parties.

20. The Committee also examined material provided by the secretariat to the Aarhus Convention²⁶, and took note of experience of public involvement under other MEAs. The Committee agreed not to propose amendments to its structure and functions in the light of its

²⁶ The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

current experience in public involvement. However, the Committee wished to continue keeping this matter under review in the light of future experience (ECE/MP.EIA/WG.1/2007/4, para. 16).

C. Criteria for dealing with information other than submissions from Parties

21. The Committee saw that the development of criteria for dealing with information other than submissions from Parties was linked to its discretionary function of Committee initiative, defined in paragraph 6 of the description of its structure and functions, and this function was potentially linked in turn to its examination of specific compliance issues identified in the previous review of implementation (ECE/MP.EIA/WG.1/2006/3, para. 13). The Committee also took note of the reports of its previous meetings in this regard (notably in MP.EIA/WG.1/2004/4, para. 7).

22. The Committee considered and identified a number of possible sources of information by which the Committee might become aware of possible non-compliance by a Party. It also considered and identified a number of possible criteria for starting a Committee initiative. The Committee drafted proposals for possible sources and criteria, sought and accepted the advice of the Working Group on EIA on the proposals, and incorporated the amended proposals in the proposed operating rules annexed to the draft decision on the review of compliance to be considered by the fourth meeting of the Parties (ECE/MP.EIA/WG.1/2006/2, para. 9, and ECE/MP.EIA/WG.1/2007/3, para. 7).

D. Membership of the Committee when considering matters under the Protocol on Strategic Environmental Assessment

23. The Committee discussed proposals regarding the membership of the Committee when considering matters under the Protocol on SEA after the first meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol. In this regard, the Committee worked with a small working group, comprising the delegations of Germany, the Netherlands and the United Kingdom, established by the Meeting of the Signatories of the Protocol. The Committee member representing Germany was also a member of the small working group and so acted as a link between the two bodies (ECE/MP.EIA/WG.1/2007/3, para. 22, and ECE/MP.EIA/WG.1/2007/4, para. 17). The Working Group on EIA, at its tenth meeting, supported the resulting proposal by the small group, including a draft decision addressing the composition of the Committee when considering matters under the Protocol (ECE/MP.EIA/WG.1/2007/2, para. 35 and annex).

E. Addressing compliance issues in the intersessional period

24. The Committee discussed an informal paper, prepared by the United Kingdom for the Working Group on EIA, regarding the frequency of future meetings of the Parties. The Committee considered that it could adjust as required to whatever frequency or level of meetings of the Parties was decided on. However, the longer the interval between meetings of the Parties, the greater would be the delay before the Meeting of the Parties could adopt the Committee's draft recommendations regarding compliance with the Convention. A longer interval would also further delay the examination of the Committee's report on the prior review of implementation. On the other hand, a longer interval would provide greater continuity in the Committee's

membership (ECE/MP.EIA/WG.1/2006/4, para. 35). The Committee agreed to recommend addressing this issue in the proposed operating rules annexed to the draft decision on the review of compliance to be considered by the fourth meeting of the Parties.

F. Operating rules

25. The Committee considered that paragraph 5 of decision III/2 provided the mandate for the development of operating rules that could provide practical arrangements for the conduct of the Committee's meetings (ECE/MP.EIA/WG.1/2006/4, para. 28). The Committee therefore drafted such rules and decided to ask the Meeting of the Parties to approve the draft operating rules as a separate legal document (ECE/MP.EIA/WG.1/2006/4, para. 28). The Committee also sought the advice of the Working Group on EIA on the mandate for developing such rules and whether and how they required adoption. The Working Group on EIA advised that a legally sound and evidence-based justification was required for proposing operating rules (ECE/MP.EIA/WG.1/2007/3, para. 23). The Committee provided such a justification in a preambular paragraph to the proposed operating rules. The Working Group subsequently welcomed the draft operating rules, while providing a period for detailed comments by delegations (ECE/MP.EIA/WG.1/2007/2, para. 15); no such comments were received. The proposed operating rules are annexed to the draft decision on the review of compliance to be considered by the fourth meeting of the Parties.

V. EXAMINATION OF THE OUTCOME OF THE FIRST REVIEW OF IMPLEMENTATION

A. General compliance issues

26. Taking note of paragraph 5 of decision III/1 on the review of implementation, the Committee discussed general compliance issues reported in the previous review of implementation²⁷. The Committee decided that general compliance issues as well as possible remedies should be reported to the Working Group on EIA for possible action within the framework of the workplan, to be put forward for adoption by the fourth meeting of Parties (ECE/MP.EIA/WG.1/2006/3, para. 12). Further, the Committee agreed that general compliance issues and possible recommendations should also be addressed in the present report (ECE/MP.EIA/WG.1/2006/4, para. 19); such recommendations are indicated in bold in this section.

27. Members of the Committee were each assigned one chapter of the first review of implementation. These were examined to identify possible general compliance issues, referring also to decision III/1, paragraph 3, and initial suggestions by the secretariat. The Committee then discussed the reports of the individual members and so made the following recommendations.

²⁷ The full 2003 review of implementation is available at: <http://www.unece.org/env/eia/review2006.htm>.

1. Notification

28. The Committee examined compliance issues related to the implementation of the Convention's notification requirements. **The Committee recommended that each Party:**

- (a) **Clarify the timing of notification in bilateral and multilateral agreements or directly bilaterally and multilaterally**, noting that Parties send the notification at different stages in their EIA procedure and recalling Article 3, paragraph 1 (“as early as possible and no later than when informing its own public about the proposed activity”);
- (b) **Inform the secretariat of any necessary changes to the information on the points of contact presented on the Convention’s website (further to decision I/3)** (ECE/MP.EIA/WG.1/2006/4, para. 13 (a)), so as to ensure notifications are correctly addressed;
- (c) **As a Party of origin, consult potential affected Parties early as to whether notification was necessary, in order to avoid problems when a notification comes at a very late stage in the procedure** (ECE/MP.EIA/WG.1/2007/3, para. 13);
- (d) **As a Party of origin, send the notification both by post and by electronic means**, taking into account the legal limitations on electronic communications in some countries (ECE/MP.EIA/WG.1/2007/4, para. 28);
- (e) **As a Party of origin, specify a reasonable time frame for a response to a notification (Art. 3.2(c)) and, as a matter of good practice, request an acknowledgement of the notification** (ECE/MP.EIA/WG.1/2006/4, para. 13 (b));
- (f) **As an affected Party, always respond within the deadline specified in a notification (Art. 3.3)** (ECE/MP.EIA/WG.1/2006/4, para. 13 (c));
- (g) **As a Party of origin, and as a matter of good practice, take action to confirm that the notification has been received before assuming that the lack of a response indicates that an affected Party does not wish to participate** (ECE/MP.EIA/WG.1/2006/4, para. 13 (d)).

2. Preparation of the environmental impact assessment documentation

29. The main compliance problems identified were: the time required for a response from the affected Party to a notification; and the adequacy of the content of the EIA documentation in terms of whether the information met the needs of the affected Party and whether it was in line with the Convention. The Committee agreed that these problems might lead to delays for the Party of origin and the project proponent, as well as limiting public information in the affected Party, and that Parties might need guidance on how to overcome the problems (ECE/MP.EIA/WG.1/2006/3, para. 10). **The Committee recommended that:**

- (a) **A workshop be provided in the workplan for the exchange of good practices in legal measures to implement the provisions of the Convention;**

(b) **Concerned Parties maximize direct contact between them to resolve timing problems, for example, by verifying that the documentation had been received (e.g. by requesting acknowledgement);**

(c) **Parties, as a Party of origin, make early contact with the affected Party regarding the content of the documentation might help avoid serious difficulties later in the transboundary EIA procedure, including the provision of effective public participation and reasonable time frames. Consultation might also be used to resolve perceived problems with the EIA documentation;**

(d) **Parties ensure that the EIA documentation meets the requirements of Appendix II to the Convention and, as a matter of good practice, is of sufficient quality** (ECE/MP.EIA/WG.1/2006/4, para. 18). The documentation should properly address issues that the affected Party identifies in response to the notification, if they are reasonable and based on Appendix II.

3. Transfer and distribution of the environmental impact assessment documentation

30. Based on the very limited number of answers to this part of the questionnaire, the Committee examined timing and organizational problems with the transfer and distribution of the EIA documentation, and highlighted difficulties with Article 4, paragraph 2, of the Convention. The secretariat noted that difficulties with this provision had also been identified in the guidance on public participation (decision III/8, appendix). **The Committee recommended that this provision be addressed in bilateral and multilateral agreements, and agreed that interpretative guidance might be required** (ECE/MP.EIA/WG.1/2006/3, para. 11).

4. Public participation

31. The Committee examined general compliance issues related to public participation. The Committee recognized that Parties had experienced difficulties regarding joint responsibility for organizing public participation (“the concerned Parties” in Art. 3, para. 8, and Art. 4, para. 2), and noted that public participation is an integral part of transboundary EIA. **The Committee therefore urged Parties to clarify responsibilities regarding public participation case by case and in bilateral and multilateral agreements**, taking into account the guidance on public participation in transboundary EIA (decision III/8, appendix, particularly section 2.5). The Committee agreed to give particular attention to public participation when it examines the next review of implementation (ECE/MP.EIA/WG.1/2006/4, para. 16).

5. Consultation

32. **The Committee discussed possible non-compliance issues related to consultation (Art. 5), emphasizing the need to clarify practical arrangements case by case and in bilateral and multilateral agreements.** The Committee agreed to also give particular attention to consultation when it examines the next review of implementation (ECE/MP.EIA/WG.1/2006/4, para. 17).

6. Final decision

33. The Committee then examined general compliance issues related to the final decision (Art. 6). The Committee concluded that there were few difficulties with the implementation of this provision, though Parties perhaps needed more practice in its application. It was noted that it was difficult to assess the influence of EIA on decision-making (ECE/MP.EIA/WG.1/2007/3, para. 14).

7. Research programmes

34. Finally, the Committee discussed general compliance issues related to research programmes (Art. 9). It observed that there had been very little experience in implementing this provision. **The Committee agreed that Parties should be urged to share research results**, not only from research into transboundary EIA but also from research in connection with national EIA that could also be useful to others in the transboundary context, e.g. in the areas of evaluation, monitoring and methodological research. This sharing could be done, inter alia, through responding to the questionnaire, including by indicating where results would be found, preferably in official languages of UNECE. **The Committee also suggested that future workplans might reflect Article 9 with the aim to encourage good practice** (ECE/MP.EIA/WG.1/2007/3, para. 15).

B. Specific compliance issues

35. On the basis of the previous review of implementation, the secretariat had identified four specific compliance issues regarding which the Committee decided to write to the Parties concerned (Armenia, Finland, Kyrgyzstan and Moldova) requesting clarification with regard to their implementation of or compliance with the Convention. The Committee asked these Parties to clarify their situation, and how it had developed since 2003, and agreed to offer assistance if needed (MP.EIA/WG.1/2005/4, para. 7).

36. The Committee considered these issues to be pilot cases, with three of the four Parties concerned (Armenia, Finland and Kyrgyzstan) being represented by members of the Committee. The Committee decided that a member whose country's compliance was being discussed should be allowed to participate in the discussion, though it might choose not to do so. Should recommendations be drawn up, paragraphs 9 and 10 of the description of the structure and functions should be applied, *mutatis mutandis*, to avoid a conflict of interest (ECE/MP.EIA/WG.1/2006/3, para. 19).

37. The Committee later agreed that relevant correspondence should be placed on the Convention's website as an illustration of the Committee's approach and of responses from Parties (ECE/MP.EIA/WG.1/2006/3, para. 17).

38. The Committee also agreed that the examination of the different parts of the review of implementation, being undertaken by the members to identify general compliance issues, should be extended to specific compliance matters. To avoid any conflict of interest, a second member was identified for each part of the review to examine only compliance with provisions in that part by the country of the first member. The Committee agreed on a set of principles to be borne

in mind when considering specific compliance issues arising from the review of implementation: issues should be within the Committee's mandate, and their consideration should promote credibility, predictability, transparency and consistency and should be unbiased and fair to all (ECE/MP.EIA/WG.1/2006/3, para. 20). The Chair volunteered to identify those Parties that had indicated a lack of experience in applying the Convention so that the Committee might discuss why this might be the case (ECE/MP.EIA/WG.1/2006/3, para. 22).

39. The Committee reviewed the specific compliance issues identified by members and noted that it was not always clear whether the information gathered indicated compliance. The Committee therefore agreed that, in examining the responses to the next questionnaire, it would pay particular attention to Parties' answers regarding the implementation of Article 2, paragraph 6, Article 3, paragraph 8 (see also para. 31 above), and Article 6, paragraph 1, as well as responses indicating a lack of practical experience (ECE/MP.EIA/WG.1/2006/4, para. 21).

40. To avoid any conflict of interest, the Chair (from Finland) asked the Vice-Chair to act as Chair during the discussion of the response received from Finland in October 2005. The Chair was not present during the discussion or the decision-making. The remaining members considered Finland's response to be sufficient and asked the Vice-Chair to send a letter to Finland, thanking it for its response, informing it of the Committee's discussion and asking to be informed of progress with planned measures to strengthen compliance (ECE/MP.EIA/WG.1/2006/3, para. 17). The Committee took note of an e-mail reply in October 2006 from Finland indicating that: (a) Finland had not been the affected Party for any projects subject to the Convention since its letter to the Committee in October 2005; and (b) it would inform the Committee when it had been able to apply the principles for public participation set out in that letter (ECE/MP.EIA/WG.1/2007/3, para. 18).

41. The Committee reviewed the written response provided by Kyrgyzstan. The Committee noted that the Convention was not yet in force in Kyrgyzstan at the time of the case for which a transboundary EIA procedure was described in the questionnaire, and that Kyrgyzstan had since developed its EIA regulations to ensure full implementation of the Convention. The Committee agreed that the Chair write to Kyrgyzstan stating that the Committee was satisfied with the information provided and would not consider the matter further. The member representing Kyrgyzstan did not take part in this decision (ECE/MP.EIA/WG.1/2006/4, para. 20, and ECE/MP.EIA/WG.1/2007/3, para. 19).

42. The Committee noted the response from Moldova. Having considered the response and having the possibility to examine at the same time the completed revised questionnaire submitted in April 2006 by Moldova, the Committee agreed that it was satisfied with the information. The Committee asked the secretariat to write to Moldova on behalf of the Chair: (a) thanking it for its response; (b) noting that the Committee had, by reference to the completed revised questionnaire, concluded that it had no specific concerns regarding the transboundary EIA procedure in Moldova; and (c) requesting that the correspondence between the Committee and Moldova be placed on the Convention's website (ECE/MP.EIA/WG.1/2007/3, para. 20).

43. The Committee's consideration of strengthening Armenia's capacities to comply with its obligations under the Convention is addressed in chapter III above.

VI. REVISED AND SIMPLIFIED QUESTIONNAIRE

A. Preparation of the revised and simplified questionnaire

44. In paragraph 6 of decision III/1 on the review of implementation, the Meeting of the Parties requested the Committee to prepare a revised and simplified questionnaire on the implementation of the Convention for consideration by the Working Group on EIA and for circulation by the secretariat thereafter.

45. In addition, in paragraph 6 of decision III/2 on the review of compliance, the Meeting of the Parties recommended that further measures be taken to strengthen reporting, and in this respect welcomed decision III/9 on the workplan.

46. In the light of the above decisions, the Committee decided to establish a structure for a reporting system, based on the first review of the implementation of the Convention, that would include two main parts. One would deal with national legal, institutional and administrative frameworks and be based on the first questionnaire. This part would only have to be updated by Parties. The second part would deal with the application of the Convention and was expected to include new information. Together, the two parts would form a national report from each country and also a basis for the Committee to review implementation of, and compliance with, the Convention (MP.EIA/WG.1/2005/3, para. 7).

47. The Committee revised the draft questionnaire for the report on implementation, taking into account the general compliance issues that the Committee members had identified when reading their designated chapters from the review of implementation 2003 (see chapter V above).

48. Following the review and amendment of the draft questionnaire by the Working Group on EIA (MP.EIA/WG.1/2005/2, paras.10–12), the secretariat sent out the finalized questionnaire in October 2005, with a deadline of 30 April 2006 for returning the reports on implementation. The Working Group agreed that the reports would be placed on the Convention's website.

B. Responses to the revised and simplified questionnaire: Reporting by Parties on their implementation of the Convention

49. By the eleventh meeting of the Committee (13–14 February 2007), 36 responses had been received from the European Commission and 35 States, including reports on their implementation by 33 States Parties to the Convention (ECE/MP.EIA/WG.1/2007/4, para. 4).

50. The second amendment to the Convention, adopted in decision III/7, provides in Article 14 bis an obligation to report. 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 (Art. 14 bis, para. 1). 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 therefore expressed its concern that many Parties had not responded to the revised questionnaire. At its tenth meeting, **the Committee agreed to report to the fourth meeting of the Parties on those Parties that had not**

responded to the revised questionnaire, noting that most had also not responded to the original questionnaire (ECE/MP.EIA/WG.1/2007/3, para. 9), even if they subsequently submitted reports on their implementation of the Convention (ECE/MP.EIA/WG.1/2007/4, para. 7).

51. Furthermore, **the Committee agreed that it might consider approaching Parties that do not respond to questionnaires to enquire how they are implementing the Convention** (ECE/MP.EIA/WG.1/2007/3, para. 9). At the Committee's eleventh meeting, the secretariat presented the draft of a letter that it proposed be sent by the Committee to those Parties that had not completed the revised questionnaire. The Committee requested its Chair to send the letter, suggesting that the letter require that an explanation be provided as to why the revised questionnaire had not been completed by the Party and to indicate that the Committee might look into the Party's compliance with the Convention (ECE/MP.EIA/WG.1/2007/4, para. 6). The letter led to further information, including completed questionnaires in each case, being provided by Belgium, Greece, Luxembourg and Portugal in the period May to July 2007. However, no completed questionnaire was received from the following Parties:

- (a) Albania;
- (b) Ireland.

52. **The Committee considered that it should, in the period between the fourth and fifth meetings of the Parties, examine the implementation of the Convention by those Parties that had failed to respond to the questionnaire.**

53. To facilitate reporting, **the Committee also suggested that in future the Working Group on EIA agree a detailed timetable not only for the submission of completed questionnaires, but also for the generation of the subsequent draft review of implementation** (ECE/MP.EIA/WG.1/2007/4, para. 7).

54. The secretariat was responsible for drafting the second review of implementation. Nonetheless, the Committee considered it important that members of the Committee assist the secretariat in editing the draft second review of implementation, as the Committee would be examining the document after the fourth meeting of the Parties (ECE/MP.EIA/WG.1/2007/3, para. 11). The review is annexed to the draft decision on the review of implementation to be considered by the fourth meeting of the Parties.

55. The Committee considered that the possibility for Parties to complete future questionnaires via the Internet might be reflected in the draft decision on the review of implementation (ECE/MP.EIA/WG.1/2006/4, para. 39).

VII. OTHER MULTILATERAL ENVIRONMENTAL AGREEMENTS PROVIDING FOR TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT

56. The Committee discussed examples of other multilateral agreements providing for transboundary EIA (MP.EIA/WG.1/2005/3, para. 18, and ECE/MP.EIA/WG.1/2006/4, para. 38). The secretariat made proposals on how the Committee might have a role in advising Parties to the Convention on how they could ensure compliance with the Convention if they were also

party to another agreement that contained provisions related to transboundary EIA. The Committee agreed that if a contradiction were to be identified between provisions in the Convention and provisions in other agreements to which a Party to the Convention is also a Party, then it might consider it as a compliance matter provided that such a contradiction can be construed as a compliance issue under the Convention (ECE/MP.EIA/WG.1/2007/4, para. 26). The Committee considered it useful to identify any potential conflicts between provisions in other MEAs and provisions in the Convention that might impede Parties' compliance with the Convention. The Committee requested the secretariat to inform it of any such potential compliance issues of which it became aware (ECE/MP.EIA/WG.1/2006/3, para. 32).

Annex IV

Operating rules of the Implementation Committee

PREAMBLE

The second meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context decided to establish an Implementation Committee for the review of compliance by the Parties with their obligations under the Convention, with a view to assisting them fully to meet their commitments (decision II/4). The third meeting of the Parties decided to revise the structure and functions of the Committee and the procedures for review of compliance (decision III/2).

These operating rules guide the Implementation Committee in the execution of its functions and provide more detail on how the Committee should operate within its structure and functions. The Committee considers that the rules are needed to facilitate its work. The rules incorporate decisions made by the Committee in its meetings and reflected in their reports. It is intended that the rules promote consistency, predictability, credibility, transparency, accountability and efficiency in the work of the Committee, particularly with regard to procedures for the review of compliance. It is also intended that the rules will provide a flexible means of adapting the Committee's mode of operation in the light of its experience.

PURPOSES

*Rule 1*²⁸

These operating rules should apply to any meeting and to any other conduct of business of the Implementation Committee under the Convention and should be read together with and in furtherance of the structure, functions and procedures set out in the appendix to decision III/2 of the Meeting of the Parties to the Convention.

Rule 2

The following rules of procedure of the Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, should apply, *mutatis mutandis*, to any meeting of the Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context, except as otherwise provided in the rules set out herein and in the appendix to decision III/2: rule 3 (Place of meetings); rules 12 and 13 (Agenda); rules 20 to 22 (Officers); rules 24 and 25(c) (Secretariat); rules 28 and 30 to 35 (Conduct of business), except rule 32, paragraph 2; and rules 38 to 46 (Voting).

²⁸ The Committee should refer here to paragraph 4 of the appendix to decision III/2.

DEFINITIONS

Rule 3

For the purposes of these rules:

- (a) “Convention” means the Convention on Environmental Impact Assessment in a Transboundary Context, adopted at Espoo (Finland) on 25 February 1991;
- (b) “Parties” means Contracting Parties to the Convention;
- (c) “Meeting of the Parties” means the Meeting of the Parties established in accordance with Article 11 of the Convention;
- (d) “Committee” means the Implementation Committee first established by decision II/4 of the Meeting of the Parties;
- (e) “Submitting Party” means one or more Parties that have concerns about another Party’s compliance with its obligations under the Convention and accordingly bring a submission before the Committee in accordance with paragraph 5 (a) of the appendix to decision III/2 of the Meeting of the Parties;
- (f) “Parties involved” means the Party whose compliance with its obligations under the Convention is in question and, as appropriate, the submitting Party;
- (g) “Chair” and “Vice-Chair” mean, respectively, the Chairperson and the Vice-Chairperson elected in accordance with rule 6 and with paragraph 1 (a) of the appendix to decision III/2;
- (h) “Member” means a member of the Committee appointed in accordance with paragraph 1 of the appendix to decision III/2 or a replacement appointed in accordance with of rule 4;
- (i) “Secretariat” means, in accordance with Article 13 of the Convention, the Executive Secretary of the United Nations Economic Commission for Europe;
- (j) “Official language” means one of the official languages of the United Nations Economic Commission for Europe: English, French and Russian.

MEMBERS

Rule 4²⁹

1. The Meeting of the Parties should elect Parties for serving two terms in the Committee. Each Party elected by the Meeting of the Parties should appoint a member of the Committee for

²⁹ The Committee should refer here to the first four sentences of paragraph 1 (a), and to paragraph 1 (b), of the appendix to decision III/2.

two terms. The term of office of a member shall commence with the appointment by a Party. This paragraph should apply without prejudice to the right of a Party elected by the Meeting of the Parties to appoint in exceptional cases a permanent replacement for that member.

2. Members are expected to participate in every meeting of the Committee. If in exceptional cases a member is unable to participate in a meeting of the Committee, the respective Party should make all efforts to provide a suitable replacement of that member for the meeting of the Committee, informing the Chair and the secretariat accordingly well in advance of the meeting.
3. Each member should ensure the confidentiality of information in accordance with these rules.

Rule 5

1. Each member should, with respect to any matter that is under consideration by the Committee, avoid direct or indirect conflict of interest. Where a member finds himself or herself faced with a direct or indirect conflict of interest, that member should bring the conflict of interest to the attention of the Committee before consideration of that particular matter. The concerned member should not participate in the elaboration and adoption of a finding or recommendation of the Committee in relation to that matter.
2. A member that represents a Party in respect of which a submission is made or which makes a submission should be entitled to participate in the consideration by the Committee of that submission but should not participate in, or be present during, the preparation and adoption of any part of a report, finding or recommendation of the Committee that relates to that submission³⁰. This paragraph should be applied, *mutatis mutandis*, in the case of a Committee initiative.
3. The members and the secretariat might accept invitations to present the Convention's compliance mechanism at appropriate events, such as conferences and workshops.

OFFICERS

Rule 6

1. The Committee should elect a Chair and a Vice-Chair for one term³¹. They should serve in those capacities until their successors are elected. The Chair and Vice-Chair could be re-elected. If an officer resigns during, or is unable to complete, his or her term of office, the Committee should elect a successor until the end of the term.

³⁰ The Committee should refer here to paragraph 10 of the appendix to decision III/2.

³¹ The Committee should refer here to the fifth sentence of paragraph 1 (a), and to paragraph 1 (b), of the appendix to decision III/2.

2. In the case that a Party intends to provide a permanent replacement for a member elected as a Chair or Vice-Chair, it should notify the Committee well in advance in order to allow a new election of the respective officer.
3. No officer should serve for more than two consecutive terms.

MEETINGS³²

Rule 7³³

1. At each meeting, the Committee, taking into account the current workplan adopted by the Meeting of the Parties, should set the indicative date for the opening and the duration of its next meeting.
2. The Committee should decide on the date, duration and venue of its meetings having regard to the budget adopted by the Meeting of the Parties. If the Committee considers necessary for the execution of its functions the holding of meetings for which no budget has been adopted by the Meeting of the Parties, it should first ensure that the necessary additional funding is available.

Rule 8

The secretariat should notify all members of the dates and venue of a meeting at least four weeks before the meeting is due to take place.

AGENDA

Rule 9

In agreement with the Chair, the secretariat should prepare the provisional agenda of each meeting. The provisional agenda should include items arising from the Committee's functions as specified by the Meeting of the Parties and other matters related thereto. The provisional agenda for each meeting should indicate which items are closed to the public in accordance with rule 17, paragraph 1.

Rule 10

To the extent possible, the provisional agenda should be distributed by the secretariat to all members at least four weeks before the meeting takes place. Other documents, prepared by the secretariat or by members, should be distributed, to the extent possible, at least two weeks before the meeting begins.

³² The Committee should refer here to the second sentence of paragraph 2 of the appendix to decision III/2.

³³ The Committee should refer here to the first sentence of paragraph 2 of the appendix to decision III/2.

PROCEDURES FOR SUBMISSIONS³⁴

Rule 11

1. Generally, the Committee should not begin the formal discussion on a matter at any meeting that takes place before any requested reply has been received from the Party whose compliance is in question or the applicable deadline for replying has passed. This paragraph should be applied, *mutatis mutandis*, in the case that the Committee requests additional information from the Submitting Party.
2. When it is known that the Committee will discuss the matter of any submission at a particular meeting, the secretariat should notify the Parties involved that the matter will be discussed as well as of their right to participate in the discussion and to present to the Committee information and opinions on the matter under consideration.
3. Generally, the Parties involved should present any new substantial information to the Committee through the secretariat at least two weeks in advance of the meeting at which the matter will be discussed.

Rule 12³⁵

1. The Committee should prepare draft findings and recommendations in closed session, taking into account, *inter alia*, any submission, reply, corroborating and supporting information and presentations to the Committee by the Parties involved. The Committee should start by considering and drawing appropriate conclusions as to whether or not the Party concerned is in compliance. It might distinguish at this point between failure to establish the necessary implementing measures and failure to apply such measures.
2. If the Committee provisionally finds that the Party whose compliance is in question is not in compliance, it should then consider and agree upon possible recommendations to the Meeting of the Parties, recalling that the present compliance procedure is non-adversarial and assistance-orientated. Possible recommendations to bring about compliance might include:
 - (a) Recommendations to the Party concerned on what legislation, procedures or institutions require strengthening and how;
 - (b) A recommendation to the Party concerned to submit to the Committee a strategy, with time schedule, for action to bring about compliance, and to report to the Committee on its implementation of the strategy;
 - (c) A recommendation to the Meeting of the Parties, and to potential donors, to provide assistance to the Party concerned through national or subregional workshops, training, seminars or technical assistance;

³⁴ The Committee should refer here to paragraphs 5 (a), 5 (b) and 7 of the appendix to decision III/2.

³⁵ The Committee should refer here to the second sentence of paragraph 9 of the appendix to decision III/2.

(d) A recommendation to the Meeting of the Parties to issue a declaration of non-compliance or a caution;

(e) In exceptional circumstances, a recommendation to the Meeting of the Parties to suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention.³⁶

*Rule 13*³⁷

1. Once prepared, the draft findings and recommendations should be transmitted to the Parties involved inviting them to comment (or make representations) within a reasonable deadline, and to submit their comments through the secretariat. The draft findings and recommendations should not be publicly available at this stage. If possible and if necessary to help the Parties involved to comment, the Committee might arrange for the draft findings and recommendations to be translated into another official language.

2. Within two weeks of receiving any comments, the secretariat should transmit the comments to the Committee and the other Parties involved, unless the Party providing the comments requested otherwise, in which case those comments should be forwarded only to the Committee.

³⁶ See Article 60 of the Convention on the Law of Treaties (Vienna, 1969), which provides for the termination or suspension of the operation of a treaty as a consequence of its breach:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
 - (a) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
 - (i) In the relations between themselves and the defaulting State, or
 - (ii) As between all the parties;
 - (b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
 - (c) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
 - (a) A repudiation of the treaty not sanctioned by the present Convention; or
 - (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.
4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

³⁷ The Committee should refer here to the second sentence of paragraph 9 of the appendix to decision III/2.

3. At its meeting following the deadline for comments, the Committee should review and finalize the draft findings and recommendations taking into account the comments received. The findings and recommendations should be prepared as an addendum to the report of the meeting (i.e. as an official document), and transmitted to the Parties involved and to the Meeting of the Parties.

*Rule 14*³⁸

Pending consideration by the Meeting of the Parties, with a view to addressing compliance issues without delay, the Committee might:

- (a) Provide advice and facilitate assistance to a Party whose compliance is in question regarding its implementation of the Convention, in consultation with that Party;
- (b) Make recommendations to a Party whose compliance is in question, subject to agreement with that Party.

PROCEDURES FOR COMMITTEE INITIATIVES³⁹

Rule 15

1. The sources of information by which the Committee might become aware of a possible non-compliance could be:

- (a) Parties' work under the Convention;
- (b) Any other source.

2. In determining whether to begin a Committee initiative, in accordance with paragraph 6 of the appendix to decision III/2, the Committee should take into account, inter alia, the following:

- (a) The source of the information is known and not anonymous;
- (b) The information relates to an activity listed in Appendix I to the Convention likely to have a significant adverse transboundary impact;
- (c) The information is the basis for a profound suspicion of non-compliance;
- (d) The information relates to the implementation of Convention provisions;
- (e) Committee time and resources are available.

³⁸ The Committee should refer here to paragraph 11 of the appendix to decision III/2.

³⁹ The Committee should refer here to paragraphs 6 and 7 of the appendix to decision III/2.

3. The Committee should consider the information on a non-discriminatory, non-arbitrary and unbiased basis.
4. Rules 11 to 14 should be applied, *mutatis mutandis*, in the case of a Committee initiative.

PUBLICATION OF DOCUMENTS AND INFORMATION

*Rule 16*⁴⁰

1. The provisional agenda, together with related official documents (other than confidential items) of a meeting of the Committee, should be publicly available on the Convention website.
2. Meeting reports, together with other related official documents (other than confidential items), should be publicly available on the Convention website once agreed by the Committee.
3. Discussion papers prepared by the secretariat or by members for meetings of the Committee should not be publicly available unless the Committee decides otherwise.
4. Submissions and related documents should not be publicly available on the Convention website, but the secretariat should prepare a short summary of each submission (including in particular the names of the Parties involved, the date of the submission, and the name and type of the activity in question). This short summary should be publicly available on the Convention website once agreed by the Committee. Apart from this short summary, working documents and further information related to specific submissions should not be published and their contents should be treated as confidential if requested. This paragraph should be applied, *mutatis mutandis*, in the case of a Committee initiative.

PARTICIPATION IN MEETINGS OF THE COMMITTEE

*Rule 17*⁴¹

1. Meetings of the Committee should be open to observers (other Parties, States, bodies, agencies and the public), unless the Committee decides otherwise. Parts of meetings dealing with specific submissions relating to compliance should not be open to observers, unless the Committee and the Party whose compliance is in question agree otherwise. Observers should register with the secretariat in advance of each meeting.
2. A Party in respect of which a submission is made or which makes a submission should be entitled to participate in, or be present during, the consideration by the Committee of that submission, but should not take part in the preparation and adoption of any report, finding or recommendation of the Committee.

⁴⁰ The Committee should refer here to the third sentence of paragraph 2 and to paragraph 8 of the appendix to decision III/2

⁴¹ The Committee should refer here to paragraphs 3 and 9 of the appendix to decision III/2.

3. This rule should be applied, *mutatis mutandis*, in case of a Committee initiative.

DECISION-MAKING

Rule 18⁴²

1. The Committee should make every effort to reach its decisions by consensus. If all efforts to reach consensus have been exhausted and no agreement has been reached, any other decision should, as a last resort, be taken by a majority vote of the members present and voting, if at least five members are present. For decision-making, each member should have one vote. Where consensus is not possible, the report should reflect the views of all members.
2. Without prejudice to rule 19 for the purposes of these rules, the phrase “members present and voting” means members present at the meeting at which voting takes place and casting an affirmative or negative vote. Members abstaining from voting should be considered as not voting.

Rule 19

In between meetings, electronic means of communication might be used by the members for the purpose of decision-making and of conducting informal consultations on issues under consideration. Decisions could only be taken by electronic means of communication, if the issue is urgent, if no member opposes using such means in a particular case, and if all eight members participate in decision-making by submitting to the Chair and the secretariat their vote or informing the Chair and the secretariat that they are abstaining from voting. Any decisions taken by electronic means of communication should be reflected in the report of the meeting of the Committee that follows the taking of the decision.

LANGUAGE

Rule 20

1. The working language of the Committee should be English. The secretariat, for meetings of the Committee held at the United Nations Office at Geneva, or the host country, for meetings held elsewhere, might arrange interpretation in one of the other official languages, if needed and agreed by the Committee.
2. The Committee might allow members to be accompanied by their own interpreters at their own cost. Members are responsible for ensuring that their own interpreters ensure the confidentiality of information in accordance with these rules.
3. Communication by electronic means and informal Committee papers should be in English. Official documents of the meetings should be drawn up in English and translated into the other official languages.

⁴² The Committee should refer here to paragraphs 9, 11 and 12 of the appendix to decision III/2.

Rule 21

A submission from a Party, the reply and further documents and information should be in English.

AMENDMENTS TO THE OPERATING RULES

Rule 22

Any amendment to these rules shall be adopted by consensus by the Committee and submitted to the Meeting of the Parties for consideration and approval. These rules shall be amended to reflect, as necessary, any amendment to decision III/2.

OVERRIDING AUTHORITY OF THE CONVENTION AND DECISION III/2

Rule 23

In the event of a conflict between any provision in these rules and any provision in the Convention or decision III/2, the provisions of the Convention or decision III/2 shall prevail.