

ECONOMIC COMMISSION FOR EUROPE

**Opinions
of the Implementation Committee
(2001–2017)**

**Convention on Environmental
Impact Assessment in a
Transboundary Context
and
Protocol on Strategic
Environmental Assessment**

2017



UNITED NATIONS

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Introduction

1. The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) was adopted in Espoo (Finland) in 1991 and entered into force in 1997. The Meeting of the Parties to the Convention established an Implementation Committee in 2001 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 (ECE/MP.EIA/4, annex IV, decision II/4).
2. The Protocol on Strategic Environmental Assessment was adopted in Kyiv (Ukraine) in 2003 and entered into force in 2010. With the entry into force of the Protocol, the Committee's mandate was extended to review compliance under the Protocol as well (ECE/MP.EIA/SEA/2, decision V/6–I/6).
3. The purpose of this document is to aid Parties to the Convention and the Protocol in their compliance with their obligations, noting that “compliance concerns both legal implementation and practical application” (ECE/MP.EIA/10, decision IV/2 (review of compliance), annex II, para. 24). The document largely comprises direct quotations of the opinions and recommendations of the Implementation Committee in the period from 2001 to 2017 (the Committee's 39 sessions as of the MOPs in 2017), as expressed in the reports of its sessions (see table below) and in its findings and recommendations subsequent to either a submission or a Committee initiative (annexed to the reports of the individual sessions).
4. The Meeting of the Parties to the Convention at its meetings has considered the opinions expressed by the Committee and has urged Parties to take them into account in their further work. At the request of the Parties, the secretariat arranges for the compilation, regular update and the electronic publication of these opinions.

Committee sessions

<i>Session number</i>	<i>Dates</i>	<i>Report</i>
1	11–14 June 2001	Informal document
2	10–12 June 2002	MP.EIA/WG.1/2003/3
3	10–11 March 2003	MP.EIA/WG.1/2003/8
4	30–31 October 2003	MP.EIA/WG.1/2004/3
5	18–19 December 2003	MP.EIA/WG.1/2004/4
6	3–5 November 2004	MP.EIA/WG.1/2005/3
7	3–4 March 2005	MP.EIA/WG.1/2005/4
8	14–15 November 2005	ECE/MP.EIA/WG.1/2006/3
9	6–8 February 2006	ECE/MP.EIA/WG.1/2006/4
10	9–10 October 2006	ECE/MP.EIA/WG.1/2007/3
11	13–14 February 2007	ECE/MP.EIA/WG.1/2007/4
12	26–28 June 2007	ECE/MP.EIA/2008/1
13	30 October–1 November 2007	ECE/MP.EIA/2008/2
14	15–17 January 2008	ECE/MP.EIA/2008/3
15	28–30 October 2008	ECE/MP.EIA/IC/2008/2
16	10–12 March 2009	ECE/MP.EIA/IC/2009/2
17	14–18 September 2009	ECE/MP.EIA/IC/2009/4
18	23–25 February 2010	ECE/MP.EIA/IC/2010/2
19	31 August–2 September 2010	ECE/MP.EIA/IC/2010/4

20	11–13 January 2011	ECE/MP.EIA/IC/2011/2
21	20 June 2011	ECE/MP.EIA/IC/2011/4
22	5–7 September 2011	ECE/MP.EIA/IC/2011/6
23	5–7 December 2011	ECE/MP.EIA/IC/2011/8
24	20–23 March 2012	ECE/MP.EIA/IC/2012/2
25	11–13 September 2012	ECE/MP.EIA/IC/2012/4
26	26–28 November 2012	ECE/MP.EIA/IC/2012/6
27	12–14 April 2013	ECE/MP.EIA/IC/2013/2
28	10–12 September 2013	ECE/MP.EIA/IC/2013/4
29	10–12 December 2013	ECE/MP.EIA/IC/2013/6
30	25–27 February 2014	ECE/MP.EIA/IC/2014/2
31	2–4 September 2014	ECE/MP.EIA/IC/2014/4
32	9–11 December 2014	ECE/MP.EIA/IC/2014/6
33	17–19 March 2015	ECE/MP.EIA/IC/2015/2
34	8–10 December 2015	ECE/MP.EIA/IC/2015/4
35	15–17 March 2016	ECE/MP.EIA/IC/2016/2
36	5–7 September 2016	ECE/MP.EIA/IC/2016/4
37	12–14 December 2016	ECE/MP.EIA/IC/2016/6
38	20–22 February 2017	ECE/MP.EIA/IC/2017/2

5. The first section includes opinions of the Committee on Convention matters, and the second session, much shorter, includes opinions of the Committee on Protocol matters (since 2011). This document does not address the Committee's structure and functions, and the procedures for the review of compliance, or the Committee's operating rules.

The Convention

Nature of obligations

6. The Implementation Committee considered that, “while it is not in its mandate to develop a hierarchy of the obligations under the Convention”, it could identify the following issues as core obligations: “establishment of an [environmental impact assessment] EIA procedure; notification; confirmation of participation in the procedure under the Convention; transmittal of information; public participation; preparation of EIA documentation; distribution of the EIA documentation for the purpose of participation of authorities and public of the affected country; consultation between Parties; final decision and transmittal of final decision documentation.” The Committee was of the opinion that “these obligations are an integral part of the whole process in the Convention” (see MP.EIA/WG.1/2003/3, para. 9). Consequently, these obligations provide a framework for this document. The obligation to report on implementation has been added to this list, as well as the field of application of the Convention.

Nature of the decisions of the Meeting of the Parties

7. The Committee considered the obligations of Parties arising directly from decisions of the Meeting of the Parties. “It was mentioned that a decision by the Meeting of the Parties did not constitute a legally binding obligation and thus would not be subject to compliance review” (MP.EIA/WG.1/2003/3, para. 10).

8. Pending the entry into force of the second amendment to the Convention as adopted by decision III/7, a failure by a Party to report on implementation might be a compliance matter to be considered by the Committee (decision IV/1, cf. ECE/MP.EIA/10, para. 8 and reproduced in the Committee’s findings and recommendations further to a Committee initiative on Albania (EIA/IC/CI/4), ECE/MP.EIA/IC/2012/6, annex II, para. 27).

9. Paragraph 5 (b) of the appendix to decision III/2 (structure, functions and operating rules) provides that a submission may be brought before the Committee by a Party “that concludes that, despite its best endeavours, it is or will be unable to comply fully with its obligations under the Convention”. In its consideration of submission EIA/IC/S/5 by Armenia having concerns about Azerbaijan's compliance with its obligations under the Convention, with respect to six named oil and gas projects developed in Azerbaijan, the Committee considered that the language of that provision (para. 5(b) of the appendix to decision III/2) was not mandatory, and therefore Azerbaijan did not have an obligation to bring a submission before the Committee in case it concluded that it was or would be unable to comply with the Convention (ECE/MP.EIA/IC/2013/4 paras.51–52). Further, the Committee held that III/2 created a right for every Party to the Convention that “ha[d] concerns about another Party’s compliance with its obligations” under the Convention to bring a submission before the Committee (*ibid.*, appendix, para. 5 (a)). This right, however, should not be abused. The Committee expects that concerned Parties act in good faith and provide substantial proof of their concerns (*ibid.* para. 69).

Obligations

Establishment of an environmental impact assessment procedure

10. The Committee has addressed the establishment of an environmental impact assessment (EIA) procedure, as provided for in article 2, paragraph 2, of the Convention.

11. When considering the first submission to the Committee, by Romania regarding Ukraine's compliance with the Convention, the Committee concluded:

“64. 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. 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.” (decision IV/2, annex I).

12. The first part of the above conclusion, that a constitutional provision regarding the direct application of international agreements was insufficient for proper implementation, was repeated by the Committee when considering its first initiative, on Armenia (decision IV/2, annex II, para. 28).

13. “The Committee is of the opinion that procedural differences between EIA and [strategic environmental assessment] SEA imply that separate provisions on EIA and SEA are preferable and that the same provisions should not attempt to address both issues” (decision IV/2, annex II, para. 31).

14. “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” (decision IV/2, annex II, para. 32).

15. “[E]ntrusting the proponent of an activity with the carrying out of the procedure for transboundary environmental impact assessment is not be adequate, unless the proponent is the State” (decision V/4, ECE/MP.EIA/15, para. 6 (b), cf. ECE/MP.EIA/IC/2010/2, para. 36).

16. The Committee has also stated that “[a] domestic regulatory framework was necessary for implementation of the Convention, especially with respect to public participation” (ECE/MP.EIA/IC/2010/4, para. 19 (a) and ECE/MP.EIA/2011/4, para. 43(a)).

17. In considering EIA procedures and the preparation of EIA documentation in relation to the decision to extend the lifetime of two nuclear reactors, when the existing operation permits had expired, the Committee considered that: “If an EIA procedure was necessary only for the construction or demolition of physical parameters, such as buildings, of an NPP and was not necessary for the modernization and replacement of technical components for safety reasons, Parties would be able to continuously modernize and thus extend the lifetime of all existing nuclear installations, without ever carrying out an EIA procedure in accordance with the Convention” (ECE/MP.EIA/IC/2014/2, annex, para. 54).

Field of application

18. The Committee has addressed the field of application of the Convention, as provided for in its article 2, paragraphs 3, 5 and 7.

19. The Committee “recognized that the Convention applies to the whole range of environmental impacts, both to neighbouring countries and long range impacts” (MP.EIA/WG.1/2003/3, para. 8).

20. Referring to a navigation channel, which was the subject of the first submission to the Committee, by Romania regarding Ukraine’s compliance with the Convention, “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” (decision IV/2, annex I, para. 41).

21. “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” (decision IV/2, annex I, para. 54).

22. The Committee reminded “all Parties to the Convention of ... article 1, item (v), which defines a ‘proposed activity’ to mean ‘any activity or any major change to an activity...’, thus, for example, including the modernization of motorways and express roads” (ECE/MP.EIA/IC/2009/2, para. 30). Further, “the Committee wished to remind Parties that ... modernization of a motorway or express road might often constitute a major change to the motorway or express road.” (ECE/MP.EIA/IC/2009/4, para. 36).

23. Further to information provided by a Ukrainian NGO on a planned extension of two reactors of the Rivne nuclear power plant in Ukraine, the Committee gathered further information and considered “that lifetime extension of nuclear power plants could be considered as a major change to an activity in appendix I, and thus fell under the scope of the Convention” (ECE/MP.EIA/IC/2011/8, para. 43); and that “extension of the lifetime of a nuclear power plant, even in absence of any works, [is] to be considered as a major change to an activity and consequently subject to the provisions of the Convention (ECE/MP.EIA/IC/2013/2, para. 21, see also ECE/MP.EIA/IC/2011/8, para. 43)”. The Committee decided to begin a Committee initiative further to paragraph 6 of the Committee’s structure and functions.

24. Having further considered the matter under the Committee initiative, the Committee concluded that “[t]he extension of the lifetime of reactors 1 and 2 of the Rivne NPP after the initial licence has expired, even in absence of any works, is to be considered as a proposed activity under article 1, paragraph (v), and is consequently subject to the provisions of the Convention (ECE/MP.EIA/IC/2014/2, annex, para. 59).

25. The Committee observed in the light of its deliberations on several Committee initiatives that “Parties should consider measures to recognize a limit on the period of validity of and EIA procedure before construction begins, and that resuming construction works after an extended time interruption in construction might be considered a major change and could therefore be subject to a new transboundary EIA procedure” (ECE/MP.EIA/IC/2011/2, para. 26 (a)).

26. Referring to a navigation channel, which was the subject of the second submission to the Committee, by Ukraine regarding Romania’s compliance with the

Convention: [T]he Committee was of the opinion that if the only purpose of the dredging was to maintain a depth of an existing waterway which was duly permitted, such dredging must be considered as maintenance of an already existing activity and therefore did not constitute a major change which could trigger the obligations under the Convention. However, maintenance of a depth in a waterway — if such a depth resulted from an activity that should have been but had not been duly permitted under the Convention — constitutes continuation of such activity and remains subject to the obligations under the Convention. (ECE/MP.EIA/IC/2010/2, annex, para. 40).

27. The Committee decided to begin a Committee initiative (see also ECE/MP.EIA/IC/2014/2 paras. 33–35) relating to the planned construction of the nuclear power plant at Hinkley Point C by the United Kingdom, taking into account that “the opportunity provided by the United Kingdom to Austria to participate under the Espoo Convention had demonstrated the agreement of the two Parties that a likely significant environmental impact on Austrian territory could not be excluded according to article 3, paragraph 7, of the Convention. The likelihood of a significant environmental impact outside the territory of the United Kingdom had also not been excluded by the Netherlands and Norway, in their letters of 23 January and 5 February 2014, respectively” (ECE/MP.EIA/IC/2014/6, para. 35).

28. In considering information gathered from other sources regarding compliance by Serbia, “the Committee noted that the construction of one block at the Kostolac lignite power plant was an activity listed in appendix I to the Convention and that the likelihood of a significant adverse transboundary impact could not be excluded. However, Serbia had not notified potentially affected Parties. On those grounds, the Committee decided to begin a Committee initiative further to paragraph 6 of the Committee’s structure and functions.”

Inquiry procedure

29. In the view of the Committee, in principle, the submission procedure should not be considered as a substitute to the application of article 3, paragraph 7, providing for the exchange of sufficient information among concerned Parties for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact. Furthermore, in the view of the Committee, it would be reasonable to follow the procedure under article 3, paragraph 7, before making a submission, unless the affected Parties had learned about the projects after they had been implemented, in which case the application of article 3, paragraph 7, would be deprived of its purpose (ECE/MP.EIA/IC/2013/4, para. 59).

30. Moreover, the Committee observed that: the procedure in article 3, paragraph 7, did not substitute the obligations of a Party of origin deriving from the Convention to notify possibly affected Parties, or to fulfil any other step of the transboundary EIA procedure in compliance with the Convention in case transboundary environmental impacts could not be excluded (ECE/MP.EIA/IC/2014/2, annex, para. 48).²⁹ The Committee has addressed in detail the Convention’s inquiry procedure, as provided for in article 3, paragraph 7, and appendix IV, particularly within findings and recommendations further to a submission by Romania regarding Ukraine (decision IV/2, annex D). Certain of the following opinions were expressed within the context of the submission, but may have wider relevance.

31. “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.... 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 (art. 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” (decision IV/2, annex I, para. 43).

32. “The Committee is of the opinion that, in the absence of clear legal grounds in the Convention for accepting *ex tunc* [or retroactive] effect, the final opinion of the Inquiry Commission should be understood as having only *ex nunc* [or non-retroactive] effect” (decision IV/2, annex I, para. 51).

33. “The immediate suspension of implementation [as a result of a request for establishment of an inquiry commission] can ... 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 law. 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 the transboundary procedure under the Convention. Bearing in mind that the final opinion of the Inquiry Commission 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” (decision IV/2, annex I, para. 53).

34. “[T]he 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” (decision IV/2, annex I, para. 68).

35. “[T]he Committee is of the opinion that ... Ukraine should have suspended the project, including its maintenance and operation ..., immediately after Romania requested the establishment of the Inquiry Commission.... Further, with the final opinion of the Inquiry Commission ..., the project, including its maintenance and operation, should have continued to be suspended pending the completion of the procedures under the Convention” (decision IV/2, annex I, para. 69 (b)).

36. “[T]he Committee finds that not notifying Romania immediately after the final opinion of the Inquiry Commission should be considered as non-compliance with the Convention” (decision IV/2, annex I, para. 69 (c)). Further, “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” (decision IV/2, annex I, para. 70 (a)). Therefore, “the Committee recommended that all Parties immediately notify other concerned Parties following a positive conclusion of an inquiry commission” (decision IV/2, annex III, para. 12).

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

(ECE/MP.EIA/15, decision V/4 on review of compliance, cf. ECE/MP.EIA/IC/2009/2, para. 22).

38. “The EIA had to cover the environmental impact of the entire proposed activity, and not address only the likely significant adverse transboundary impacts identified by the Inquiry Commission. The Committee emphasized that the Inquiry Commission’s role was to determine whether the whole Project required application of the Convention, and not to determine the scope of the assessment” (ECE/MP.EIA/2011/4, para. 17, see also ECE/MP.EIA/IC/2009/4, para. 14).

Relationship to other international agreements

39. “The Committee noted that article 2, paragraph 10, of the Convention is meant to make it clear that following the obligations related to notifying potentially affected Parties and conducting, if appropriate, other steps of transboundary procedure, does not release the Parties from observing relevant obligations under other international instruments, unless such instruments specifically provide so. Simultaneously, following the obligations stemming from any international instrument can by no means be interpreted as an excuse for not observing the requirements of the Convention related to notifying potentially affected Parties and conducting, if appropriate, other steps of transboundary procedure” (ECE/MP.EIA/IC/2010/2, annex, para. 41).

Notification

40. The Committee has addressed notification, as provided for in article 3 of the Convention.

41. “Acknowledging the likelihood of a ‘significant adverse transboundary environmental impact from proposed activities’ for the purpose of triggering the Convention’s procedures 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 (art. 6, para. 1)” (decision IV/2, annex I, para. 55).

42. The Committee recalled “the need to enhance international cooperation in assessing environmental impact as well as the principle of prevention, as referred to in the third and the fourth paragraphs of the Convention’s Preamble, respectively, and the role of notification in this regard. Furthermore, it consider[ed] that the mere notification of possibly affected Parties, regardless of their number, [did] not impose an excessive burden on Parties of origin. It also note[d] that even before the entry into force of the Convention, Parties [had] expressed a strong preference towards notification whenever there was a possibility of a significant impact, “no matter how uncertain” (ECE/MP.EIA/IC/2016/2, para. 59).

43. Moreover, “in forming its view, the Committee evaluates both the impact caused by the activity during its usual operation as well as the impact caused by an accident. The Committee notes that for certain activities, in particular nuclear energy-related activities, while the chance of a major accident, accident beyond design basis or disaster occurring is very low, the likelihood of a significant adverse transboundary impact of such an accident can be very high. Therefore, the Committee believes that on the basis of the principle of prevention, when considering the affected Parties for the purpose of notification, the Party of origin should be exceptionally prospective and inclusive, in order to ensure that all Parties potentially affected by an accident, however uncertain, are notified. The Party of origin should make such consideration

using the most careful approach on the basis of available scientific evidence, which indicates the maximum extent of a significant adverse transboundary impact from a nuclear energy-related activity, taking into account the worst-case scenario.” (ECE/MP.EIA/IC/2016/2, para. 60).

44. “It was recognized that the Convention did not include a clear provision to which authority in the affected Party the notification would have to be sent. It was noted that for this reason the first Meeting of Parties established in its decision I/3 the points of contact. It was mentioned that a decision by the Meeting of the Parties did not constitute a legally binding obligation and thus would not be subject to compliance review. However, it was realized that this is relevant for a good functioning of the Convention. The Implementation Committee concluded that a Party would have fulfilled its obligations under the Convention when the notification was sent to the authority nominated for this purpose by the affected Party, which would normally be the point of contact or the Ministry of Foreign Affairs, unless otherwise provided for in a bilateral or multilateral agreement” (MP.EIA/WG.1/2003/3, para. 10).

45. The Committee “recommended that Parties clarify the timing of notification in bilateral and multilateral agreements” (ECE/MP.EIA/WG.1/2006/4, para. 12).

46. “The Committee suggested that Parties adopt a precautionary approach, including early consultation with potential affected Parties 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).

47. In a number of direct recommendations related to the implementation of the Convention’s notification requirements:

“28. ... 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, para. 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, para. 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))” (decision IV/2, annex III).

48. The Committee further recommended that: “If the concerned Parties do not have bilateral or multilateral agreements covering such issues, they should agree at the start of the transboundary EIA procedure, when sending or responding to the notification, on: (i) the language or languages for correspondence and of the EIA documentation; (ii) the timing of, and means for carrying out, consultations under article 5” (ECE/MP.EIA/IC/2009/2, para. 24).

49. “Parties in their role of Party of origin (a) notify as early as possible and when determining case by case the content of environmental impact assessment documentation (“scoping”), where applicable, so that the environmental impact assessment documentation could meet the needs of the affected Party [...] (decision V/4, para. 7, see also ECE/MP.EIA/IC/2010/2, para. 20).

50. “The Committee considered that Parties, either individually or through bilateral or multilateral agreements or other arrangements, might find useful to establish a list of activities, with thresholds if appropriate, that should automatically be subject to notification” (ECE/MP.EIA/2011/4, para. 47, and also ECE/MP.EIA/IC/2010/2, para. 21).

51. “The Party of origin is responsible for ensuring that notification under article 3 is carried out properly” (decision V/4, paragraph 6(a), cf. ECE/MP.EIA/IC/2010/2, para. 38).

52. “The Committee emphasized that ... [t]he recipient of a notification in the affected Party was the point of contact in accordance with decision I/3 (ECE/MP.EIA/2, annex III), unless otherwise provided for in a bilateral or multilateral agreement or other arrangement” (ECE/MP.EIA/IC/2010/2, para. 38).

53. “Parties retain records of the means of communication, dates and addresses, and that communications should be sent in parallel by other means, for example simultaneously by post and e-mail” (decision V/4, para. 8(a), cf. ECE/MP.EIA/IC/2010/2, para. 43).

54. “[T]he Committee recalled decision I/3 by which the Meeting of the Parties had agreed that notifications should be transmitted to the relevant points of contact, unless otherwise provided for in bilateral or multilateral agreements or other arrangements. The Committee recommended that Parties should retain records of the means of communication, dates and addresses, and that communications should be sent in parallel by other means, for example simultaneously by post and e-mail” (ECE/MP.EIA/IC/2010/2, para. 43).

55. Further refining these recommendations the Committee noted:

“27. If, on the one hand, the Party of origin sends a notification to the point of contact in the affected Party and can prove that it did so and, on the other hand, the affected Party did not initially receive the notification, there is no need for the Party of origin to send again the notification provided that:

(a) The Party of origin accepts the participation of the affected Party in the transboundary EIA procedure;

(b) The affected Party receives all information provided for in article 3, paragraphs 2 and 5, as well as the environmental impact assessment documentation” (ECE/MP.EIA/IC/2010/4).

56. “The affected Party could not impose conditions on the notification beyond those provided in the Convention unless provided in a bilateral agreement or other arrangement between the concerned Parties” (ECE/MP.EIA/IC/2010/4, para. 28).

57. “A bilateral agreement could be an effective mechanism to address communication between concerned Parties and the sending of information” (ECE/MP.EIA/IC/2010/4, para. 29).

58. “If a Party of origin was uncertain of the means of communication with an affected Party, it should send information both by post and through diplomatic channels, and use e mail or any other appropriate communication to verify receipt” (ECE/MP.EIA/IC/2010/4, para. 30).

59. “If a Party failed to provide correct and up-to-date contact details of its point of contact and focal point to the secretariat and, as appropriate, the Party of origin, in an ongoing procedure, the Party of origin in ongoing and new procedures could not be held responsible for a failure to provide information to that Party in accordance with the Convention. Changes to the point of contact or the focal point should be communicated immediately” (ECE/MP.EIA/IC/2010/4, para. 31).

60. “Parties to the Convention [...] should be reminded that the obligation in article 3 of the Convention [...] to notify potentially affected Parties rested solely with the Party of origin (ECE/MP.EIA/IC/2012/2, para. 17, and ECE/MP.EIA/IC/2012/6, annex I, para. 38). The secretariat having exceptionally acted as an intermediary does not release a Party from its obligations under the Convention (ECE/MP.EIA/IC/2012/6, annex I, para. 37 (a)). Article 13 of the Convention cannot be interpreted as providing an obligation on the secretariat to act as an intermediary in the procedures set out in the Convention (Ibid., para. 38).

61. If, under exceptional circumstances, the Party of origin seeks the assistance of an intermediary in fulfilling its obligations to notify potentially affected Parties, it retains responsibility for any actions or omissions of the intermediary in the process of notification (ECE/MP.EIA/IC/2012/6, annex I, para. 37 (d) and ECE/MP.EIA/IC/2012/2, para. 17).

62. When a Party of origin entrusts the notification procedure to an intermediary, the fulfilment of the conditions set out in article 3, paragraph 3, is to be established from the correspondence between the affected Parties and the intermediary, unless otherwise agreed upon between the Parties concerned and the intermediary (ECE/MP.EIA/IC/2012/6, annex I, paras. 37 (b) and 38). Any miscommunications between the Party of origin and the intermediary should have no impact on the application of the provisions of the Convention (Ibid., para. 37 (c)). Neither the Convention itself nor the applicable international rules provide for an exception, and therefore absence of diplomatic relations cannot be considered legitimate reason for not applying the Convention (Ibid. para. 46).

63. E-mail is a widely used, commonly acceptable and rapid means of communication and information exchange, including in public international relations, and the legal validity of electronic means of communication for the purposes of notifying is acknowledged (ECE/MP.EIA/IC/2012/6, annex I, para. 33). A Party that responds by electronic means to a notification within the time specified for response has fulfilled its obligation under article 3, paragraph 3, as regards the timeliness of the response (Ibid.).

Preparation of the environmental impact assessment documentation

64. The Committee has addressed the preparation of the EIA documentation, as provided for in article 4, paragraph 1, of the Convention.

65. “The Committee recommended that the Party of origin involve the affected Party in any scoping procedure” (ECE/MP.EIA/2011/4).

66. The Committee further recommended that:

“(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” (decision IV/2, annex III, para. 29).

67. The Committee considered that “the non-technical summary should outline in non-technical language the findings included in each of the earlier chapters corresponding to items (a)–(h) of appendix II” (ECE/MP.EIA/IC/2009/2, para. 16).

68. The Committee recalled that “the Convention’s provision requiring that the EIA documentation included a description, where appropriate, of reasonable alternatives (appendix II, item (b)) was mandatory for the legal implementation of the Convention by a Party” (ECE/MP.EIA/IC/2009/2, para. 39).

69. “Parties in their role of Party of origin [...] (b) involve the affected Party in any case-by-case determination of the content of the EIA documentation (‘scoping’)” (decision V/4, para. 7, see also ECE/MP.EIA/IC/2009/4, para. 26).

70. “It was important that the no-action alternative should be addressed fully so that the evolution of the environment in the absence of the project could be considered” (ECE/MP.EIA/IC/2010/2, para. 33).

71. “The standards of the Party of origin relating to the content of the environmental impact assessment documentation were normally applicable, as long as they complied with international legislation applicable in the concerned Parties” (ECE/MP.EIA/IC/2010/2, para. 34).

72. “During the procedure for transboundary environmental impact assessment the concerned Parties share the responsibility for ensuring that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin. That opportunity must be based on accurate and effective notification of the public and access to at least relevant parts of the documentation in the appropriate language of the affected Party, when documentation is in a language that could not be understood by the public of the affected Party. That is in addition to their responsibility to provide the possibility of access to the full and final environmental impact assessment documentation in the original language or languages during the procedure for transboundary environmental impact assessment. In that context, while recognizing the lack of administrative powers of the Party of origin’s competent authority on the territory of the affected Party, at a minimum it has to provide the possibility for the public of the affected Party to participate in the procedure of the Party of origin. The Party of origin’s competent authority should furthermore support the affected Party’s competent authority in providing effective participation for the public of the affected Party in the procedure for transboundary environmental impact assessment” (decision V/4, para. 6 (c), cf. ECE/MP.EIA/IC/2010/2, para. 35, and ECE/MP.EIA/IC/2010/4, paras. 19(c) and 20).

73. [A]ccess to at least relevant parts of the documentation in a language the public could understand, as set out in article 2, paragraph 6; article 3, paragraph 8; and article 4, paragraph 2 of the Convention] must be based on at least partial translation of documentation, when documentation was in a language that could not be understood by the public of the affected Party (ECE/MP.EIA/IC/2010/2, para. 35).

74. Unless otherwise provided for in a bilateral or multilateral agreement or other arrangement, the concerned Parties should, when sending or responding to the

notification, agree at the start of the procedure for transboundary environmental impact assessment on the scope of documentation to be translated. The documentation to be translated should, as a minimum, include the non-technical summary and those parts of the environmental impact assessment documentation that are necessary to provide an opportunity to the public of the affected Party to participate that is equivalent to that provided to the public of the Party of origin. Unless otherwise provided for in a bilateral or multilateral agreement or other arrangement, the burden for translation should fall upon the Party of origin in line with the polluter pays principle (decision V/4, para. 6(f), cf. ECE/MP.EIA/IC/2010/2, para. 35).”

75. “Environmental impact assessment documentation should include a separate chapter on transboundary impact to facilitate translation” (decision V/4, para. 8 (b), cf. ECE/MP.EIA/IC/2010/2, para. 35).

76. “Copyright protection should not be considered as allowing for the prevention of the public availability of the full environmental impact assessment documentation” (decision V/4, para. 6(e), cf. ECE/MP.EIA/IC/2010/4, para. 20).

77. “The EIA documentation must evaluate and justify different elements to be taken into account for the “reasonable [locational] alternatives [appendix II to the Convention]”. [...] “The choice of the location of the proposed activity should result from the EIA procedure and should not be determined before the final EIA report [is] issued, unless the choice of the location [is] determined in an appropriate SEA procedure that included a transboundary procedure” (ECE/MP.EIA/IC/2013/2, annex, para. 54).

Transfer and distribution of documentation

78. The Committee has addressed the transfer and distribution of the EIA documentation, as provided for in article 4, paragraph 2, of the Convention.

79. “The Committee recommended that this provision be addressed in bilateral and multilateral agreements, and agreed that interpretative guidance might be required” (decision IV/2, annex III, para. 30, and report of the eighth session, ECE/MP.EIA/WG.1/2006/3, para. 11).

Public participation

80. The Committee has addressed public participation, as provided for in article 2, paragraph 6, article 3, paragraph 8, and article 4, paragraph 2, of the Convention.

81. The Committee “noted that public participation is an integral part of transboundary EIA” (ECE/MP.EIA/WG.1/2006/4, para. 16). “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)” (decision IV/2, annex III, para. 31).

82. “The affected Party has an obligation to allow that the opportunity provided to the public of the affected Party to participate in the procedure under the Convention is equivalent to that provided to the public of the Party of origin. If the affected Party refuses to carry out its duties, the Party of origin cannot be held responsible for organizing public participation in the affected Party, but should provide the possibility for the public of the affected Party to participate in the procedure of the Party of origin” (decision V/4, para. (d), cf. ECE/MP.EIA/IC/2010/2, para. 37).

83. “The organization of public participation under the Convention was the responsibility of the competent authority and not of the proponent. Nevertheless, it might be possible under national systems that the competent authority and the

proponent would organize the public participation together. However, the proponent should not be responsible for public participation without the competent authority” (ECE/MP.EIA/IC/2010/4, para. 19 (b)).

84. “The concerned Parties had a common responsibility for providing equivalent opportunities for public participation in the affected Party, including accurate and effective notification of the public. In that context, while recognizing the lack of administrative powers of the Party of origin’s competent authority on the territory of the affected Party, at a minimum it had to provide the possibility for the public of the affected Party to participate in the procedure of the Party of origin (ECE/MP.EIA/IC/2010/2, para. 37). The Party of origin’s competent authority should furthermore support the affected Party’s competent authority in providing effective participation for the public of the affected Party in the procedure for transboundary environmental impact assessment” (ECE/MP.EIA/IC/2010/4, para. 19 (c), see also ECE/MP.EIA/2011/4, para. 43 (c))

85. “Bilateral agreements could resolve many issues relating to public participation, as foreseen by the Convention” (ECE/MP.EIA/IC/2010/4, para. 19 (f), see also ECE/MP.EIA/2011/4, para. 43 (f)).

86. “[R]ecalling an earlier opinion on the necessary translation of documentation (ECE/MP.EIA/IC/2010/2, para 35), the Committee was of the opinion that during the procedure for transboundary environmental impact assessment the concerned Parties should share the responsibility for ensuring that the opportunity provided to the public of the affected Party was equivalent to that provided to the public of the Party of origin, including access to at least relevant parts of the documentation in the appropriate language of the affected Party” (ECE/MP.EIA/IC/2010/4, para. 20, see also ECE/MP.EIA/2011/4, para. 44).

87. The Committee noted that “the participation of representatives of some NGOs in the meetings of the Board of the nuclear safety authority did not amount to public participation of the public in the areas likely to be affected in the meaning of article 2, paragraph 6, of the Convention” (ECE/MP.EIA/IC/2014/2, annex, para. 56).

88. “Although the Convention does not specify mechanisms for public participation, the holding of public hearings is an essential step in the effective public participation provided for in article 2, paragraph 6, and article 3, paragraph 8, of the Convention as set out in the Guidance on public participation” (ECE/MP.EIA/IC/2013/2, annex, para. 44).

89. “As such, a website could be one of the useful means to allow for the public of the Parties concerned to participation in a transboundary EIA procedure, if they so agree, provided that the information [is] complete, provided in time and, for the relevant parts of the EIA documentation, in the language of the affected Party, and that the public [is] given a possibility to comment on the website” (ECE/MP.EIA/IC/2013/2, annex, para. 48).

90. “In accordance with article 5 of the Convention, consultations should not be only a mere formality but should concern the measures to “reduce or eliminate” (article 5, paragraph 1) the potential transboundary impact of the proposed activity and allow thorough examination of its possible alternatives” (ECE/MP.EIA/IC/2013/2, annex, para. 51).

91. “In order to allow for meaningful consultations under article 5, the information provided by the Party of origin should be as complete and precise as possible, and in particular, should meet any reasonable request as to its scope made by the affected Party” (ECE/MP.EIA/IC/2013/2, annex, para. 52).

Consultations

92. The Committee has addressed consultations on the basis of the EIA documentation, as provided for in article 5 of the Convention.

93. “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” (decision IV/2, annex III, para. 32, and ECE/MP.EIA/WG.1/2006/4, para. 17).

94. The Committee recommended that:

“(a) If the concerned Parties do not have bilateral or multilateral agreements covering such issues, they should agree at the start of the transboundary EIA procedure, when sending or responding to the notification, on:

(i) The language or languages for correspondence and of the EIA documentation;

(ii) The timing of, and means for carrying out, consultations under article 5;

(b) Parties refer to the guidance on the practical application of the Convention (ECE/MP.EIA/8, section 2.9)” (ECE/MP.EIA/IC/2009/2, para. 24).

95. “The Committee underlined that article 5 provides for specific consultations after completion of the EIA documentation” (ECE/MP.EIA/IC/2009/2, para. 25).

96. “The Committee reminded Parties that consultations under article 5 were bilateral or multilateral discussions between authorities that had been authorized by the concerned Parties, and should not be confused with public participation under article 3, paragraph 8, and article 4, paragraph 2, or with consultation of the authorities under article 4, paragraph 2, in the areas likely to be affected” (ECE/MP.EIA/IC/2010/2, para. 39).

97. “The affected Party must clearly express its will to participate in the transboundary environmental assessment procedure. In addition, the affected Party may or may not express an opinion on the substance or the merits of the proposed activity which was the subject of the Party of origin’s notification, without this causing prejudice to the future exchanges and consultation between the two Parties” (ECE/MP.EIA/IC/2012/6., annex I, para. 34).

Final decision

98. The Committee has addressed the final decision, as provided for in article 6 of the Convention.

99. “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” (ECE/MP.EIA/10, decision IV/2, annex I, para. 61).

100. “If the conditions attached to a decision can be altered subsequently by other decisions, the former cannot be considered the ‘final decision’ in the meaning of the Convention” (decision V/4, para. (i), cf. ECE/MP.EIA/IC/2009/2, para. 21).

101. The Committee made the following recommendations to the Parties on good practice:

“(a) Information about possibilities to appeal should be included by the Party of origin in the final decision, as suggested in the guidance on the practical application of the Convention. This is a legal requirement in many Parties;

(b) The concerned Parties should agree, at the latest during the EIA procedure, on the whether the final decision will be translated and, if so, whether the whole final decision or only specific parts;

(c) The final decision should always be submitted as a paper document but, if the affected Party so requests, the final decision should also be transmitted electronically” (ECE/MP.EIA/2011/4, para. 51).”

102. “In the light of article 3, paragraph 8 and article 4, paragraph 2 of the Convention, the obligation under article 6 paragraph 2, shall be interpreted as an obligation to inform also the public concerned in the affected Party of the final decision” (decision V/4, para. 6(h), cf. ECE/MP.EIA/IC/2009/2, para. 27).

103. “An extended time period between a final decision on a planned activity and subsequent construction works might bring into doubt the validity of the environmental impact assessment for the planned activity and thus of the final decision” (decision V/4, cf. ECE/MP.EIA/IC/2009/4, paras. 36 (a) and 46).

104. “[T]he Committee recommended that Parties include monitoring conditions in their final decisions when applying the Convention” (ECE/MP.EIA/IC/2010/2, para. 18).

105. “The final decision should provide a summary of the comments received pursuant to article 3, paragraph 8, and article 4, paragraph 2, and the outcome of the consultations as referred to in article 5, and should describe how they and the outcome of the environmental impact assessment had been incorporated or otherwise addressed in the final decision, in the light of the reasonable alternatives described in the environmental impact assessment documentation” (decision V/4, para. 6 (g), cf. ECE/MP.EIA/IC/2010/2, para. 40).

Post-project analysis

106. “The Committee recommended that Parties include monitoring conditions in their final decisions when applying the Convention” (ECE/MP.EIA/2011/4, para. 53).

Bilateral and multilateral cooperation

107. The Committee has addressed bilateral and multilateral cooperation, as provided for in article 8 of the Convention.

108. “Parties consider developing informal agreements, such as bilateral guidelines, common declarations and memorandums of understanding, in cases where bilateral and multilateral agreements are inappropriate” (decision V/4, cf. ECE/MP.EIA/IC/2010/2, para. 18).

Research programme

109. “The Committee decided to remind Parties of their obligation to exchange the results of research programmes in accordance with article 9, and to encourage them to exchange such results through the mechanisms for the exchange of information under the workplan of the Convention. This obligation should be fulfilled through, among other means, national reporting on the implementation of the Convention” (ECE/MP.EIA/2011/4, para. 55; cf. MP.EIA/WG.1/2004/4, para. 10 and ECE/MP.EIA/IC/2010/2, para. 19).

Reporting

110. The Committee first considered the question of whether there is a legal obligation to report at its second session: “As there is no legal obligation to report, the Committee considered that it cannot review compliance with reporting” (MP.EIA/WG.1/2003/3, para. 6).

111. However, the Meeting of the Parties later adopted an amendment that will provide an obligation to report within the Convention and this led to a change the Committee’s position at its sixth session: “The second amendment to the Convention, adopted at the third meeting of the Parties, provides in article 14 bis an obligation to report. 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).

112. The Meeting of the Parties subsequently decided “that Parties shall complete the questionnaire as a report on their implementation of the Convention, taking note of the obligation to report arising from article 14 bis as adopted by decision III/7, and that a failure to report on implementation might be a compliance matter to be considered by the Implementation Committee” (decision IV/1, para. 8).

113. As regards reporting on public participation related provision the Committee expressed its opinion that “[s]ynergies should be sought with national reporting on implementation of article 6 of the Aarhus Convention (on public participation), given that the corresponding field of application and the membership of the Conventions were each almost identical under the two treaties” (ECE/MP.EIA/2011/4, para. 43 (d)).

The Protocol

114. The Committee considered that the obligation in article 10 of the Protocol to notify potentially affected Parties rests solely with the Party of origin. If, under exceptional circumstances, the Party of origin were to seek the assistance of an intermediary in fulfilling its obligations in that respect, it would retain responsibility for any actions or omissions of the intermediary in that regard. However, article 17 of the Protocol cannot be interpreted as providing an obligation on the secretariat to act as an intermediary in the procedures set out in the Protocol (ECE/MP.EIA/IC/2012/2, para. 17).
