I SUMMARY OF FACTS, INFORMATION AND ISSUES

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 (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. The construction of Buk Bijela hydropower plant was a proposed activity under item 11 of appendix I to the Convention “Large dams and reservoirs” of the Espoo Convention.

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, alleged non-compliance by Bosnia and Herzegovina with the Convention, for failing to:

1) notify Montenegro about the proposed activity;
2) give Montenegro the opportunity to participate in the related environmental impact assessment; and
3) provide Montenegro with relevant information at its own initiative.

Prior the submission by Montenegro, in respect to the proposed activity, the Committee had received submission 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) expressing its concerns about compliance by Bosnia and Herzegovina with its obligations under the Convention.

Committee gathered information from Parties concerned and at its fiftieth session (Geneva, 4–7 May 2021), the Committee began its consideration of the submission. During its fifty-fourth session (Geneva, 4–7 October 2022) Committee reached an agreement on the main points 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, 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. 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 ANALYSIS OF CONSIDERATION AND EVALUATION, FINDINGS AND RECOMMENDATIONS
Montenegro was explaining the process in detail and regret that Montenegro’s submission, comments and reflections on draft findings and recommendations were not taken properly into account, when considering the case:

1. **Transboundary procedure conducted in 2012/13 was in non-compliance with Espoo Convention**
2. **New environmental impact assessment procedure, which started in 2019 required a new transboundary procedure**

In addition, it is worrying that Implementation Committee did not take properly into account the following facts:

1. The quality of EIA documentation from 2012 and a lack of data and transboundary impacts: the activity’s transboundary impacts were not properly analyzed in the environmental impact assessment, in particular with respect to its possible negative effects on environment of Montenegro, such as:
   - **(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) Migration of fish species and 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.**
2. Possible impacts on protected areas - 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),
4. Montenegro was not given the opportunity to take part in a new procedure in 2019 in accordance with Espoo Convention (relevant institution/s and public),
5. Validity period of the environmental permit (2012/13).

The environmental permit for the activity issued in 2013 based on the environmental impact assessment procedure carried out by Bosnia and Herzegovina in 2012/2013 had expired on 22 May 2018. **New environmental permit issued in 2019 did not represent renewal of old**
environmental impact assessment procedure. This was legally confirmed by the district court in Banja Luka, Rebublika Srpska, Bosnia and Herzegovina. Therefore, the new EIA procedure should be the matter of a new transboundary procedure.

Having this said, it is reasonable to raise the question what kind of message Implementation Committee has sent to the Contracting Parties in respect to the application of the Espoo Convention. Montenegro believes that some findings and recommendations made by Implementation Committee may harmfully influence future transboundary procedures in application of the Espoo Convention.

Therefore, we kindly ask Secretariat of the Espoo Convention to transmit this letter to all Contracting Parties to consider the proposed finalized Implementation Committee findings and recommendations at the Working group and invite Implementation Committee to reconsider the Implementation’s Committee findings and recommendations and to take into account these comments made by Montenegro, prior to adoption of Decision on compliance to be submitted to the Meeting of the Parties to the Convention at its ninth session.

In accordance with Montenegro’s views on findings and recommendations,

In section V. Recommendations, page 15, point 89. it should be changed and stated as follows:

(ii) The 2012–2013 environmental impact assessment was not still deemed valid for the issuance of a new permit in 2019;

Bosnia and Herzegovina was obliged to conduct a new environmental impact assessment before issuing a new permit in 2019, and, therefore it had failed to comply with its obligations under articles 2 (1)–(3) and 3-5 of the Convention;

In addition, Montenegro wants to point out that Montenegro agrees with the following findings and recommendation of the Implementation Committee:

IV. Findings

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 subsequently 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.

V. Recommendations

(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; and (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;

But, Montenegro cannot agree and cannot accept all final findings and recommendations as stated below, and in specific there is critical conclusion that for a new environmental procedure, the procedure finalized in 2013, was still deemed valid for the issuance of a new permit in 2019; even if the validity period had expired:

*In section V. Recommendations, page 15, point 69.*

(ii) given that the 2012-2013 environmental impact assessment was still deemed valid for the permit renewal in 2019, Bosnia and Herzegovina was not obliged to conduct a new environmental impact assessment before issuing a new permit in 2019, and, therefore it did not fail to comply with its obligations under article 2 (2) and (3) and article 4 (1) of the Convention;

(explained below):
This is wrong conclusion and cannot be accepted as correct, due to fact that in 2019 Bosnia and Herzegovina initiated a new environmental impact assessment procedure. It was not matter of renewal of environmental permit from 2013. It was a matter of a new EIA procedure in 2019.

Further, Montenegro cannot accept the following decision (item 81 and 82):

3. Environmental impact assessment procedure in 2012
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.

The conclusions 81 and 82 are wrong, because of:

1. Two environmental impact assessment procedures have been carried by Bosnia and Herzegovina (2012/13 and 2019), a and none of the two procedures were carried out in accordance with Espoo.

2. Espoo Convention and Environmental impact assessment procedure in 2012/13 had never been properly applied (absence of notification to Montenegro, not given timeframe for submission of transboundary comments, absence to ask Montenegro to submit its `transboundary’ comments, based on Montenegro’s strong initiative to conduct transboundary consultation, as well as absence to inform on final decision in 2013).

In September 2012, in the absence of the notification from Bosnia and Herzegovina, Montenegro requested Bosnia and Herzegovina to exchange information regarding the construction hydropower plant for the purposes of holding discussions on whether a significant adverse transboundary environmental impact from the activity was likely. In November 2012, the representatives of relevant
authorities from Bosnia and Herzegovina and Montenegro held initial discussions in Bosnia and Herzegovina. 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 transboundary impacts from the planned activities on the environment of Montenegro to be carried out by an expert commission to be established by Montenegro. Public hearing scheduled to be carried out in Montenegro had not been organized due to weather condition (extreme snowfalls). The timeframe had never been set to Montenegro to submit its transboundary comments. In meanwhile, Montenegro received an information that investor had withdrawn from the project Buk Bijela, which was confirmed by the fact that seven years have passed (till 2019) without the application of the activity. Furthermore, Montenegro had never received inquiry or deadline from Party of origin requesting Montenegro to submit its comments. The expert commission in Montenegro had completed its analysis of the likely transboundary impacts from the planned activities on the environment of Montenegro. Montenegro made publicly available the Expert Commission analysis (the Report of the Commission) by publishing on the website of the Environmental Protection Agency of Montenegro: link: http://www.epa.org.me/images/IZVIESTA/%20ZA%20HE%20Buk%20Bijela%201%20RE%20Fo ca.pdf.

Montenegro Expert Commission analysis (the Report of the Commission) was published on website on 18 April 2013, while the ecological permit in Bosnia and Herzegovina (no. 15.04-96-35/13) was issued on 22nd May 2013, not taking into account those comments and not informing Montenegro about the final decision. Bosnia and Herzegovina was aware of this Commission’s Report.

Furthermore, Bosnia and Herzegovina had never informed Montenegro on final decision/environmental permit from 2013. For the first time, Montenegro found out from the official letter requesting the approval for a new environmental permit in 2019 that Bosnia and Herzegovina had issued environmental permit in 2013. With no information on final decision from Bosnia and Herzegovina, Montenegro believed all those years that environmental permit was not issued. So, Montenegro believes that Bosnia and Herzegovina was in clear non-compliance of Art. 6 of the Espoo Convention.

Therefore, we believe that Bosnia and Herzegovina was in non-compliance with articles 4, 5 and 6 of the Convention.

3. In 2019 a new environmental impact assessment procedure started in Bosnia and Herzegovina

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, page 7, point 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 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”.

Montenegro sees that also Implementation Committee noticed that the new permit procedure has been initiated. This presents the legal fact.
But Montenegro reminds Parties that Espoo convention is about Environmental Impact Assessment in transboundary context and not permit procedure, therefore the right terminology should be used by Implementation Committee.

Page 8, point 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, 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”.

In respect with cited above, such procedure is violation of Art. 4(2), because there was no possibility to consult authorities and public in such short timing. In addition to this, Montenegro had no received an official notification of the new environmental procedure in 2019.

Page 8, point 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”.

In December 2019, Bosnia and Herzegovina issued the environmental permit for Buk Bijela hydropower plant without any information on Final decision. For both environmental procedures 2012/13 and 2019 Montenegro had not been informed about final decision and that is why Bosnia and Herzegovina was in non-compliance of Art. 6.

Information on bilateral discussion
Based on information received from media that Bosnia and Herzegovina has started construction on hydropower plant Buk Bijela in 2021, Montenegro initiated bilateral discussions on Buk Bijela hydropower plant.
In this context, the Concerned parties organised two meetings in Bosnia and Herzegovina (in 2021); exchanged views and established a working group (“Working Group for resolving open issues with Montenegro regarding the construction of Buk Bijela hydropower plant” – or 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, the 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. In 2022, participants from Concerned parties met once and took part according to the mentioned programme.

With above mentioned, Montenegro therefore asks the Contracting Parties (during the meeting of the Working Group on EIA and SEA (13-15 June 2023) to reconsider findings and recommendations prepared by Implementation Committee:

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, page 12, point 66 and page 15, point 5: Procedure under article 3 (7) of the Convention. This article was applied by Montenegro in 2012 by requesting the discussion, and Bosnia and Herzegovina agreed to hold consultations, but the same article is not applicable for procedure in 2019. Montenegro clearly indicated in its responses to Bosnia and Herzegovina in 2019, that it wished to participate in transboundary consultation.

In this respect, Montenegro asks that these points 66 and 85 should be deleted due to non-relevance of application of the article 3(7).

Page 15, 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.

In any case Party of origin has obligation from Art. 6 to inform affected Party which asked to be included into transboundary environmental impact assessment procedure about the final decision. Montenegro reminds that Art. 6 is self-standing and compliance should be analysed properly.

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.

In this respect, Montenegro emphasizes that good practice demonstrating the good faith of Bosnia and Herzegovina in applying the Convention shall be the supported by Implementation Committee as well as recognized. Therefore, the information on final decision should be requested by Implementation Committee as an obligation under Art. 6 and as a minimum in applying of Espoo when potentially affected party expressed its wish to participate in transboundary procedure.

Page 11, point 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.
Montenegro agrees that EIA from 2012 could be the basis for a new EIA procedure, either amended with new environmental data (seven years had passed), amended by transboundary impacts or amended with mitigation measures/missing data in EIA documentation (what represents a matter of ongoing bilateral consultations from 2021-open issues) or a completely new EIA, but for sure not to be considered as a valid in 2019 procedure as it was evaluated by Implementation Committee.

As it is obviously, Implementation Committee is aware of deficiencies in EIA procedure from 2012/13. Deficiencies in the previous, 2013 procedure necessarily mean deficiencies in the new procedure if they are taken as continuation of procedure. However, the Committee admitted in points b and particularly in point d in order to correct the lack of possible impacts on fish migration in EIA documentation:

(b): “Implementation Committee welcomed 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”;

and point d:

(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”.

Montenegro believes that bilateral discussion should not prevent Implementation Committee to properly, fairly and professionally evaluate and address all non-compliance. This is very important for further activities in the region.

Conclusions:

Having all said, Montenegro expresses the worries that the Implementation Committee did not address all noncompliance properly and invites all Contracting parties and Implementation Committee to reconsider findings and recommendations made by Implementation Committee, to take our comments into account and change the conclusion as proposed.

Bilateral consultation, initiated by Montenegro in 2021 does not mean the correction of the EIA procedure from 2019 or 2012/13, and it is necessary to conduct a new environmental procedure in transboundary context in accordance with Espoo Convention and relevant EIA legislation.

At the end, Montenegro kindly invites Secretariat of the Espoo Convention, all Contracting parties and Implementation Committee to demonstrate proper application of the Espoo Convention for the case HPP Buk Bijela, to apply precautionary and preventive principle, until
the deficiencies are corrected in previous procedures and in Findings and recommendations prepared by Implementation Committee, and to invite Party of Origin, Bosnia and Herzegovina to stop all construction activities related to HPP Buk Bijela in Bosnia Herzegovina, till new Environmental impact assessment procedure with transboundary consultations is carried out and completed.

Sincerely,

MINISTER
Ana Novaković Đurović

Kemal Grbović, general director of Directorate for Ecology and Climate Change

Brankica Cmišanović, National Focal point and Contact point for Espoo Convention and SEA Protocol