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

Meeting of the Parties to the Convention
on Environmental Impact Assessment in
a Transboundary Context serving as the
Meeting of the Parties to the Protocol on
Strategic Environmental Assessment

Implementation Committee

Fifty-sixth session

Geneva, 2–5 May 2023

Item 4 of the provisional agenda

Findings and recommendations on compliance by Bosnia and Herzegovina with its obligations under the Convention and the Protocol with respect to the construction of Buk Bijela hydropower plant on the Drina River

Prepared by the Implementation Committee

Summary

The present document contains findings and recommendations prepared by the Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment further to the submission by Montenegro concerning compliance by Bosnia and Herzegovina with its obligations under the Convention and the Protocol regarding the construction of Buk Bijela hydropower plant on the Drina River. The Committee finalized at its fifty-fifth session (Geneva (online), 31 January–3 February 2023) the findings and recommendations, taking into account comments and representations from Bosnia and Herzegovina and Montenegro in accordance with paragraph 9 of its structures and functions.^a

In accordance with rule 13 of the operating rules of the Implementation Committee,^b the secretariat issued those findings and recommendations as an official document for the Committee to refer to, and for their transmission to the Parties involved and, subsequently, to the Meeting of the Parties to the Convention at its ninth session (Geneva, 12–15 December 2023) for its consideration and to be taken into account when considering the related draft decision.



^a Available at [https://unece.org/sites/default/files/2021-](https://unece.org/sites/default/files/2021-02/Implementation%20Committee%20structure%20functions%20procedures%20rules.e%202020.pdf)

02/Implementation%20Committee%20structure%20functions%20procedures%20rules.e%202020.pdf.

^b Ibid.

I. Introduction – the Committee’s procedure

1. On 11 December 2020, Montenegro submitted information to the Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment, expressing its concerns about compliance by Bosnia and Herzegovina with its obligations under the Convention and the Protocol in respect of the construction of Buk Bijela hydropower plant on the Drina River. In its submission, Montenegro, among other things, alleged non-compliance by Bosnia and Herzegovina with the Convention, for failing to: notify Montenegro about the proposed activity; give Montenegro the opportunity to participate in the related environmental impact assessment; and provide Montenegro with relevant information at its own initiative. Additionally, Montenegro alleged non-compliance by Bosnia and Herzegovina with the Protocol with respect to the lack of transboundary consultations regarding the planning of the hydro energy system of Upper Drina (including the selection of a strategic partner) that encompassed Buk Bijela, Foča, Paunci and Sutjeska hydropower plants.

2. The submission asserted that Bosnia and Herzegovina had violated articles 2 (1)–(3), and 3–5 of the Espoo Convention and article 10 (1) of the Protocol.

3. On 17 December 2020, the secretariat forwarded the submission with the corroborating information to the focal point of Bosnia and Herzegovina in conformity with paragraph 5 (a) of the Committee’s structure and functions.¹

4. Prior to the submission by Montenegro, the Committee had already sought clarifications from Bosnia and Herzegovina and Montenegro with respect to the construction of Buk Bijela hydropower plant further to information provided jointly by four non-governmental organizations (NGOs) on 15 May 2020 (Aarhus Centar and Centre for Environment in Bosnia and Herzegovina, Green Home and Environmental Movement Ozon in Montenegro).² The Committee had noted the information at its forty-eighth session (Geneva, 1–4 September 2020)³ and approached the two Governments for clarifications. At its forty-ninth session (Geneva (online), 2–5 February 2021),⁴ the Committee had noted the response by Bosnia and Herzegovina, dated 5 January 2021, to its letter of 2 November 2020. Subsequently, in the absence of objections from Bosnia and Herzegovina, the Committee transmitted that response to Montenegro for its comments and observations. The Committee decided to continue to consider the information gathered up to that point under the submission by Montenegro.

5. At its fiftieth session (Geneva, 4–7 May 2021), the Committee began its consideration of the submission, noting the responses by Bosnia and Herzegovina of 5 January and 8 March 2021. The Committee also noted the views provided by Montenegro on 22 March 2021. It asked Montenegro to clarify the scope of its submission, which had also referred to another hydropower plant (Foča), and its concerns regarding the Protocol.

6. The Committee continued its deliberations at its fifty-first session (Geneva, 4–7 October 2021). It noted the response by Montenegro of 10 September 2021 that the scope of

¹ Appendix to decision III/2 (ECE/MP.EIA/6, annex II).

² EIA/IC/INFO/33.

³ ECE/MP.EIA/IC/2020/4, para. 43 (a).

⁴ ECE/MP.EIA/IC/2021/2, para. 35.

its submission was limited to Buk Bijela hydropower plant, and proceeded with requests for additional information from the Parties.⁵

7. Based on the sets of information received from the two Parties, both dated 8 November 2021, the Committee decided by electronic decision-making procedure to invite Bosnia and Herzegovina and Montenegro to its fifty-second session (Geneva, initially scheduled for 1–4 February 2022 but later postponed to 29–31 March 2022) to present information and opinions on the matter under consideration in line with paragraph 9 of its structure and functions. To prepare for the hearing, the Committee also agreed on a list of questions that were submitted to the Parties.

8. On 20 December 2021, the Committee received additional information from Centre for Environment/Friends of the Earth Bosnia and Herzegovina.

9. The two Parties provided written replies to the Committee's questions on 25 March 2022.

10. At its fifty-second session, after examination of the information provided by the Parties and the NGOs, the Committee welcomed the delegations of Bosnia and Herzegovina and Montenegro to the session and invited them to present information and opinions on the matter. It then posed questions to seek clarification on the countries' positions. The Committee welcomed, among other things, the clarifications of Bosnia and Herzegovina, as a Party of origin, regarding the first preparatory act for the Framework Energy Strategy until 2035 and other strategic documents covering Buk Bijela hydropower plant and invited the Party to provide additional information in writing by 6 April 2022.⁶

11. Bosnia and Herzegovina provided additional clarifications on 8 April 2022.

12. The Committee then proceeded with the preparation of its draft findings and recommendations based on the information made available to it. During its fifty-fourth session (Geneva, 4–7 October 2022) it reached an agreement on the main points⁷ and agreed on the text of the draft findings and recommendations by electronic decision-making procedure on 6 December 2022. Upon agreement, the draft was transmitted to the Parties concerned for comments or representations by 13 January 2023, and subsequently finalized by the Committee at its fifty-fifth session (Geneva (online), 31 January–3 February 2023) taking into account the comments made by Bosnia and Herzegovina and Montenegro on 13 and 17 January 2023, respectively.⁸ The findings and recommendations would be referred to in the draft decision on compliance to be submitted to the Meeting of the Parties to the Convention at its ninth session (Geneva, 12–15 December 2023). Any recommendations would also be included in the draft decision itself.

II. Summary of facts, information and issues

13. This section summarizes the main facts, information and issues considered to be relevant to the question of compliance, as presented by the Government of Bosnia and Herzegovina and the Government of Montenegro in their correspondence to the Committee and during the hearing of 30 May 2022 in their responses to the Committee's questions. It also takes account of information submitted to the Committee by the four above-mentioned NGOs.

A. Nature of the activity

14. Buk Bijela hydropower plant and its dam are a proposed activity to be constructed on the upper course of the Drina River, approximately 11.6 km upstream from the town of Foča

⁵ ECE/MP.EIA/IC/2021/6, paras. 32–36.

⁶ ECE/MP.EIA/IC/2022/2, paras. 8–9.

⁷ ECE/MP.EIA/IC/2022/7, paras. 23–24.

⁸ ECE/MP.EIA/IC/2023/2, para. 21.

(Bosnia and Herzegovina) and around 11.5 km downstream from the confluence of the Piva and the Tara Rivers at Šćepan Polje, on the border with Montenegro.

15. The project was first initiated in the 1950s as a joint (Buk Bijela and Piva) project for the Drina River of the Federal People's Republic of Yugoslavia.⁹ During the period 1957–1965, the Buk Bijela hydropower plant project, with a reservoir water level of 550 m above sea level (a.s.l.), was examined by the then-national authorities. However, following the 1965 decision on the construction of Piva hydropower plant, the Buk Bijela hydropower plant project was reviewed and redesigned using a water level of 500 m a.s.l. Piva hydropower plant was built in 1976 on the territory of Montenegro, while Buk Bijela hydropower plant was planned on the territory of Bosnia and Herzegovina as a compensation basin of Piva hydropower plant. In December 2004, Montenegro adopted the Declaration on the Protection of the Tara River along its entire course and withdrew from the joint project.

16. The disputed project, subject to the submission by Montenegro, refers to Buk Bijela (low) hydropower plant with a reservoir water level of 434.0 m a.s.l. (reduced from 500 m a.s.l. according to the previous project plan). Its hydropower potential will belong entirely to Bosnia and Herzegovina. The plan was to construct a gravity concrete dam with a crown elevation of 436.10 m a.s.l. and a maximum construction height of 57.80 m. The width of the dam in the crown was planned to vary between 9.85 m and 15.50 m. The construction of the dam was expected to form a reservoir with a normal water level of 434 m a.s.l. and a total volume of 15.70 million m³. The reservoir, with a length of 11.5 km, would reach, but not cross, the border with Montenegro. The dam, with a total length in the crown of 197.3 m, was designed to contain an overflow and a non-overflow section. According to the project plans, the non-overflow section was expected to be 68.2 m long on the left bank and 33.5 m long on the right bank. All non-overflow lamellas were planned to have a vertical upstream face, while the downstream face would have a slope of 1:0.8.

17. Buk Bijela hydropower plant was planned under a general plan for the use of a hydro energy system in the Upper Drina River that covers a number of hydropower plants including Foča, Paunci and Sutjeska.¹⁰

B. Project rationale

18. In its response to the submission, dated 5 January 2021, Bosnia and Herzegovina stressed that the proposed activity was important for its economy and energy generation. In addition, Buk Bijela plant was necessary for Bosnia and Herzegovina to mitigate the negative effects on the water regime downstream from the operation of Piva hydropower plant. Notably, it stated that: “As a result, in longer periods (especially in the summer), in the bed of the Piva River downstream from the [hydropower plant] ‘Piva’ there may not be enough water. This fact is also important for the Republic of Srpska, since its State border runs along the downstream stretch of the Piva River at a greater length. The second, very unfavourable, effect of the action of the [hydropower plant] ‘Piva’ is peak work without flattening the flow downstream. When the [hydropower plant] enters operation, a head wave with a flow of 240 m³/s is created downstream, which is not favourable when you consider that the inhabitants of Foča, which is located downstream, actively use the banks of the Drina.” Lastly, Bosnia and Herzegovina maintained that normal oscillations of the Drina River going up to 150 cm a day distressed the area even without flooding.

⁹ The Federal People's Republic of Yugoslavia (later known as the Socialist Federal Republic of Yugoslavia), established in 1945, consisted of six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia (including the regions of Kosovo and Vojvodina) and Slovenia. The year 1991, marked the declarations of independence of Croatia and Slovenia, followed, in 1992, by those of Bosnia and Herzegovina, and Macedonia. In 2006, the union of the two remaining republics ended, with the declarations of independence of Montenegro and Serbia.

¹⁰ Letter from Bosnia and Herzegovina to Montenegro, dated 2 October 2012.

C. Interlinkages with other international agreements

19. In its correspondence to the Committee, Montenegro referred to a letter from the United Nations Educational, Scientific and Cultural Organization (UNESCO), dated 4 November 2021, expressing the concern of the World Heritage Committee about the revival of the Buk Bijela hydroelectric power plant project in Bosnia and Herzegovina and its potential negative impacts on the attributes of Outstanding Universal Value of Durmitor National Park, such as the rich fish fauna of the Tara River. UNESCO pointed out that Bosnia and Herzegovina, as a State party and signatory to the World Heritage Convention, had obligations thereunder and in particular under the Operational Guidelines for the Implementation of the World Heritage Convention. According to those provisions and, in particular, to paragraph 118 bis of the Operational Guidelines “States parties shall ensure that Environmental Impact Assessments, Heritage Impact Assessments, and/or Strategic Environmental Assessments be carried out as a prerequisite for development projects and activities that are planned for implementation within or around a World Heritage property”.¹¹ The Tara River basin has also been part of the UNESCO Man and the Biosphere Programme since 1977.

D. Information about significant adverse transboundary impact

20. In the view of Montenegro, a significant adverse environmental impact of the proposed activity on its environment was likely. It alleged that the operation of the dam to be constructed under the Buk Bijela hydropower plant project would alter the existing hydrological and morphological characteristics of the Drina River system, leading to a decrease in water velocity, an increase in depth, changes in sediment transport regime and, consequently, changes in the riverbed characteristics. Such changes would inevitably result in changes in the aquatic organism communities’ structure. Montenegro also projected the following adverse impacts:

- (a) Encroaching of the reservoir onto the territory of Montenegro during both its normal and maximum elevation levels;
- (b) Changes in water temperature and oxygen concentration;
- (c) Inability of fish in the Tara River to reach their spawning grounds;
- (d) A subsequent decline in fish stock levels, including for the endangered Danube salmon.

21. According to Montenegro, the Tara River, in the canyon area, could provide very few habitats for the spawning and breeding of some of the most important fish species. This was due to the highly turbulent river system and the limited number of accessible tributaries. Therefore, fish species such as huchen, grayling and common nase needed to migrate outside the canyon to reach a favourable spawning ground; or else, they could not reproduce. Montenegro explained that no studies had been made on the migrations of these fish species in these parts of the basin by its expert group.

22. The NGOs alleged that the mitigation measures described in the environmental impact assessment documentation, such as stocking or the construction of a hatchery, were rather obsolete and could not serve to replace the ecological functionality or sustainability of the system. “For the Buk Bijela hydropower facility, with a dam reaching nearly 58 [m] in height, it is extremely difficult to imagine any type of functional fish pass facility, to serve both the upstream and downstream migratory habitats of species such as Danube salmon, nase or

¹¹ United Nations Educational, Scientific and Cultural Organization (UNESCO)/World Heritage Convention, document WHC.21/01.

European grayling among others”.¹² In fact, the authors of the study cited by the NGOs¹³ stressed that they did not know of any such facility in all of Europe that could accommodate the passage of such species over a dam of this height.

23. Bosnia and Herzegovina in turn claimed that, according to the environmental impact assessment documentation prepared by it in 2012, a significant adverse transboundary impact from the activity – including from the necessary preparatory works, its construction and operation – on the environment of Montenegro and its protected areas was not likely. In the view of Bosnia and Herzegovina, the activity would not have any hydraulic impact on the Tara and Piva Rivers or any impact on their water quality. It recognized, however, some adverse impact on migratory species and envisioned measures to minimize that impact. The planned protection measures for the Danube salmon species implied the construction of facilities within the dam of Buk Bijela hydropower plant, which should enable the longitudinal migration of fish from the lower to the upper water bodies, including a corrective measure to control the percentage of fish species by restocking the main and side watercourses. Bosnia and Herzegovina pointed out that the environmental permit required the investor to construct fish paths and to rehabilitate the existing “Foča” fish-farm for artificial restocking to mitigate the impacts of the activity on the fish stock.¹⁴

24. With regard to the impact of the activity on groundwater, Bosnia and Herzegovina explained that the reservoir area was surrounded by watertight rocks (it was made up of Palaeozoic and Lower Triassic rocks (quartz conglomerates and sandstones) with Middle Triassic limestones occurring in some isolated spots). Taking into account those characteristics of the rock masses, along with the position and size of the planned reservoir, no significant adverse impact on the groundwater regime affecting water users was expected.

E. Licensing and environmental impact assessment procedure

1. Environmental impact assessment procedure of 2012

25. On 18 September 2012, in the absence of the notification from Bosnia and Herzegovina, Montenegro requested Bosnia and Herzegovina to exchange information regarding the construction of Foča hydropower plant for the purposes of holding discussions on whether a significant adverse transboundary environmental impact from the activity was likely. In its communication, Montenegro had affirmed that, to its knowledge, consultations with the public of Bosnia and Herzegovina had taken place on 23 August 2012. Bosnia and Herzegovina also confirmed that said consultations had been held in the town of Foča.

26. In its response to Montenegro, dated 2 October 2012, Bosnia and Herzegovina stated that, on 20 April 2011, it had adopted a decision on the selection of the strategic partner for the Hydro Energy System of Upper Drina project, which included four hydropower plants: Buk Bijela, Foča, Paunci and Sutjeska. It also asserted that, according to its national environmental impact assessment procedures, a significant adverse transboundary environmental impact from Buk Bijela and Foča hydropower plants was not likely. However, in a spirit of cooperation, it was ready to make related documents available to Montenegro and to consider and present documents relating to the assessment of the impact of the two projects on the environment.

27. On 17 October 2012, Montenegro confirmed its interest and willingness to take part in “direct consultations” with the relevant authorities of Bosnia and Herzegovina regarding both proposed activities, also proposing to organize in-person consultations in Banja Luka and inviting Bosnia and Herzegovina to set a date for those consultations.

¹² Letter from non-governmental organizations dated 15 May 2020, referring to Steven Weiss (Institute of Biology, Department of Zoology, University of Graz, Austria) and Predrag Simonović (Faculty of Biology, University of Belgrade), “Critical comments on the description of, and impacts on the fauna and flora and aquatic systems in the environmental report for the Buk Bijela hydropower plant” (20 April 2020).

¹³ Weiss and Simonović, “Critical comments”.

¹⁴ Answers from Bosnia and Herzegovina dated 25 March 2022 to the Implementation Committee’s non-exhaustive list of questions, question No. 13.

28. By its letter, dated 27 September 2012,¹⁵ the Ministry of Spatial Planning, Construction and Ecology of Bosnia and Herzegovina transmitted to Montenegro information on activities conducted as a part of the environmental impact assessment procedure regarding Buk Bijela and Foča hydropower plants, including explanations from the institutions that had developed the draft environmental impact assessment for both hydropower plants.¹⁶ It maintained that a significant adverse transboundary environmental impact from the activities was not likely and considered that, in such circumstances, the application of the subsequent steps of the Convention, including regarding the environmental impact assessment documentation (art. 4 of, and appendix II to, the Convention) would not be required.

29. On 30 November 2012,¹⁷ the representatives of relevant authorities from Bosnia and Herzegovina and Montenegro held initial discussions regarding the two proposed activities. The Parties agreed to continue their communication on the matter further to the outcome of public consultations to be held in Montenegro and the analysis of the likely impacts from the planned activities on the environment of Montenegro to be carried out by an expert commission to be established by Montenegro.

30. Montenegro initiated consultations with its public on 5 January 2013. The environmental impact assessment documentation was made available to the public for comments by 15 February 2013 on the websites of the Environmental Protection Agency¹⁸ and the Ministry of Sustainable Development and Tourism of Montenegro and at the premises of the Environmental Protection Agency/Arhus Centre Podgorica. Public hearings scheduled to take place on 12 February 2013 in Plužine, Montenegro, did not take place because weather conditions prevented representatives of Bosnia and Herzegovina from attending.¹⁹ No information was made available to the Committee about the rescheduling of the public hearings.

31. The expert commission set up by Montenegro delivered to the Ministry of Sustainable Development and Tourism of Montenegro its report on the likely impacts of the two planned hydropower plants on the environment of Montenegro. However, the report was not submitted to Bosnia and Herzegovina, as, according to Montenegro, it understood from external sources that the investor had withdrawn from the project and, consequently, the permitting procedure had been halted.²⁰ According to the information made available to the Committee, the Parties did not continue their information exchange regarding the activities any further. Bosnia and Herzegovina had not requested any official opinion from Montenegro about the report of the expert commission. On 28 February 2013, in the absence of comments or objections from Montenegro after the deadline for public consultations had expired on 15 February 2013, the Ministry of Spatial Planning, Construction and Ecology of Republika Srpska adopted a decision approving the Environmental Impact Study, which ended the environmental impact assessment procedure for Buk Bijela hydropower plant. It did not inform Montenegro about the completion of the permitting procedure and did not share any information on the final decision regarding the project.

2. Environmental permit procedure carried out in 2019

32. According to the information made available to the Committee, by letter dated 11 July 2019, Bosnia and Herzegovina (the Ministry of Spatial Planning, Construction and Ecology of Republika Srpska) informed Montenegro (the Ministry of Sustainable Development and Tourism) that the environmental permit for the activity issued in 2013 based on the environmental impact assessment procedure carried out by Bosnia and Herzegovina in

¹⁵ Annex to letter from the Ministry of Foreign Affairs of Montenegro to the Ministry of Sustainable Development and Tourism of Montenegro dated 26 October 2012.

¹⁶ Attachments to the letter dated 27 September 2012 from the Ministry of Spatial Planning, Construction and Ecology of Bosnia and Herzegovina to Montenegro.

¹⁷ Date was established further to the letter from Montenegro to Bosnia and Herzegovina, dated 6 November 2012.

¹⁸ See www.epa.org.me, section “Dokumenta” (Montenegrin only).

¹⁹ Letter from Bosnia and Herzegovina to the Implementation Committee dated 5 January 2021, annex, p. 25.

²⁰ Submission by Montenegro dated 1 December 2020, received on 11 December 2020, p. 8.

2012/2013 had expired on 22 May 2018, as the investor had failed to request its renewal within the legal period. Subsequently, the Ministry of Spatial Planning, Construction and Ecology of Republika Srpska had extended the validity of the permit for the construction of Buk Bijela hydropower. However, on 19 May 2019, the district court in Banja Luka had annulled the renewed permit, and a new permit procedure had been initiated.

33. Taking into account the fact that no major changes had been introduced to the project since 2013 when the initial permit was issued, including with regard to its location, characteristics and technical parameters,²¹ Bosnia and Herzegovina requested Montenegro to “give the consent of your institution, so that the obligations set by the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) could be fulfilled in the procedure of the issuing of a new ecological permit for the Buk Bijela hydropower plant, based on the environmental impact assessment conducted in 2012”. Montenegro was requested to respond within 10 days from the date of receipt of the letter.

34. Montenegro responded to Bosnia and Herzegovina on 23 July 2019, indicating that it considered itself an affected Party with respect to the proposed activity, expressing its interest in taking part in the ongoing procedure, and requesting Bosnia and Herzegovina to provide it with the necessary environmental impact assessment documentation. It also indicated that the time frame for Montenegro to respond should not be shorter than 30 days. In a letter dated 1 August 2019, Bosnia and Herzegovina requested Montenegro to respond urgently to its letter of 11 July 2019. Montenegro reiterated its request for the conduct of a transboundary environmental procedure, by its letter dated 2 September 2019. On 4 November 2019, Montenegro requested Bosnia and Herzegovina to deliver the environmental impact assessment documentation as a matter of urgency. On 10 February 2020, Bosnia and Herzegovina issued the environmental permit for Buk Bijela hydropower plant.

F. Strategic environmental assessment

35. In its submission and in the further clarifications it provided on 7 July 2021 and 22 March 2022, Montenegro asserted that, in its view, Bosnia and Herzegovina did not fulfil the requirements of the Protocol with respect to a decision of 20 April 2011 on the selection of a strategic partner for the Hydro Energy System of Upper Drina project that encompasses Buk Bijela, Foča, Paunci and Sutjeska hydropower plants. In the view of Montenegro, Buk Bijela plant was part of a general plan for the usage of the hydro energy potential of the Drina River that fell under the scope of the Protocol, and a transboundary strategic environmental assessment should be conducted, including transboundary consultations in accordance with article 10 of the Protocol, to assess the cumulative and synergistic effects of the power plants. Montenegro added, in its letter dated 22 March 2022, that Buk Bijela power plant was also part of the Energy Development Strategy of Bosnia and Herzegovina until 2035.

36. According to the information from Bosnia and Herzegovina, dated 25 March 2022, the planned hydropower plant system on the Drina River, “the Gornja Drina hydropower system”, envisaged the construction of three dams – Buk Bijela, Foča and Paunci (Sutjeska was not included) – on the upper course of the Drina River that were seen as one system. Buk Bijela hydropower plant, located the furthest upstream, would contribute to the two downstream plants Foča and Paunci with a lower storage capacity. Bosnia and Herzegovina stated that the Buk Bijela project was included in the 2025 Spatial Plan of Republika Srpska and was part of the Energy Development Strategy of Bosnia and Herzegovina until 2035. According to Bosnia and Herzegovina, a strategic assessment has been conducted since 2012, when a chapter on strategic assessment was introduced under the Law on Environmental Protection. Bosnia and Herzegovina recalled that it had ratified the Protocol on Strategic Environmental Assessment in 2017.

²¹ Letter from Bosnia and Herzegovina to Montenegro dated 11 July 2019.

G. Bilateral cooperation

37. According to the sets of information from Montenegro and Bosnia and Herzegovina, both dated 8 November 2021, at the request of Montenegro, the Parties concerned initiated discussions on Buk Bijela hydropower plant. In this context, the Parties concerned convened two meetings (Trebinje, Bosnia and Herzegovina, 21 July and 27–28 September 2021); exchanged information and established a working group (“Working Group for resolving open issues with Montenegro regarding the construction of Buk Bijela hydropower plant” – or joint working group) to: review prepared technical documentation for the activity; analyse the proposed operation conditions; and address other open issues. In addition, with inputs from the Energy Community, they considered the preparation of a project proposal related to hydrological and geodetic works on the Piva, Tara and Drina Rivers. Furthermore, the two Parties discussed possibilities for representatives of the authorities from Montenegro to visit several activity-related sites. The joint working group met on 28 September 2021. Following this meeting, the joint working group prepared a programme of hydrological and geodetic works on the Piva, Tara and Drina Rivers and both Parties designated participants to take part in the programme.

III. Consideration and evaluation

38. The Committee gathered information allowing it to identify in a sufficiently precise manner the main facts and events, and to evaluate the application of the Convention.

A. Legal basis

39. Bosnia and Herzegovina deposited its instrument of accession to the Convention on 14 December 2009 and the Convention entered into force 90 days later, on 14 March 2010. It deposited its instrument of ratification of the Protocol on 20 July 2017, and the Protocol entered into force 90 days after, on 18 October 2017. Montenegro deposited its instrument of accession to the Convention on 9 July 2009, and the Convention entered into force 90 days later, on 7 October 2009. Montenegro succeeded to the Protocol on 23 October 2006 and ratified it on 2 November 2009. The Protocol entered into force 90 days later, on 31 January 2010.

40. Based on the information made available to it, the Committee examined Buk Bijela hydropower plant with the dam as an activity under item 11 of appendix I to the Convention “Large dams and reservoirs”.

41. In the context of this submission, the Committee examined whether the activity could be considered as having likely significant adverse transboundary impact on the territory of Montenegro and whether the notification was necessary under articles 2 (4) and 3 (1) of the Convention.

42. In addition, the Committee examined articles 2–6 of the Convention and article 10 of the Protocol.

B. Main issues

1. Significant adverse transboundary impact and notification (arts. 2 (4) and 3 (1))

43. The Committee observed that there was no disagreement amongst the Parties that the proposed activity, considering its technical characteristics, could be classified as an activity covered by item 11 of appendix I to the Convention “Large dams and reservoirs”.

44. The Committee noted that the Parties concerned disagreed essentially about the likelihood of a significant transboundary impact (see paras. 20–24 above).

45. The Committee held that the analysis of whether an activity was likely to cause a significant adverse transboundary impact should focus on the proposed activity’s typical effects and risks for the environment. This analysis did not take into account proposed nor

described mitigating or compensatory measures that could or would be set as conditions for the activity.

46. Considering its potential influence on the water regime and the environment, above all for migrating fish species, in the Drina River and its tributaries on Montenegrin territory, the Committee was of the view that the planned activity at Buk Bijela hydropower plant was likely to cause a significant adverse transboundary impact.

47. On the basis of paragraphs 43–46 above, the Committee considered that Bosnia and Herzegovina was obliged under article 2 (4) of the Convention to notify Montenegro, in accordance with article 3 thereof, of the plans for building Buk Bijela hydropower plant and to invite Montenegro to take part in the environmental impact assessment procedure.

2. Environmental impact assessment procedure in 2012

48. The Committee noted that Montenegro had first learned about the planned activity from other sources than the competent authorities of Bosnia and Herzegovina. In the absence of a notification, Montenegro had contacted Bosnia and Herzegovina, after which it was provided with relevant information and environmental impact assessment documentation and the Parties concerned held initial discussions regarding Buk Bijela hydropower plant.

49. Subsequently, however, as described in paragraphs 29–31 above, no public hearings took place in Montenegro within the expected public consultation period that extended until February 2013 and, after the end of that period, Montenegro did not officially respond to Bosnia and Herzegovina regarding the proposed activity.

50. The Committee took note of the statement by Bosnia and Herzegovina during the hearing to the effect that it was unaware of the information alleging that the investor had withdrawn the application for a permit, which was not the case. There were no grounds for the Committee to believe that this false information had originated from Bosnia and Herzegovina. At the same time, the Committee noted that Bosnia and Herzegovina did not remind Montenegro to express its opinion on the proposed activity before proceeding with the decision-making, as it should have, considering that Montenegro had shown a strong interest in the activity previously, having proactively asked Bosnia and Herzegovina to be consulted.

51. As indicated in the previous section, the Committee considered that Bosnia and Herzegovina should have notified Montenegro in accordance with article 3 of the Convention (see para. 47 above). However, given that, subsequently, bilateral consultations and exchange of information took place (paras. 29 and 48 above), the Committee was of the view that such steps remedied the initial breach of the Convention. Consequently, the Committee considered that the environmental impact assessment procedure of 2012–2013 and the subsequent final decision (the permit issued) in 2013 should be recognized as valid under the Convention.

3. Relevance of a past environmental impact assessment procedure for a new environmental permit

52. The Committee then deliberated whether the environmental impact assessment conducted in 2012/2013 for authorizing the proposed activity could be the basis for a permit renewal procedure. In the Committee's view, that could be the case provided that the activity that was subject to the environmental impact assessment and the scope of the new permit did not substantially differ. According to the information available to the Committee, the Buk Bijela project had not experienced a change that would qualify as a "major change" according to article 1 (v) of the Convention and that would require a new environmental impact assessment procedure. In the view of the Committee, an alteration of a project required a new transboundary environmental impact assessment only if there were substantial changes to the nature of the project or its location.

53. The Committee understood that, in the view of Bosnia and Herzegovina, the project for the construction of Buk Bijela hydropower plant had been delayed but had not undergone any major changes since 2012, such as location, project characteristics or installed power, which led the Party of origin to the conclusion that the renewal of the permit for the activity

in 2019 did not require a new transboundary environmental impact assessment, including notification, consultation and preparation of new environmental impact assessment documentation.

54. The Committee took note of the claims of Montenegro that the fact that seven years had passed between the environmental impact assessment procedure started in 2012 and the new permit procedure in 2019 demonstrated that there was no continuity between the two procedures, and, in the view of Montenegro, its request to initiate a new transboundary environmental impact assessment between the Parties concerned was justified.²²

55. The Committee considered that a longer lapse of time in between the environmental impact assessment procedure and the granting of an environmental permit in itself could entail new considerations, for example, as regards new technological developments. New knowledge might shift the views regarding permissibility of an activity or the conditions under which it might be conducted. Furthermore, changes in the environment might have occurred that were not covered by the initial environmental impact assessment and would therefore require a new assessment. On the other hand, the Committee pointed out that the mere fact that seven years had passed since the environmental impact assessment was conducted did not in itself mean that the environmental impact assessment should be regarded as obsolete or void. Therefore, the environmental impact assessment of 2012 could, in principle, be the basis for a new permit procedure.

56. The Committee considered that for reasons, *inter alia*, of legal certainty, deficiencies in a past environmental impact assessment procedure must be of a certain magnitude to disqualify the use of its outcomes for a permit renewal and/or be combined with factors such as the emergence of new information or technologies. For the Committee, deficiencies of an environmental impact assessment do not make it non-existing. In the view of the Committee, unless a past environmental assessment procedure was carried out in breach of the Convention, the mere existence of factors that could or should have been analysed at that time, did not automatically impose the conduct of a new environmental impact assessment procedure.

57. The Committee noted allegations from Montenegro and the NGOs that the activity's transboundary impacts were not properly analysed in the environmental impact assessment, in particular with respect to its possible negative effects on migrating fish species and on protected areas in Montenegro.

58. The Committee noted the claim by Montenegro that the impact from the activity on its flora and fauna had not been completely understood, and that account had not been taken of additional up-to-date information made available in the meantime that would be important to consider prior to the final decision on the proposed activity. Furthermore, Montenegro referred to the high environmental values and vulnerability of the Tara River basin, protected under the UNESCO Man and the Biosphere Programme and as a World Heritage site (encompassing the territories of Durmitor National Park and Biogradska Gora National Park).

59. The Committee noted the counterargument by Bosnia and Herzegovina that the developer had analysed any possible changes to the proposed activity but concluded that there were none that would have required a new environmental impact assessment.

60. According to the information available to the Committee, Bosnia and Herzegovina had considered the activity's impacts on the territory of Montenegro during the environmental impact assessment procedure. However, considering the alleged deficiencies in that procedure, the Committee felt that the investigation of the activity's transboundary impacts seemed to have been insufficient. It also pointed out that the recent establishment by the concerned Parties of a working group ("Working Group for resolving open issues with Montenegro regarding the construction of Buk Bijela hydropower plant") to analyse the activity's transboundary impacts further indicated that the original investigations had been insufficient in this regard.

²² Submission by Montenegro dated 1 December 2020, p. 6.

61. However, although the Committee identified shortcomings in the 2012 environmental impact assessment procedure, it lacked clear evidence that these shortcomings were so substantial that they would nullify it. Also, the Committee considered that there was no clear evidence that at least the major part of the alleged shortcomings of the environmental impact assessment could not have been clarified and analysed at that time.

62. Even if new knowledge and other alleged factors could have shifted the perspectives on possible cross-border environmental risks since 2012, in this case, the Committee failed to see evidence of sufficient weight to conclude that Bosnia and Herzegovina, for that reason alone, had an obligation to conduct a new environmental impact assessment procedure prior to adopting the new environmental permit in 2019.

4. 2019 procedure

63. The Committee noted that no explicit allegations regarding significant changes to the project, as covered by the 2013 licence, as opposed to the 2019 licence, were brought to its attention. Nor had the Committee received any evidence contradicting the view of Bosnia and Herzegovina that there has been no significant change of the proposed activity.

64. The Committee noted that, in 2019, prior to taking a final decision on the activity (on the issuance of the new permit) Bosnia and Herzegovina had asked Montenegro to give its consent, giving Montenegro 10 days to respond (see para. 33 above). The Committee saw that the purpose of this letter was for Bosnia and Herzegovina to receive an opinion on the transboundary procedure. In the view of the Committee, the letter cannot be understood as a notification in accordance with article 3, or as resuming the previous consultations between the concerned Parties, as it did not give an opportunity for Montenegro to participate in a new environmental impact assessment procedure.

65. The Committee stated that, for the purposes of notification under article 3, a time-limit of only 10 days for the affected Party's response would not be acceptable, considering the complexity of the project subject to the proceedings, irrespective of any possibility to request an extension of the initial time limit. It estimated that, in the present case, three weeks, as a minimum, would have been required for Montenegro to examine the issue and provide its views. However, as the Committee did not consider the communication with Montenegro to be a notification under article 3 but to have served other purposes that fell outside the transboundary environmental impact assessment procedure according to the Convention, the Committee did not further analyse that procedure and its timeliness.

5. Procedure under article 3 (7) of the Convention

66. Referring to the Committee's considerations regarding the 2012 and 2019 procedures, the Committee noted that article 3 (7) is not a means to reopen environmental impact assessment procedures that have already been closed, provided that these procedures are regarded as having been conducted in compliance with the Convention. Furthermore, and based on the documentation made available to it, the Committee could not find any evidence that Montenegro had initiated a procedure under article 3 (7) of the Convention and fulfilled its formal requirements. Notably, in its request to participate in the transboundary procedure, Montenegro did not refer to article 3 (7) or specify explicitly that, in the absence of a notification by a certain indicated date, it wished to exchange information on whether a significant impact was likely.

6. Bilateral cooperation and the final decision under article 6 of the Convention

67. For an application in the spirit of the Convention, the Committee underlined the importance of an open and continuous dialogue between the Parties. The confusion and misunderstandings that had occurred in this matter between the concerned Parties, such as the false impression of Montenegro that the project had been withdrawn in 2013, could easily have been avoided through bilateral contacts, by seeking clarifications from the other Party.

68. Considering that the concerned Parties had been in contact since 2012, and that Montenegro had demonstrated a strong interest in the project, the sudden absence of a response from Montenegro, in the Committee's view, could have prompted Bosnia and Herzegovina to contact Montenegro and enquire about the outcome of the public consultation

in February 2013 and the report of the expert commission. In the absence of comments or objections from Montenegro after the deadline for public consultations had expired on 15 February 2013, Bosnia and Herzegovina completed its environmental impact assessment procedure for Buk Bijela hydropower plant, and a permit was issued. At the same time, being aware of the importance for Bosnia and Herzegovina of the planned project, Montenegro could have made efforts to clarify the situation and not remain inactive.

69. On the basis of the above, the Committee considered that, according to application *mutatis mutandis* for this situation of article 3 (4) of the Convention, Bosnia and Herzegovina no longer had any formal obligations under the Convention to inform Montenegro of the final decision according to article 6 of the Convention. However, as Bosnia and Herzegovina had entered into transboundary consultations with Montenegro, informing Montenegro of the final decision would have been expected in line with the application in good faith of the Convention. As a result, Montenegro was not aware of the fact that the project had been approved and permitted.

70. The Committee welcomed the fact that, subsequently and as a result of a commenced bilateral cooperation, in 2021 a joint working group with representatives from both countries had been established to evaluate whether there would be any impact of the planned project on Montenegrin territory.

71. The Committee noted the statement by Bosnia and Herzegovina during the hearing that the outcome of the joint working group analyses might affect which conditions the project would be bound by and that, subsequently, new conditions might be decided for the activity.

7. Contested strategic environmental assessment procedure

72. In order to assess the applicability of the Protocol on the activity by Bosnia and Herzegovina, the Committee considered article 24 (3)–(4) of the Protocol, recalling that Bosnia and Herzegovina had deposited its instrument of ratification of the Protocol on 20 July 2017, and the Protocol had entered into force on 18 October 2017.

73. The Committee took note of a letter by Bosnia and Herzegovina to Montenegro, dated 2 October 2012, which stated that Bosnia and Herzegovina had adopted a decision on the selection of a strategic partner for the project of the Upper Drina hydro energy system encompassing four hydropower plants (Buk Bijela, Foča, Paunci and Sutjeska). The Committee further noted subsequent information by Montenegro, referring to the “Framework Energy Strategy until 2035” of Bosnia and Herzegovina.

74. According to information provided by Bosnia and Herzegovina to the Committee, in 2012, Bosnia and Herzegovina adopted the Energy Strategy until 2030. In 2014, activities on the preparation of the Framework Energy Strategy until 2035 commenced, which was subsequently adopted on 1 June 2018.

75. At the time of commencing the procedure to adopt the Framework Energy Strategy until 2035, in 2014, Bosnia and Herzegovina was not a Party to the Protocol: further to the ratification of the Protocol by Bosnia and Herzegovina, on 20 July 2017, the treaty had entered into force for the country on 18 October 2017, four years after the initiation of the Strategy. Consequently, in the view of the Committee, Bosnia and Herzegovina was not bound by the provisions of the Protocol during the preparations of that Strategy, or by other strategic documents covering Buk Bijela hydropower plant.

IV. Findings

76. Having considered the above, the Committee adopted the following findings, with a view to bringing them to the attention of the Meeting of the Parties for formal adoption in accordance with paragraph 13 of the appendix to decision III/2 (ECE/MP.EIA/6).

1. Nature of the proposed activity under the Convention (art. 1 (v), in conjunction with appendix I)

77. The Committee found that the construction of Buk Bijela hydropower plant was a proposed activity under item 11 of appendix I to the Convention “Large dams and reservoirs” and was consequently subject to the Convention.

2. Significant adverse transboundary impact and notification (arts. 2 (4) and 3 (1))

78. Considering its potential influence on the water regime and the environment, above all for migrating fish species, in the Drina River and its tributaries on Montenegrin territory, the Committee found that the planned activity at Buk Bijela hydropower plant was likely to cause a significant adverse transboundary impact.

79. The Committee further found that Bosnia and Herzegovina had had an obligation under article 2 of the Convention to notify Montenegro on the planned building of Buk Bijela hydropower plant and to offer the possibility for Montenegro to take part in the environmental impact assessment procedure in 2012. By not notifying Montenegro regarding the activity, Bosnia and Herzegovina had failed to fulfil its obligations under articles 2 (4) and 3 (1) of the Convention.

3. Environmental impact assessment procedure in 2012

80. The Committee found that, although Bosnia and Herzegovina was in non-compliance with its obligations under the Convention for not notifying Montenegro, the fact that the subsequent cooperation and exchanges of information at the time seemed satisfactory to both Parties remedied the initial breach of the Convention and would not as such deem the following procedure to be in non-compliance with the Convention.

81. The Committee further found that, despite the shortcomings of the environmental impact assessment procedure conducted in 2012–2013 regarding the investigation of transboundary effects, most of the alleged shortcomings in the procedure had been clarified and analysed at that time. Hence, the Committee found that the environmental impact assessment procedure finalized in 2013, as such, should not be regarded as being in breach of the Convention and could be taken in account in procedures for subsequent permit decisions.

82. The Committee found that Bosnia and Herzegovina was in compliance with articles 4 and 5 of the Convention.

4. 2019 procedure

83. The Committee found that there had not been a major change between the activity covered by the environmental impact assessment approved in 2013 and the scope of the new permit according to article 1 (v) of the Convention. Furthermore, the Committee was not presented with evidence on changes in the environment or in other circumstances that would have implied that the outcomes of the 2013 environmental impact assessment should be regarded as obsolete for the purposes of the new permitting procedure. Thus, regarding the decision to permit the activity in 2019, the Committee found that it was justified for Bosnia Herzegovina to have adhered to the environmental impact assessment procedure carried out in 2012–2013.

84. The Committee found that Bosnia and Herzegovina had not been obliged to conduct a new environmental impact assessment before issuing a new environmental permit in 2019 and, consequently, it did not fail to comply with its obligations under articles 2 (2)–(3) and 4 (1) of the Convention.

5. Procedure under article 3 (7) of the Convention

85. The Committee also found that article 3 (7) was not applicable to reopening the procedure for the already adopted decision approving the Environmental Impact Study for Buk Bijela hydropower plant. Furthermore, the Parties concerned did not appropriately initiate and/or apply article 3 (7) of the Convention governing exchange of information, in the absence of the notification, for the purposes of holding discussions on whether there was

likely to be a significant adverse transboundary impact of the activity of Buk Bijela hydropower plant. This did not constitute non-compliance with the Convention.

6. Final decision (art. 6 (1))

86. The Committee found, in application of article 3 (4) of the Convention *mutatis mutandis*, that, in the absence of a response by Montenegro after the end of the public consultation period in February 2013, Bosnia and Herzegovina no longer had a formal obligation to inform Montenegro of its final decision on the proposed activity and did not breach article 6 (1). The fact that Montenegro erroneously believed that the investor had withdrawn from the project and the permitting procedure had been halted did not alter the Committee's finding.

87. The Committee found, however, that despite the absence of an obligation to do so, informing Montenegro about the final decision would have constituted good practice, demonstrating the good faith of Bosnia and Herzegovina in applying the Convention.

7. Contested strategic environmental assessment procedure

88. As the Protocol entered into force for Bosnia and Herzegovina after the first preparatory act for the procedure to adopt the Framework Energy Strategy until 2035 and other strategic documents covering Buk Bijela hydropower plant, the Committee found that Bosnia and Herzegovina was not bound by its obligations.

V. Recommendations

89. The Committee recommended that the Meeting of the Parties:

(a) Endorse the findings of the Implementation Committee that:

(i) By not notifying Montenegro regarding the activity early in the 2012 procedure, Bosnia and Herzegovina failed to fulfil its obligations under articles 2 (4) and 3 (1) of the Convention;

(ii) The 2012–2013 environmental impact assessment was still deemed valid for the issuance of a new permit in 2019;

(iii) Following the above (para. 89 (a) (ii)), Bosnia and Herzegovina was not obliged to conduct a new environmental impact assessment before issuing a new permit in 2019, and, therefore it had not failed to comply with its obligations under articles 2 (2)–(3) and 4 (1) of the Convention;

(iv) Bosnia and Herzegovina was not in non-compliance with its obligations under the Protocol, as the Protocol had entered into force for it only after the start of the procedure for the adoption of plans or programmes for the energy sector that include Buk Bijela hydropower plant;

(b) Welcome the fact that the Parties entered into bilateral cooperation to address some of the disputed issues and recommend that, in the future, the Parties broaden the scope of that cooperation to cover issues of a more general focus;

(c) Also welcome the establishment of a joint working group as a result of the bilateral cooperation, not only for this project but also for future proposed activities, to enhance trust and understanding between the Parties;

(d) Recommend that, as part of its deliberations, the joint working group also address fish paths and other possible solutions to facilitate the migration of fish, given the importance of this subject for the proposed activity and the dispute between the concerned Parties.