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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-seventh session

Geneva, 29 August–1 September 2023

Item 4 of the provisional agenda

Committee initiatives

Findings and recommendations on compliance by Albania with its obligations under the Convention and the Protocol in respect of the planned construction of several small hydropower plants on the Cijevna 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 Albania with its obligations under the Convention and the Protocol in respect of the planned construction of several small hydropower plants on the Cijevna River.

The Committee finalized at its fifty-sixth session (Geneva, 2–5 May 2023) the findings and recommendations, taking into consideration comments and representations from Albania 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 the above-mentioned 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 Meetings of the Parties to the Convention and the Protocol at their



next sessions (Geneva, 12–15 December 2023) for information and to be taken into account when considering the related draft decision.

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

^b *Ibid.*

I. Introduction — the Committee's procedure

1. On 25 September 2019,¹ the Government of Montenegro made a submission to the Implementation Committee expressing concerns about the compliance of Albania with its obligations under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment (the Protocol) in respect of the planned construction of a number of small hydropower plants on the Cijevna River, including Broja, Dobrinje, Grabom, Muras 1 and 2, Peshtan and Vriela hydropower plants.

2. The submission claimed that Albania had not notified Montenegro about any related plans or programmes, or, subsequently, about its planned activities in accordance with the Protocol and the Convention, respectively. It was further pointed out that, despite numerous official requests from Montenegro in the course of 2018 and 2019, Albania had not provided Montenegro with the information about them that was required under the Convention and the Protocol. Furthermore, Montenegro was not afforded the possibility to exchange information on the planned activities in a transboundary context. In particular, the submission asserted that Albania did not furnish Montenegro with information on the number of the planned small hydropower plants and their likely impacts on the environment of Montenegro, consequently hindering the opportunities for the public of Montenegro to participate in the related environmental assessment procedure in accordance with article 2 (6) of the Convention. It further asserted that Albania failed to comply with:

(a) Article 2 (2) of the Convention setting the general provision for the Parties to take the necessary legal, administrative or other measures to implement the Convention;

(b) Article 2 (5) of the Convention, which states that: “Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether one or more proposed activities not listed in appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed.”;

(c) Article 10 (1) of the Protocol requiring the Party of origin to notify affected Parties where the implementation of a plan or a programme was likely to have a significant transboundary effect.

3. Montenegro asked the Implementation Committee to assist it in obtaining the requested information with regards to the planned activities, including the assessment of their transboundary impacts and the planned mitigation measures, as well as to invite Albania to suspend all works towards the construction of the proposed activities until the transboundary procedure was completed.

4. On 30 September 2019, the secretariat, in conformity with paragraph 5 (a) of the appendix to decision III/2 (ECE/MP.EIA/6, annex II), forwarded a copy of the submission to the focal point of the Convention and the Protocol in Albania, requesting that the Government send any reply and information in support thereof to the secretariat within three months.

5. At its forty-sixth session (Geneva, 10–13 December 2019), the Committee noted the submission by Montenegro and deliberated on its admissibility considering that the establishment of small hydropower plants is not listed in appendix I to the Convention or in the annexes to the Protocol. The Committee decided that, upon receipt of the reply from Albania, it would exceptionally consider the matter, including to facilitate the related information exchange between the two Parties.²

6. The Government of Albania provided its reply to the submission on 30 December 2019. The Committee began its consideration of the submission and the reply by Albania at its forty-seventh session (Geneva, 16–19 March 2020).³ It agreed that, for its further deliberations on the matter, it needed: additional information and clarifications concerning, among other things, the planned activities, their number, location and cumulative and transboundary effects; and, information on the Parties' previous communication on the

¹ The letter was received by the secretariat on 25 September 2019 but dated 11 September 2019.

² ECE/MP.EIA/IC/2019/6, paras. 29–31.

³ ECE/MP.EIA/IC/2020/2, paras. 50–56.

matter, including under the Joint Commission established under the 2018 Framework Agreement on Mutual Relations in the Field of Management of Transboundary Waters between Montenegro and Albania⁴ (Joint Commission).⁵ In addition, the Committee encouraged the Parties to organize an expert meeting with a view to discussing and, if possible, agreeing whether the proposed activities were likely to cause significant adverse transboundary effects.⁶ Furthermore, the Committee noted the letter dated 17 December 2019 from the Chair of the Implementation Committee under the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) informing the Espoo Convention Implementation Committee that Montenegro had initiated an advisory procedure under the Water Convention concerning the same matter.⁷

7. In response to the Committee's request, Albania and Montenegro provided clarifications on, respectively, 16 June and 17 June 2020.

8. At its forty-eighth session (Geneva, 1–4 September 2020), the Committee examined the information from Albania and Montenegro.⁸ In its follow-up letters to both Parties, dated 28 October 2020, the Committee welcomed steps taken by the Parties concerned to enter, further to article 2 (5) of the Espoo Convention, into discussions on whether the proposed activities were likely to cause a significant adverse transboundary impact, and invited them to update it on the status and outcome of those discussions. It also noted the outcome of separate information-gathering and consultation sessions with Montenegro and Albania concerning similar activities on the Cijevna River held by the Implementation Committee under the Water Convention at its eleventh meeting (Geneva (hybrid), 31 August–2 September 2020).

9. On 11 January 2021, Montenegro informed the Espoo Convention Implementation Committee about the definitive plans of the Parties to continue their dialogue regarding the activities under article 2 (5) of the Convention at the second bilateral meeting of the Joint Commission. Albania did not provide any updates.

10. At its forty-ninth session (Geneva, 2–5 February 2021), the Committee welcomed the information from Montenegro. It also welcomed the information from the secretariat about a second round of consultations with Albania and Montenegro at the twelfth meeting of the Implementation Committee under the Water Convention (Geneva, 4 and 5 February 2021). By two separate letters, dated 16 February 2021, the Espoo Convention Implementation Committee invited both Parties to update it on the outcome of the second bilateral meeting of the Joint Commission (see para. 9 above), and to provide any other relevant information on the matter. It also informed the Parties that it would consider concluding the matter at its forthcoming session in case, based on the new information, there were no grounds for it to pursue the case further.⁹

11. By its letter, dated 29 March 2021, in response to the Committee's request dated 16 February 2021, Montenegro briefed the Committee on the ongoing dialogue between the two Governments regarding the activities, including the work done within the framework of the related advisory procedure under the Water Convention. Albania did not respond to the Committee's request.

12. At its fiftieth session (Geneva, 4–7 May 2021),¹⁰ the Committee examined the information from Montenegro, and noted the report of the Implementation Committee under the Water Convention on its twelfth meeting containing detailed information on the outcome

⁴ The agreement was signed in line with the obligation of the Parties concerned to enter into agreements and establish joint bodies under art. 9 (1)–(2) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

⁵ Throughout the correspondence different versions of the name of this Commission are used. In the present document, the title "Joint Commission" is employed.

⁶ Letters from the Chair of the Implementation Committee to Albania and Montenegro, both dated 17 April 2020.

⁷ WAT/IC/AP/1.

⁸ ECE/MP.EIA/IC/2020/4, paras. 33–35.

⁹ ECE/MP.EIA/IC/2021/2, paras. 30–32.

¹⁰ ECE/MP.EIA/IC/2021/4, paras. 23–24.

of its advisory procedure.¹¹ Based on the information from Montenegro and the outcome of the Water Convention procedure, the Espoo Convention Implementation Committee concluded that there were no grounds for it to pursue its consideration of the matter further. By its letters, dated 9 June 2021, the Committee informed Albania and Montenegro accordingly and proceeded with the preparation of its draft findings and recommendations. Due to resource constraints, the draft was discussed only at the Committee's fifty-fourth session (Geneva, 4–7 October 2022).

13. At its fifty-fourth session, the Committee decided to request an update from the Parties concerned on their bilateral discussions by 1 December 2022, and, on that basis, to complete the draft findings and recommendations at its fifty-fifth session.¹²

14. At its fifty-fifth session, the Committee examined the responses from Albania and Montenegro dated 1 December 2022 and 11 January 2023, respectively, to its requests and discussed the draft findings and recommendations.¹³

15. The Committee agreed on the draft findings and recommendations by electronic decision-making procedure on 20 February 2023 and, before finalization, transmitted them to Montenegro and Albania, in accordance with rule 13 (1) of the Committee's operating rules, inviting their comments or representations by 31 March 2023.

16. At its fifty-sixth session (Geneva, 2–5 May 2023), the Committee finalized its findings and recommendations, taking into account the responses by Montenegro and Albania dated 27 and 31 March 2023, respectively, expressing their agreement with the draft findings and recommendations. The Committee requested the secretariat to prepare the findings and recommendations as an official document and to transmit them to the Meetings of the Parties to the Convention and the Protocol for information at their next sessions (Geneva, 12–15 December 2023).¹⁴

II. Summary of facts, information and issues

17. This section summarizes the main facts, information and issues considered to be relevant to the question of compliance, as presented by the Government of Montenegro and the Government of Albania in their correspondence to the Committee and the reports and information provided by the Implementation Committee under the Water Convention.

A. Proposed activity

18. The Cijevna River (in Albanian “Cem”) originates in Albania on the northern side of the Prokletije Mountains and has a total length of 65 km, of which 33 km are on the territory of Montenegro. The river's canyon forms the border between Montenegro and Albania and is a nature protection site in Montenegro.

19. In its submission, Montenegro expressed its concerns about the planned construction by Albania of a number of small hydropower plants on the Cijevna River close to its border, and the cumulative effects thereof.¹⁵ In its response to the submission,¹⁶ Albania referred to the following six hydropower plants without dams or storage tanks:

- (a) Broja (total capacity of 1.97 MW);
- (b) Dobrinje (total capacity of 0.8 MW);
- (c) Grabom (total capacity of 1.97 MW);

¹¹ See ECE/MP.WAT/IC/2021/1, paras. 5–17, and annex.

¹² ECE/MP.EIA/IC/2022/7, paras. 19–22.

¹³ ECE/MP.EIA/IC/2023/2, paras. 17–19.

¹⁴ ECE/EIA/MP.IC/2023/4, paras. 22–24.

¹⁵ Corroborating information to the submission: extracts from television and radio programmes in the period October–November 2018.

¹⁶ Letter from Albania to the Committee, dated 16 June 2020.

- (d) Muras 1 and 2 (total capacity of 2 MW each);
- (e) Peshtan (total capacity of 1.97 MW);
- (f) Vriela (total capacity of 0.5 MW).

20. According to Albania, as at 30 December 2019, construction permits for the Dobrinje, Muras and Vriela hydropower plants had been issued. Although works based on those permits in Dobrinje and Muras hydropower plants had commenced, they had not been in operation at the time. The other three hydropower plants had received preliminary approvals at that time.

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B. Significant adverse transboundary impact

21. Montenegro considered that although the planned activities were not listed in appendix I to the Convention, cumulatively they were likely to cause a significant adverse impact on the territory of Montenegro. In the view of Montenegro, the construction and operation of the planned multiple small hydropower plants would significantly affect habitats and migration paths of wildlife, including protected species, lead to disruptions of the water regime, and affect the overall quality of other environmental segments. In particular, Montenegro was concerned about the impact of the planned activities on the Cijevna River canyon, located in close proximity to the proposed activities, which was recognized as an area of exceptional natural value under the Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention) and a potential Emerald Network site.

22. In its response to the submission, dated 30 December 2019, Albania stated that the proposed activities were not covered by appendix I to the Convention, including its item 11 “Large dams and reservoirs”. It specified that the proposed activities consisted of the establishment of small hydropower plants with a maximum installed capacity of up to 2 megawatts (MW) without a dam or a storage tank on the territory of Albania. With reference to article 2 (5) and the criteria listed in appendix III to the Convention, Albania argued that neither the location(s), technical characteristics, the planned approach to the exploitation of water resources, nor the scientific evidence indicated that the proposed activities were likely to cause a significant impact on the environment of Montenegro, including any impact on the quantity and quality of water flowing to Montenegro and the Cijevna Canyon.¹⁸ However, it expressed its readiness to carry out consultations in accordance with article 5 of the Convention should Montenegro provide convincing argumentation that significant adverse impacts were likely.

C. Cumulative impacts

23. According to Albania, prior to obtaining a construction permit, each project had to undergo certain administrative procedures, including an environmental impact assessment. It did not deem it necessary to consider cumulative impacts of the proposed activities under the environmental impact assessment procedure or any other required administrative procedure.

D. Discussions between the Parties regarding the application of the Convention

24. Prompted by the wide media coverage and by several non-governmental organizations (NGOs) in autumn 2018, Montenegro, by letters dated 8 October 2018¹⁹ and 20 November 2018²⁰ through the Ministry of Foreign Affairs of Albania, requested Albania to provide it

¹⁷ Annex to letter from Albania to the Committee, dated 30 December 2019, pp. 1–2 and 4 and letter from Montenegro to the Committee, dated 11 September 2019, p. 2.

¹⁸ Response of Albania to the submission, annex, p. 4, para. 6.

¹⁹ Letter from the Ministry of Sustainable Development and Tourism of Montenegro to the Ministry of Foreign Affairs of Montenegro dated 12 February 2019, p. 1., referring to the requests.

²⁰ Ibid.

with relevant information concerning the planned activities, including the environmental impact assessment documentation referred to in article 4 of the Convention. On 6 November 2018, Montenegro received a reply from Albania indicating that construction permits had already been obtained for three small hydropower plants, with an additional three activities having received preliminary approvals. Albania stated that, according to its assessment, the proposed activities had no likely transboundary impact on the territory of Montenegro. Albania was of the view that, if Montenegro could prove the impacts of the planned activities on its own territory, it was ready to enter into discussion with Montenegro to assess the impacts in a transboundary context. In its letter of 20 November 2018, Montenegro asked Albania to suspend the works under the issued construction permits and reiterated its request for the environmental impact assessment documentation.

25. On 5 February 2019, at a meeting between the Ministry of Agriculture and Rural Development of Montenegro and the Water Resource Management Agency of Albania in Shkodra (Albania) regarding the establishment of a Joint Commission, Montenegro reiterated its request for sufficient information to assess the likelihood of a significant adverse impact on its territory from the proposed activities.²¹

26. By its letter through the Ministry of Foreign Affairs to Albania, dated 12 February 2019, Montenegro reiterated its request for the environmental impact assessment documentation. At a meeting between the Ambassador of Montenegro and the Minister for Infrastructure and Energy of Albania held at the end of February 2019,²² the Minister clarified that the authorities had asked for a voluntary temporary suspension of works under some 420 contracts to allow for monitoring of compliance of the activities with the governmental requirements. The Minister expressed the readiness of Albania to prioritize the monitoring and evaluation of the impacts of the small hydropower plants on the Cijevna River and assured Montenegro that, once the Joint Commission was established, Albania would provide Montenegro with the requested environmental impact assessment documentation with a view to allowing expert verification of the environmental impacts of the plants on the territories of both Parties.

27. In July 2019, Albania submitted to Montenegro the environmental impact assessment documentation for Vriela, Dobrinje and Muras hydropower plants. No information about the other planned activities was provided. Following its examination of the documentation, Montenegro observed that it did not contain any information on the likely impacts of the activities on the environment of Montenegro, concluding that such impacts had not been assessed. With reference to appendix III to the Convention, Montenegro specified that, among other things, an environmental impact assessment should assess cumulative impacts on biodiversity, the quantity and quality of water, the quality of air, the quality of soil during the construction and the operation of the small hydropower plants. It stated that, in the absence of any information about the number and technical characteristics of the planned activities from Albania, Montenegro was unable to evaluate the cumulative impact on its environment.

28. At the first meeting of the Joint Commission (Podgorica, 19 September 2019), both Parties outlined their differing positions regarding the application of the Convention and the Protocol to the proposed activities and the preceding planning. Albania reiterated its request to Montenegro to provide scientific evidence that significant adverse impact on its territory was likely. Montenegro, in turn, underlined that, in order to assess the likelihood of an adverse impact on its environment, it needed information about the number and location of the planned and the existing hydropower plants, along with complete technical documentation and hydrogeological data. The Parties agreed to continue to communicate and to exchange information regarding the activities in accordance with the applicable international and national legislation.

29. In November 2019, following the first meeting of the Joint Commission, Albania provided Montenegro with additional and updated information, including a map indicating

²¹ Response of Albania to the submission, p. 1, para. 4.

²² Submission from Montenegro to the Committee, dated 11 September 2019, received 25 September 2019, p. 4, para. 7.

the location of the existing hydropower stations and of those under construction²³ In January 2020, Montenegro published that documentation, translated into the national language, on the website of the Ministry of Sustainable Development and Tourism, inviting its relevant authorities and the public to provide their views and opinions. By a letter of 16 June 2020, Montenegro informed the Implementation Committee that it intended to draw its conclusions about the likely significant adverse impacts of the planned activities on its territory further to the outcome of the examination of the updated documentation and the opinions from the public and the relevant authorities by the Montenegrin Commission for Cooperation in the Field of Water Management with Albania.

30. According to the information made available to the Committee, although the pace of the Parties' cooperation had slowed in 2020 due to the coronavirus disease (COVID-19) pandemic, their dialogue regarding the planned activities under article 2 (5) of the Convention continued. Four further meetings of the Joint Commission took place (15 April 2021 (online), 22 February 2022 (Podgorica),²⁴ 25 July 2022 and 21 December 2022, (online)),²⁵ and the first meeting of the Joint Technical Group (see para. 36 (a) below) in Tamara, Albania, on 26 May 2022. Following that meeting, Albania made available for Montenegro technical documentation on three hydropower plants (Tamara, Kozhnje 1 and 2), such as their deployment plans, hydrological reports, as well as information from the National Agency of Natural Resources, received by Montenegro with a delay due to a cyberattack on the Montenegrin information system.

31. Based on the review of that technical documentation, the Montenegrin Commission for Cooperation in the Field of Water Management with Albania concluded that: "It is highly likely that the installation of all six micro hydropower plants (and possibly more in the future) will result in changes to the transport of sediment, degradation of fish breeding grounds in the Republic of Albania, variations in the amount of dissolved oxygen, mineral matter, and organic matter washed from the surrounding mountain areas, which can bring about changes in the environmental system of the Cijevna River in the protected section."²⁶

32. Montenegro further informed the Committee that it was in the process of drafting a protocol on cooperation, which, after internal finalization, would be sent to Albania for ratification.²⁷

E. Advisory procedure initiated by the Implementation Committee under the Water Convention

33. An advisory procedure (WAT/IC/AP/1) was initiated by the Implementation Committee under the Water Convention in May 2020, following a request from Montenegro of 13 November 2019 and agreement of Albania of 31 January 2020 to participate in the procedure related to concerns of Montenegro about the likely impacts of the planned construction of the small hydropower plants on the Cijevna/Cem River in Albania – the same planned activities as those subject to this submission.

34. In the framework of its advisory procedure, the Implementation Committee under the Water Convention received information about the activities from both Parties and held consultation sessions with Montenegro and Albania at its eleventh (Geneva, 31 August–2 September 2020), twelfth (Geneva, 4–5 February 2021) and fourteenth (Geneva, 24–25 February 2022) meetings.

35. Based on the information provided by the Parties, and in the absence of sufficient monitoring information and data, the Implementation Committee under the Water Convention was unable to confirm or deny the likelihood of cumulative transboundary impact

²³ Information from Albania, dated 16 June 2020 and from Montenegro, dated 16 June 2020.

²⁴ Letter from Albania to the Implementation Committee, dated 1 December 2022.

²⁵ Letter from Montenegro to the Implementation Committee, dated 11 January 2023.

²⁶ Ibid.

²⁷ Ibid.

of the planned construction by Albania of a number of small hydropower plants on the Cijevna/Cem River within the meaning of article 1 (2) of the Water Convention.²⁸

36. In the course of the advisory procedure and the related consultations with the Parties concerned, the Implementation Committee under the Water Convention recognized the lack of information and data as the key challenge for the assessment of any transboundary impact of small hydropower plants in the Cijevna River basin.²⁹ During the consultations, the Parties agreed:

(a) That the existing Joint Commission should establish a joint technical working group on “Monitoring and assessment”, define the mandate of that working group based on pressures in the Cijevna/Cem River basin and ensure its regular meetings;

(b) To develop and implement an information-exchange protocol;

(c) To use the meetings of the Joint Commission to exchange information, including on existing and planned uses of water and related installations;

(d) To convene the next meeting of the Joint Commission in the third week of March 2021, with a view to setting up the joint technical working group.³⁰

F. Application of article 10 of the Protocol

37. In its initial requests to Albania between October 2018 and February 2019, Montenegro did not refer to the Protocol but expressed its willingness to participate in the transboundary procedure under the Convention. However, in the submission and its later discussions with Albania, including under the Joint Commission in September 2019, Montenegro explicitly declared that, in its view, the transboundary consultations under article 10 of the Protocol should also have been carried out within the course of the strategic environmental assessment for a plan or a programme covering the planned activities.³¹

38. In its response to the submission, Albania explained that it had not adopted any plan or programme for the construction of the small hydropower plants on the Cijevna River. It also stated that the activity “Construction of small hydropower plants” was not listed in appendix I to the Convention or in annex I to the Protocol.

III. Consideration and evaluation

A. General observations

39. The Committee gathered information allowing it to identify in a sufficiently precise manner the main facts and events, and to evaluate the application of the Convention and the Protocol to those activities. The Committee observed with regret that some information regarding the activities, in particular, about the total number and location of the planned small hydropower plants, was not made available to the Committee by either of the Parties.

B. Legal basis

40. Albania deposited its instrument of ratification of the Convention on 4 October 1991 and the Convention entered into force for it on 10 September 1997, the date of entry into force of the Convention. It deposited its instrument of ratification of the Protocol on 2

²⁸ See ECE/MP.WAT/IC/2021/1, annex.

²⁹ See ECE/MP.WAT/IC/2020/2, para. 10 (d).

³⁰ Report of the Implementation Committee under the Water Convention on its twelfth meeting (ECE/MP.WAT/IC/2021/1, para. 15 (a)–(d)). At its twelfth meeting, the Implementation Committee under the Water Convention provided its legal and technical advice to Montenegro and Albania. Subsequently, the Committee followed up with the two countries on implementation of its legal and technical advice.

³¹ Submission, 11 September 2019, p. 8.

December 2005 and the Protocol entered into force on 11 July 2010, the date of entry into force of the Protocol. Montenegro deposited its instrument of accession to the Convention on 9 July 2009 and the Convention entered into force for it 90 days later, on 7 October 2009. It succeeded to the Protocol on 23 October 2006 and deposited its instrument of ratification on 2 November 2009. The Protocol entered into force for it on 11 July 2010, the date of entry into force of the Protocol.

41. Based on the information made available to it, the Committee noted that the proposed activities (small hydropower plants) the subject of the submission were not listed in appendix I to the Convention or in annex I to the Protocol. It agreed that the matter was about the application of article 2 (5) of the Convention for determining whether the activities have significant adverse impact. Article 2 (5) reads:

Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether one or more proposed activities not listed in appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed. Where those Parties so agree, the activity or activities shall be thus treated. General guidance for identifying criteria to determine significant adverse impact is set forth in appendix III.

42. The Committee examined the application of article 2 (5) and further agreed to focus its considerations on the procedural aspects of the application of that provision by the concerned Parties.

C. Main issue

Discussions on significant adverse transboundary impact under article 2 (5) of the Convention

43. The Committee noted that, since October 2018, the Parties had exchanged opinions and information on whether the Convention should apply even though the activities were not listed in appendix I to the Convention, focusing, in particular, on whether the proposed activities were likely to cause significant adverse transboundary impact.

44. The Committee acknowledged and welcomed the willingness of Albania to apply the Convention should the Parties agree that transboundary impacts were likely, and the existence of communication and efforts by both Parties to cooperate. However, it expressed regret that the Party of origin had answered with delays and incompletely information requests from the potentially affected Party, and communication gaps remained during the whole time.

45. Further to the analysis of all information made available to it by the Parties concerned, the Committee noted that the Parties agreed to make use of the Joint Commission as a platform for carrying out the discussions on the matter. The Committee considered that it was up to the Parties concerned to decide whether, for the purposes of carrying out discussions under article 2 (5) of the Convention, they wished to establish a separate body or to use any existing structures, including those set up under any international or bilateral treaties. The Parties, however, needed to ensure that the selected body or structure provided a platform for the exchange of credible and sufficient information and for holding discussions among the competent authorities and relevant environmental and sectoral experts from both Parties on whether the proposed activities not listed in appendix I to the Convention were likely to cause a significant adverse transboundary impact.

46. The Committee noted that, during the discussions, both Parties consistently requested each other to provide substantiated assessments on whether the significant adverse impact on the environment of Montenegro was likely. As at January 2023, such assessments have not been presented to the Committee.

47. The Committee observed that, according to Montenegro, the initial information provided by Albania on 19 July 2019 was insufficient for Montenegro to draw its

substantiated conclusions prior to the first meeting of the Joint Commission on 19 September 2019.³²

48. The Committee further noted that, although the updated and additional information provided by Albania to Montenegro in November 2019 contained more details, some essential information was still missing. According to Albania, it was not able to provide Montenegro with information on all planned small hydropower plants or to indicate them on a map, as they were still undergoing internal approval procedures, based on which some of them might even be rejected should they be likely to have an adverse impact on the environment.

49. In addition, the Committee noted that, despite the shortcomings of the information provided by Albania, Montenegro in the first half of 2020 consulted its own public and relevant authorities and institutions and intended to draw its conclusions about the likelihood of significant adverse impacts from the activities on its territory.³³ In 2022, its national Commission³⁴ concluded that the installation of all six small hydropower plants was likely to result in changes in the environmental system of the Cijevna River (see para. 31 above).

50. The Committee further noted that the Parties sought the assistance of the Implementation Committee under the Water Convention with regard to the transboundary impact from the proposed activities. However, based on the information provided by both Parties, and in the absence of sufficient monitoring information and data, the Implementation Committee under the Water Convention, was unable to confirm or deny the likelihood of cumulative transboundary impact of the planned activities (see para. 35 above).

51. The Committee understood that the lack of information and data, in particular on the state of the affected environment and monitoring data, was considered by the Parties as the key challenge for the assessment of any transboundary impact of small hydropower plants in the Cijevna River basin. It noted that to address this gap, the Parties, with the assistance of the Implementation Committee under the Water Convention, agreed to establish – under the Joint Commission – a joint technical working group on “Monitoring and assessment” that should meet regularly to assess pressures in the Cijevna/Cem River basin. The Committee commended the Parties for the establishment of a joint body for discussing the matters and found it positive that Parties were discussing the matter also under the Water Convention, as information exchanges between the United Nations Economic Commission for Europe (ECE) bodies governing multilateral environmental agreements were useful.

52. The Committee was of the opinion that discussions under article 2 (5) needed to be conducted in good faith. It recalled its previous opinion that, when a Party wished to enter into consultations under article 2 (5) regarding an activity not listed in appendix I, the Party of origin had an obligation to do so without delay.³⁵ It further recalled the Committee’s previously expressed view that a lack of a response by the Party of origin to requests of the potentially affected Party regarding an activity not listed in appendix I to the Convention and a failure of the Party of origin to furnish a potentially affected Party with information about the activity in the light of the criteria for determining significant adverse impact set out in appendix III to the Convention constituted non-compliance with article 2 (5) of the Convention.³⁶

53. In addition to its previous opinions, the Committee pointed out that, when Parties concerned conducted discussions under article 2 (5), they should exchange information in such a way that it was possible to identify if significant adverse transboundary impacts on the environment could occur. Both Parties should be provided with meaningful information for the discussion and were responsible for the timeliness and quality of their information

³² Minutes of the first meeting of the Joint Commission established under the 2018 Framework Agreement on Mutual Relations in the Field of Management of Transboundary Waters between Montenegro and Albania, Podgorica, 19 September 2019, provided to the Committee by Montenegro on 17 June 2020.

³³ Letter from Montenegro dated 16 June 2020.

³⁴ Montenegrin Commission for Cooperation in the Field of Water Management with Albania.

³⁵ ECE/MP.EIA/IC/2021/4, para. 58.

³⁶ ECE/MP.EIA/IC/2021/2, para. 65.

exchange. The Committee considered that, initially, the discussions have not been carried out in compliance with article 2 (5), as Albania had not provided essential information for the discussion (see para. 48 above). However, subsequently the Parties concerned engaged in detailed discussions at the technical level, met repeatedly in various formats and in, 2022, the Montenegrin Commission for Cooperation in the Field of Water Management with Albania drew its conclusions about the likely environmental impacts of the installation of all six small hydropower plants (see para. 31 above). The Committee considered that the initial suspicion of non-compliance with article 2 (5) of the Convention by Albania had been remedied by the consecutive provision of meaningful information and dialogue.

IV. Findings

1. Application of the Convention and its article 2 (2) and (6)

54. The Committee found that, although the construction of a small hydropower plant or a cascade of small power plants on one watercourse was not listed in appendix I to the Convention, in accordance with article 2 (5) such an activity shall be treated as if it were listed, if the Parties concerned agreed that the activity was likely to cause a significant adverse transboundary impact.

55. As Albania did not agree that the activity was likely to cause significant adverse transboundary impact, Albania was not obliged to apply the provisions of the Convention (including its art. 2 (2) and (6) that Montenegro referred to in its submission) to the proposed activity.

2. Discussions on significant adverse transboundary impact under article 2 (5)

56. The Committee found that, despite the initial delays in the discussions between the Parties under article 2 (5) of the Convention, Albania was not in non-compliance with that article on the grounds that discussions requested by Montenegro thereunder were being conducted in good faith.

3. Application of the Protocol and transboundary consultations under article 10 (1) of the Protocol

57. The Committee noted that the establishment of small hydropower plants was not listed in either annex I or II to the Protocol. Therefore, the Committee found that, in the absence of a plan or programme by Albania covering the development of the small hydropower plants at the Cijevna River in the meaning of article 4 (1) of the Protocol, the Protocol was not applicable. The Committee thus did not consider the allegations under the Protocol.

V. Recommendations

58. The Committee recommended that the Meetings of the Parties:

(a) Welcome the steps taken by the Parties concerned to enter, further to article 2 (5) of the Convention, into discussions on whether the proposed activities by Albania referred to in the submission by Montenegro of 25 September 2019 were likely to cause a significant adverse transboundary impact;

(b) Establish that, in discussions under article 2 (5) of the Convention, Parties should exchange information in a way that allowed them to identify if significant adverse transboundary impacts on the environment could occur and that both the Party of origin and the affected Party are responsible for the timeliness and quality of their information exchange;

(c) Endorse the findings of the Implementation Committee that, in accordance with the information provided to the Committee:

(i) Albania and Montenegro had properly fulfilled their obligations under article 2 (5) of the Convention by entering into discussion with each other on the matter;

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- (ii) In the absence of an agreement by the concerned Parties under article 2 (5), Albania was not in non-compliance with article 2 (2) and (6) of the Convention as those provisions were not applicable;
- (iii) Albania was not in non-compliance with article 10 of the Protocol as, in the absence of a plan or a programme by Albania in the meaning of article 4 (1) of the Protocol, the Protocol was not applicable;
- (d) Encourage both Parties to continue their dialogue under article 2 (5) of the Convention, ensuring that the cumulative impact of the proposed activities was properly assessed, and the criteria listed in appendix III of the Convention were properly applied during the assessment, including with regard to the environmental sensitivity of the Cijevna River basin;
- (e) Invite Albania to continue to provide Montenegro with information on all planned activities at the Cijevna River referred to in the submission for the purposes of the assessment of their transboundary impacts;
- (f) Invite Montenegro to provide Albania with any further reasonably obtainable information relating to the potentially affected environment from the proposed activities, if requested;
- (g) Acknowledge that Albania expressed its willingness to apply the Convention should it, as a result of the discussions under article 2 (5), agree that the activities in question cause significant adverse transboundary impacts;
- (h) Encourage Albania to take into account, in the context of any future assessment of transboundary environmental impacts of any further small hydropower plants on the Cijevna River, the cumulative impact from all existing and planned hydropower plants, and to provide the related information to Montenegro;
- (i) Encourage Montenegro to provide Albania with any reasonably obtainable information relating to the potentially affected environment from any future relevant planned activities at the Cijevna River, if requested;
- (j) Request Albania and Montenegro to apply the Protocol as an environmental protection instrument at an early stage of development of plans and programmes such as energy strategies or plans and joint river basin management plans that cover any future developments in the Cijevna River basin or other areas of outstanding nature and environmental value; as well as, to ensure that cumulative impacts of the planned activities, including those in a transboundary context, were properly addressed.
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