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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

Report of the Implementation Committee on its fifty-seventh session

Introduction

1. The fifty-seventh session of the Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment was held in Geneva, from 29 August to 1 September 2023.

Attendance

2. The following members of the Implementation Committee for Convention and Protocol matters attended the session: Ms. Aysel Rzayeva (Azerbaijan), Mr. Christian Baumgartner (Austria), Mr. Ralph Bodle (Germany), Mr. Joe Ducombe (Luxembourg), Ms. Barbora Pavlačič Doneva (Slovakia), Ms. Zsuzsanna Pocsai (Hungary), Mr. Anders Bengtsson (Sweden) and Mr. Lasse Tallskog (Finland).

I. Adoption of the agenda

3. The Chair of the Committee opened the session.
4. The Committee included under agenda item 6 “Information gathering” three new information gathering matters (INFO 35, 36 and 37), and adopted its agenda as set out in document ECE/MP.EIA/IC/2023/7 with that modification.



5. The Secretary to the Convention and the Protocol reported on the outcomes of the twelfth meeting of the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment (Geneva, 13–15 June 2023).

II. Preparations for the next sessions of the Meetings of the Parties

6. The Committee finalized the draft decisions on compliance for consideration of the Meetings of the Parties to the Convention and the Protocol at their next sessions (Geneva, 12–15 December 2023), as relevant, taking into account comments provided by the delegations of Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria and the European Union and its member States during the twelfth meeting of the Working Group.¹

III. Follow-up to decisions VIII/4a–e²

A. Armenia (EIA/IC/CI/1)³

7. The Committee continued its follow-up to decision VIII/4a on compliance by Armenia with its obligations under the Convention in respect of its national legislation.

8. It reviewed (the English translation of) the law on making an amendment to the Law on Environmental Impact Assessment and Expert Examination, adopted by Armenia on 3 May 2023. It found, however, that several fundamental deficiencies of the previous law remained to be addressed. The Committee also noted that the adoption by Armenia of the relevant secondary legislation had been further delayed. The Committee then finalized draft decision IX/4b-V/4b on the matter.

B. Azerbaijan (EIA/IC/CI/2)⁴

9. The Committee continued its follow-up to decision VIII/4b on compliance by Azerbaijan with its obligations under the Convention in respect of its national legislation, in the absence of the Committee member nominated by Azerbaijan. The Committee finalized draft decision IX/4d on the matter, considering the comments from Azerbaijan.⁵

C. Belarus (EIA/IC/S/4)⁶

10. The Committee followed up on decision VIII/4c on compliance by Belarus with its obligations under the Convention in respect of the Belarusian nuclear power plant in Ostrovets.

11. It noted the annual reports for the period 2022–2023 provided by Belarus and Lithuania, and the comments of both Parties on the annual report of the other Party. It then finalized draft decision IX/4e on the matter, considering the related comments of Belarus, Lithuania and the European Union.

¹ ECE/MP.EIA/2023/4–ECE/MP.EIA/SEA/2023/4, ECE/MP.EIA/2023/6, ECE/MP.EIA/2023/7 and ECE/MP.EIA/SEA/2023/7.

² Available at <https://unece.org/environment-policy/environmental-assessment/decisions-taken-meetings-parties>. *Note:* The discussions under agenda items 2–10 were not open to observers, in accordance with rule 17 (1) of the operating rules of the Implementation Committee. See <https://unece.org/sites/default/files/2021-02/Implementation%20Committee%20structure%20functions%20procedures%20rules.e%202020.pdf>

³ Available at <https://unece.org/environment-policy/environmental-assessment/eiaicci1-armenia>.

⁴ Available at <https://unece.org/environment-policy/environmental-assessment/eiaicci2-azerbaijan>.

⁵ See also the Committees's findings in ECE/MP.EIA/IC/2023/4, paras. 14–15.

⁶ Available at <https://unece.org/environmental-policy/environmental-assessment/eiaics4-belarus>.

D. Ukraine

1. Bystroe Canal Project (EIA/IC/S/1)⁷

12. The Committee continued its follow-up to decision VIII/4d on compliance by Ukraine with its obligations under the Convention in respect of the Danube-Black Sea Deep Water Navigation Canal in the Ukrainian sector of the Danube Delta.

13. The Committee noted the information from Romania of 22 June 2023 that it had carried out public consultations on the new project “Reconstruction of construction facilities ‘Creation of Danube River-Black Sea Water Navigation Canal in the Ukrainian part of the Danube Delta’” of Ukraine based on the environmental impact assessment documentation received from Ukraine on 3 May 2023. The Committee also recalled information provided by Ukraine before and during the informal consultations at its fifty-sixth session (Geneva, 2–5 May 2023) but noted with regret the lack of response by Ukraine to the Committee’s letter dated 19 May 2023.

14. The Committee concluded that, despite steps taken by Ukraine to implement the previous decisions of the Meetings of the Parties on the matter, including, in particular, the conclusion of the bilateral agreement with Romania in November 2022, and considering the difficulties for Ukraine to implement the Convention during the war, Ukraine was still not in compliance with its obligations under the Convention. The Committee then prepared draft decision IX/4k on the matter.

2. Rivne nuclear power plant (EIA/IC/CI/4)⁸

15. The Committee continued its follow-up to decision VIII/4e on compliance by Ukraine with its obligations under the Convention in respect of the extension of the lifetime of units 1 and 2 of Rivne nuclear power plant.

16. It took note of the letters from Austria to Ukraine dated 9 and 14 August 2023, in response to a letter from Ukraine to Austria dated 5 June 2023, stating that Austria did not consider the transboundary consultations as completed, as it had not yet received the final decision of Ukraine on the activity in question.

17. The Committee welcomed the steps taken by Ukraine to implement decision VIII/4e but expressed regret that not all its requirements had been fulfilled. The Committee also expressed regret at the lack of response from Ukraine to its letter dated 19 May 2023. The Committee then finalized draft decision IX/4l on the matter.

IV. Submissions⁹

A. Bosnia and Herzegovina (EIA/IC/S/8–SEA/IC/S/1)¹⁰

18. The Committee considered the comments by Montenegro on draft decision IX/4c–V/4c and the findings and recommendations regarding 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 (ECE/MP.EIA/IC/2023/5), stating that Bosnia and Herzegovina had not given a time frame to Montenegro to submit its comments in the 2012/2013 procedure. It also considered clarifications from Bosnia and Herzegovina regarding the time frame that the secretariat, upon request by the Chair, had asked for.

19. Based on the new information, the Committee revised its findings and recommendations and the corresponding draft decision. It asked the secretariat to send the revised draft findings and recommendations (see annex II below) to the Parties concerned for

⁷ Available at <https://unece.org/environmental-policy/environmental-assessment/eiaics1-ukraine>.

⁸ Available at <https://unece.org/environment-policy/environmental-assessment/eiaicci4-ukraine>.

⁹ See <https://unece.org/submissions-overview>.

¹⁰ See <https://unece.org/environment-policy/environmental-assessment/eiaics8seaic1>.

any further comments and representations within 2 weeks after their receipt, prior to finalizing them by an electronic decision-making procedure considering the comments to be received. As needed, the corresponding draft decision would be adjusted accordingly.

B. Poland (EIA/IC/S/9)¹¹

20. The Committee began its consideration of the submission by Belarus, dated 12 April 2023, expressing concerns about compliance by Poland with its obligations under the Convention with respect to the construction of a barrier in the “Bialowieza Forest” – a transboundary United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Site – on the border between the two countries.

21. The Committee examined the information from Poland, dated 17 July 2023, stating that: the construction of the State’s border security wall did not fall under the Convention; and that, under article 2 (8) thereof, for national security reasons, national laws might be applied and take precedence over the Convention, allowing for the wall to be built.

22. The Committee further considered the information from Belarus, dated 16 August 2023, rejecting the claim of Poland of national security reasons and insisting on the application of article 2 (5). Belarus further emphasized the impact of the activity on the ecosystems of the Bialowieza Forest.

23. The Committee invited its Chair to write to Poland asking it to:

(a) Explain why it did not consider the activity to fall under appendix I, and how Poland defined “deforestation” and “large area”;

(b) Specify in detail the security-related reasons for not applying article 3 (1) and for not entering into consultations with Belarus under article 2 (5);

(c) Provide the Committee with the English translation of the law concerning the construction of the State border security wall.

24. The Committee Chair should also write to Belarus to ask whether it had requested consultations with Poland under article 3 (7) or article 2 (5) of the Convention, whether it agreed that the proposed activity could fall under appendix I, and what was its national definition of “deforestation” and “large area”.

25. The Committee agreed to continue its consideration of the matter at its next session.

V. Committee initiatives¹²

A. Svydovets mountains (EIA/IC/CI/7)¹³

26. The Committee continued the consideration of its initiative concerning the construction of a large tourism complex (Svydovets mountains, Ukraine) close to the borders with Hungary and Romania, in the absence of the Committee member nominated by Hungary.

27. The Committee recalled the letter of Ukraine dated 13 April 2023, indicating that, since the developer’s notice of it in March 2018, the activity had not proceeded but remained a mere project: no environmental impact assessment documentation had been prepared, nor had any permits for related works been issued.¹⁴ Based on the information made available to it, the Committee agreed that, without evidence that the activity was expected to be implemented, there were no grounds for the Committee to continue its consideration of the matter.

¹¹ See <https://unece.org/environmental-policy/environmental-assessment/eiaics9-belaruspoland>.

¹² See <https://unece.org/environment-policy/environmental-assessment/committee-initiative-overview>.

¹³ Available at <https://unece.org/environment-policy/environmental-assessment/eiaicci7>.

¹⁴ ECE/MP.EIA/2023/4, para. 87.

28. If the proposed activity was implemented in the future, the Committee pointed out that Ukraine should assess whether it fell under the Convention. In that regard, the Committee recalled that the precautionary principle underlay the Convention and guided its interpretation and application, including when determining, for the purposes of a notification, whether a proposed activity was likely to have a significant adverse transboundary impact.¹⁵ It recalled further its previous opinion that “notification is necessary unless a significant adverse transboundary impact can be excluded”.¹⁶ The Committee conceded that, for the project in question, within a distance of 78 km to the closest border, transboundary impacts were not a priori self-evident; nevertheless, considering the scale of the activities and the Tisza River that linked them with the borders of the possibly affected Parties, the Committee deemed it possible that a significant adverse transboundary impact could be identified.

29. The Committee agreed to close the matter and asked its Chair to write to Ukraine, Hungary and Romania to inform them about the Committee’s considerations.

B. Belarus national legislation (EIA/IC/CI/11)

30. The Committee finalized the draft findings and recommendations on compliance by Belarus with its obligations under the Convention in respect of its national legislation, taking into account the comments by Belarus dated 7 August 2023. It requested the secretariat to issue said findings and recommendations as an annex to the present meeting report (see annex I below) and to transmit that document to Belarus and to the Meeting of the Parties to the Convention at its next session. It also finalized draft decision IX/4f on the matter.

VI. Information gathering¹⁷

Convention matters

A. Khmelnitsky nuclear power plant (EIA/IC/INFO/10)¹⁸

31. The Committee continued its deliberations on the information it had gathered on the planned construction of units 3 and 4 of Khmelnitsky nuclear power plant in Ukraine.

32. It recalled the information provided by Ukraine during the informal consultations at the Committee’s fifty-sixth session.¹⁹ The Committee asked its Chair to write to Ukraine, requesting information on whether Ukraine had informed the concerned Parties as advised during the informal consultations.²⁰

B. Muzhiyevo Goldmine (EIA/IC/INFO/13)²¹

33. The Committee continued its consideration of the information it had gathered concerning the planned activity related to mining at the Muzhiyevo goldmine (close to the border with Hungary) and its possible reopening by Ukraine, in the absence of the Committee member nominated by Hungary.

34. The Committee noted with regret the lack of an answer by Ukraine to the Committee’s letter, dated 19 May 2023, requesting Ukraine to inform the Committee about its answer to the letter of Hungary dated 9 December 2021.

¹⁵ See ECE/MP.EIA/2019/14, para. 102; and ECE/MP.EIA/IC/2018/4, annex, para. 26.

¹⁶ ECE/MP.EIA/10, decision IV/2, annex I, para. 54.

¹⁷ See <https://unece.org/information-other-sources-0>.

¹⁸ Available at <https://unece.org/eiaicinfo10-ukraine-0>.

¹⁹ECE/MP.EIA/IC/2023/4, para. 83.

²⁰Ibid., para. 85.

²¹ Available at <https://unece.org/eiaicinfo13-ukraine-0>.

35. The Committee lacked evidence that Ukraine had entered into discussions with Hungary on whether the proposed activity was likely to cause significant adverse transboundary impact and thus should be treated as if it was listed in appendix I to the Convention. That continued to constitute non-compliance with article 2 (5).

36. Furthermore, the Committee could not exclude that the activity fell under appendix I to the Convention, requiring a notification under article 3 (1) or allowing the application of article 3 (7).

37. The Committee asked its Chair to write to Ukraine, with a view to:

- (a) Informing Ukraine about its conclusions;
- (b) Urging Ukraine to provide Hungary with the documents requested and to enter into discussions with it under article 2 (5) as soon as possible;
- (c) Informing Ukraine that the Committee would consider opening a Committee initiative at its fifty-ninth session, pointing out that, in the case in question, both compliance under article 2 (5) and the issue of whether the activity fell under appendix I, paragraph 14, would have to be assessed.

C. Lifetime extension of Rivne, South-Ukrainian, Zaporizhzhya and Khmelnytsky nuclear power plants (EIA/IC/INFO/20)

38. The Committee continued its deliberations on the lifetime extension of 12 power units located at Rivne, South-Ukrainian, Zaporizhzhya and Khmelnytsky nuclear power plants in Ukraine. It reviewed information provided by Austria (18 July), Belarus (25 July), Germany (31 July), Hungary (31 May), Poland (17 July) and Romania (22 June 2023) in response to the Committee's inquiry dated 19 May 2023 on the state of the transboundary environmental impact assessment procedure regarding South-Ukrainian and Zaporizhzhya nuclear power plants. Most concerned Parties indicated that they were still expecting the final decision from Ukraine. Moldova did not respond to the Committee.

39. The Committee, noting with regret the lack of response by Ukraine, asked its Chair to remind Ukraine to answer the letter sent on 19 May 2023. Furthermore, it asked its Chair to write to Slovakia with a view to the country informing the Committee about any update from Ukraine regarding South-Ukrainian and Zaporizhzhya nuclear power plants.

D. Netherlands (EIA/IC/INFO/15)

40. The Committee continued its consideration of the information it had gathered on the lifetime extension of Borssele nuclear power plant in the Netherlands.

41. It examined the information from the Netherlands, Germany and Belgium, as well as the non-governmental organization (NGO) Greenpeace Netherlands, in the light of the *Guidance on the Applicability of the Convention to the Lifetime Extension of Nuclear Power Plants* (the Guidance).²²

42. The Committee considered that the activity was related to situations described in the Guidance.²³ Notably, the Committee considered that the lifetime limitation until 31 December 2033 set by the 2010 amendment to the Nuclear Energy Act, the 2011 amendment to the operating permit concerning the fuel diversification and the 2013 amendment to the Nuclear Energy Act licence for the extension of the design lifetime of Borssele nuclear power plant amounted to a lifetime extension.

43. The Committee also considered that the Netherlands had notified the Belgian Region of Flanders in 2010 regarding the diversification of fuel of the power plant and had received a response from the Flemish authorities with a positive recommendation without further

²² United Nations publication, ECE/MP.EIA/31.

²³ *Ibid.*, situations 1 and 2, respectively, paras. 25 and 27.

remarks, including no expression of interest in being involved in the environmental impact assessment or licensing procedures, due to the limited transboundary impact in Belgium.

44. The Committee also considered that, in 2012, the draft decision issued by the Netherlands to extend the design lifetime of Borssele nuclear power plant had been notified to the neighbouring Belgian Region of Flanders and municipalities. However, the competent national authorities of Belgium and Germany had not been notified.

45. The Committee noted that Germany was aware of the regional public participation in Belgium concerning the lifetime extension. In September 2012, the Netherlands had informed Germany of the proceedings during the meeting of a bilateral body. Additionally, Germany had informed the Committee that it did not consider article 3 (7) of the Convention to be applicable.

46. The Committee took note of information from its Chair, that, in the interim, the Netherlands had consulted 10 potentially affected Parties on the “Draft Memorandum on Scope and Level of Detail for the amendment of the Nuclear Energy Act as the necessary first step towards extending the operating life of Borssele nuclear power plant beyond 2033.”²⁴

47. Considering the above, the Committee agreed:

(a) That the renewal of the operating authorization of the nuclear power plant was a lifetime extension;

(b) That the modifications that were prerequisites for the lifetime extension were subject to environmental impact assessments;

(c) That, with regard to notification, based on the facts in the individual case in question, there was no profound suspicion of non-compliance;

(d) To close the case;

(e) To welcome the recent application by the Netherlands of the Convention in its decision-making process for the extension of the operating life of Borssele nuclear power plant beyond 2033, including by widely notifying the potentially affected Parties.

48. The Committee asked its Chair to write to the Netherlands and Greenpeace Netherlands to inform them about the Committee’s conclusions.

E. France (EIA/IC/INFO/32)²⁵

49. The Committee continued its consideration of the information it had gathered regarding the planned lifetime extension by France of 32 units of eight nuclear power plants.²⁶

50. It examined information from France and the NGO Greenpeace France (letters of 1 August and 31 July 2023, respectively). It considered whether to open a Committee initiative further to paragraph 6 of its structure and functions with regard to Tricastin unit 1.²⁷

51. To determine whether the information available to the Committee gave rise to a profound suspicion of non-compliance, it reviewed the information in the light of the Guidance.

52. The Committee first examined whether the Convention was applicable. It considered whether the activity represented a lifetime extension of Tricastin unit 1, and whether the lifetime extension represented an activity or a major change to an activity under the Convention.

²⁴ Summary of the Memorandum on Scope and Level of Detail (platformparticipatie.nl).

²⁵ Available at <https://unece.org/eia/info32>.

²⁶ For more information about the number of units, see ECE/MP.EIA/2020/4–ECE/MP.EIA/SEA/2020/4, table 4.

²⁷ See <https://unece.org/sites/default/files/2021-02/Implementation%20Committee%20structure%20functions%20procedures%20rules.e%202020.pdf>

53. Regarding the lifetime extension, the Committee deemed it irrelevant that the French regulatory system did not contain the concept of a design life or a lifetime extension, as the Guidance did not refer to a formally established lifetime but followed a pragmatic approach and used the term “lifetime extension” based on a common understanding. The situations contained in chapter II were not exhaustive; they aimed to ensure broad application of the Guidance.²⁸

54. Furthermore, the fourth periodic safety review coincided with the end of 40 years of operating time. While periodic safety reviews were not an indicator per se for a lifetime extension, a specific periodic safety review towards the end of the established lifetime could be carried out in support of the decision-making process and might thus indicate a lifetime extension.²⁹

55. Also, in a public letter to the operator, the Nuclear Safety Authority of France stated that the fourth periodic safety review of the 900 MWe reactors was “of particular importance because the service life hypothesis adopted at the design stage was 40 years. Continuing operation beyond 40 years necessitates the updating of the design studies or equipment replacements”.³⁰

56. That review was the basis for a public inquiry and for the decisions of the Nuclear Safety Authority of 23 February 2021, 29 June and 7 July 2023, which prescribed the conditions for the continued operation and authorized the modifications.

57. In the view of the Committee, that review and the ensuing decisions appeared to have more significance for the operation of unit 1 than the previous periodic safety reviews. They formed the basis for allowing the continued operation beyond the “service life hypothesis” of 40 years. That indicated a lifetime extension as described in situation 3, or potentially situation 2.³¹

58. Regarding a major change, the Committee considered as indicators pointing towards it the statement by the Nuclear Safety Authority in a public letter to the operator upon conclusion of the generic phase of the fourth periodic safety review, that the magnitude of modifications would bring “very significant” improvements to the safety of the reactors.³² The letter summarized some of the modifications:

- (a) Verifying, over a wide area, that reactors complied with their standards;
- (b) Taking better account of internal and external hazards. Reactors would thus be able to cope with more severe hazards than hitherto, and would be robust to the failure of active equipment and the most important passive equipment;
- (c) Limiting the radiological consequences of accidents without core meltdown, including in the event of an attack, which would significantly reduce the occurrence of situations requiring the implementation of population protection;
- (d) Taking into account new accident situations for the pools, ... and improving the provisions for managing accident or stress situations affecting the storage pool;
- (e) Reducing the risk of core meltdown accidents and limiting the consequences of that type of accident, in particular by limiting situations that would require the containment vessel to be breached, and by reducing the risk of corium breaking through the bottom of the containment vessel. Those measures would significantly reduce releases to the environment during that type of accident.

59. The Committee noted that the decision of 29 June 2023 stated in its preamble that “actions planned by [Électricité de France] and those taken in response to the requirements

²⁸ ECE/MP.EIA/31, paras. 22 and 24.

²⁹ Ibid., situation 3, paras. 29–31.

³⁰ See www.french-nuclear-safety.fr/asn-informs/news-releases/900-mwe-reactors-beyond-40-years.

³¹ ECE/MP.EIA/31, paras. 27–28.

³² Letter from the Nuclear Safety Authority to the operator, dated 23 February 2021, p. 2. Available at www.french-nuclear-safety.fr/Media/Files/00-Consultation-du-public/Courrier-a-EDF-Conditions-generiques-du-4e-reexamen-RP4-900-MWe.

of annex 1 to the aforementioned decision of February 23 2021 will enable the objectives set for this periodic review to be met”.³³

60. Also, the decision of 7 July 2023³⁴ expressly “authorizes” the operator “to modify in a noticeable way the installations, the elements that lead to the commissioning, and the operating conditions of units 1 and 2 of Tricastin nuclear power plant”, as applied on 23 March 2022.

61. France also informed the Committee that, according to the operator, investment costs related to the fourth periodic safety review were, on average, €235 million per unit.³⁵

62. Having found, for the purpose of deciding whether to open a Committee initiative, that the Convention appeared *prima facie* to be applicable, the Committee considered whether there was a profound suspicion of France being in non-compliance with its obligations under the Convention.

63. Regarding the obligation under article 3 (1) to notify potentially affected Parties, there was no indication for the Committee that France had done so. In its letter of 1 August 2023, France argued that the modifications had no transboundary impact, without mentioning the letter from Italy of 14 January 2021 indicating that it was an affected Party and requesting to be involved in a transboundary procedure. The Committee considered its previous findings about the likelihood of transboundary impacts in case of a lifetime extension.³⁶

64. Regarding the obligation under article 3 (7) to consult with Italy following its letter of 14 January 2021, there was no indication that France responded to Italy or took the required steps under article 3 (7) (exchange of information and discussions between these Parties regarding potential transboundary impacts).

65. Regarding the obligation under article 2 (2)–(3) to conduct a transboundary environmental impact assessment procedure, France concluded internally that there was no need to do so because there was no transboundary impact. However, in the Committee’s guidance letter of February 2022, it had reminded France about its view on possible transboundary impacts of lifetime extensions, as previously expressed by the Committee.³⁷

66. The Committee found that there was a profound suspicion of non-compliance by France with its obligations under articles 2 (2)–(3) and 3 (1) and (7) of the Convention in respect of the lifetime extension of unit 1 of Tricastin nuclear power plant.

67. The Committee therefore decided to open a Committee initiative. It agreed to invite France, further to paragraph 9 of the Committee’s structure and functions, to attend a hearing at its fifty-ninth session (Geneva, 18–21 June 2024). The Committee would prepare a non-exhaustive list of questions during its fifty-eighth session (Geneva, 27 February–1 March 2024).

68. The Committee invited its Chair to write to France with a view to informing it about the Committee’s considerations, and inviting France to its fifty-ninth session.

69. Lastly, the Committee asked the secretariat to share with France and Greenpeace France – in the absence of any objections based on reasonable grounds – the respective letters, dated 1 August and 31 July 2023.

³³ Nuclear Safety Authority decision No. 2023-DC-0764, para. 6. Available at <https://www.asn.fr/l-asn-reglemente/bulletin-officiel-de-l-asn/installations-nucleaires/decisions-individuelles/decision-n-2023-dc-0764-de-l-asn-du-29-juin-2023>.

³⁴ Decision of the President of the French Nuclear Safety Authority No. CODEP-DCN-2023-032796 of 7 July 2023 authorizing Électricité de France to modify in a noticeable way Tricastin nuclear power plant in the light of the conclusions of the fourth periodic review of reactor No. 1 of Basic Nuclear Installation No. 87, and amending Nuclear Safety Authority decisions Nos. 2011-DC-0227, of 27 May 2011, and 2015-DC-0494, of 27 January 2015.

³⁵ Checklist, 16 June 2021, p.3, point 2.1.

³⁶ ECE/MP.EIA/IC/2022/2, para. 27.

³⁷ ECE/MP.EIA/IC/2022/4, para. 23.

F. Germany (EIA/IC/INFO/35)

70. The Committee began its consideration of the information it had received on 29 June 2023, from the German NGO “Deutsche Umwelthilfe”, concerning the planned construction by Germany of a liquefied natural gas terminal in the Bay of Pomerania in the Baltic Sea, near the coastal waters of Denmark, Poland and Sweden. The NGO raised concerns about transboundary environmental impacts due to the shipping traffic of liquefied natural gas tankers, including significant underwater noise and pollutant emissions that would negatively affect the Baltic Sea’s marine water ecosystems, seabirds and marine mammals, as well as neighbouring States’ interests.

71. The Committee also reviewed the information provided by two other NGOs, Coalition Clean Baltic and Greenpeace Poland, on 5 and 21 July 2023 respectively, also expressing their concern regarding the potential transboundary environmental impacts of that planned activity.

72. The Committee appointed a curator for the case. It asked its Chair to write to the Government of Germany to inform it about the information received from the NGOs and requesting information about the planned activity and the application by Germany of the transboundary environmental impact assessment procedure under the Convention regarding the planned activity.

G. North Macedonia (EIA/IC/INFO/36)

73. The Committee began its consideration of the information it had received on 19 July 2023 from the Bulgarian NGO “Balkanka Association” concerning the development by North Macedonia of a new gold-copper mine, close to the border with Bulgaria.

74. The Committee examined information from the NGO raising concerns regarding the potential adverse transboundary environmental impact of the planned activity, such as the poisoning of the Struma River basin due to the project, planned at the North Macedonian villages of Ilovitsa and Shtuka.

75. The Committee appointed a curator for the case. It asked its Chair to write to North Macedonia to inform it about the information received from the NGO and requesting information about the planned activity and the application by North Macedonia of the transboundary environmental impact assessment procedure under the Convention regarding the planned activity.

H. Bulgaria (EIA/IC/INFO/37)

76. The Committee began its consideration of the information it received on 14 August 2023 from the Bulgarian NGO “Balkanka Association” concerning several planned mining activities in Bulgaria, close to the border with Greece. According to the NGO, the “Ada Tepe” and “Tintyava” gold mines threatened to poison the transboundary Byala Reka River and Arda River basins.

77. The Committee appointed a curator for the case. It asked its Chair to write to the Government of Bulgaria, to inform it about the information received from the NGO and requesting information about the planned activity and the application by Bulgaria of the transboundary environmental impact assessment procedure under the Convention regarding the planned activity.

VII. Review of implementation

A. Examination of general and specific compliance issues from the sixth review of implementation of the Convention

78. The Committee noted with regret the lack of clarifications from Kyrgyzstan regarding the definition of “major change” in its national legislation in the light of article 1 (v) of the Convention, despite numerous reminders.

79. The Committee invited its Chair to write again to Kyrgyzstan asking it to respond, through the secretariat in English, by 31 October 2023, and indicating that, in the absence of a response, the Committee would consider further measures at its next session. The absence of a response by Kyrgyzstan would also be flagged in draft decision IX/4 on general issues of compliance with the Convention.

80. The Committee appointed a new curator for the matter.

B. Examination of general and specific compliance issues

1. From the second review of implementation of the Protocol

81. The Committee continued its consideration of the specific compliance issue regarding Serbia identified in the second review of implementation of the Protocol (ECE/MP.EIA/SEA/2017/9).

82. The Committee noted with regret the repeated lack of response from Serbia despite several reminders.

83. It invited its Chair to write again to Serbia with a view to reminding it to inform the Committee about the status of the legislative process to adopt the new Law on Strategic Environmental Assessment and, if adopted, to provide the Committee with the amended Law and the English-language translation thereof, at the latest by 15 January 2024. Serbia should also be informed that: in the absence of a response, the Committee would consider further measures at its next session; and that its lack of response would be flagged in draft decision V/4 on general issues of compliance with the Protocol.

84. The Committee envisaged appointing a new curator for the matter at its next session from amongst the Committee members for Protocol matters.

2. From the third review of implementation of the Protocol

85. The Committee continued its consideration of general and specific compliance issues identified in the third review of implementation of the Protocol (ECE/MP.EIA/SEA/2020/8), noting the response by Armenia, and the lack of response thereto from North Macedonia.

86. Concerning Armenia, the Committee noted with satisfaction that the new law (see para. 8 above) regulated “minor modifications” to a plan or programme in accordance with article 4 (4) of the Protocol, and closed the matter. However, shortcomings of the new law related to the screening in accordance with article 4 (3)–(4) of the Protocol would be subject to further consideration in the follow-up to the forthcoming decision IX/4b–V/4b.

87. Regarding North Macedonia, the Committee noted with regret the repeated lack of response from North Macedonia despite several reminders. It asked its Chair to write again to North Macedonia with a view to reiterating a third time its request for clarifications by, at the latest, 31 October 2023. In the absence of an answer, the Committee would consider further measures at its next session. The matter would also be flagged in draft decision V/4 on general issues of compliance with the Protocol.

VIII. Structure, functions and operating rules

88. The Committee finalized the proposed amendments to the Implementation Committee's operating rules and structure and functions,³⁸ for consideration of the Meetings of the Parties, and an informal document setting out the rationale for the proposals.

IX. Other business

89. In 2024, the Committee would hold its fifty-eighth session from 27 February to 1 March (online), its fifty-ninth session from 18 to 21 June and its sixtieth session from 14 to 17 October (formats to be confirmed).

X. Presentation of main decisions taken and closing of the session

90. The Committee reviewed the main decisions taken. The Chair then formally closed the fifty-seventh session. The Committee adopted the draft report by electronic decision-making procedure, on 18 September 2023.

³⁸ ECE/MP.EIA/2023/5–ECE/MP.EIA/SEA/2023/5 (forthcoming).

Annex I

Findings and recommendations on compliance by Belarus with its obligations under the Convention regarding its national legislation

I. Introduction — the Committee's procedure

1. On 18 July 2016, Belarus adopted Law No. 399-3 on State Ecological Expertise, Strategic Environmental Assessment and Environmental Impact Assessment (hereinafter, the Law). At its thirty-ninth session (Geneva, 5–7 September 2017), the Committee began its information gathering regarding the recently adopted Law, requesting Belarus to provide information thereon to the Committee.¹
2. At its forty-third session (Geneva, 4–7 December 2018), the Committee examined the Law and the related subsidiary legislation, noting several deficiencies vis-à-vis the Convention. By letter dated 2 January 2019, it shared a non-exhaustive list of deficiencies with Belarus and requested clarification from Belarus about its plans to address said deficiencies.²
3. The Committee, at its forty-fourth session (Geneva, 12–15 March 2019), requested additional clarifications from Belarus regarding its environmental impact assessment legislation, following information received from Belarus dated 4 March 2019.³
4. At its forty-sixth session (Geneva, 10–13 December 2019), the Committee noted the response of Belarus of 15 July 2019 to the Committee's letter of 11 April 2019. It invited Belarus to: update the Committee on recent changes in its environmental impact assessment-related legislation; and to provide copies of the amended legislation and of all sanitary rules and regulations referred to in the letter of Belarus dated 15 July 2019 and clarifications on how Belarus had addressed the deficiencies in its legislative framework vis-à-vis the Convention communicated to it in the Committee's letter dated 2 January 2019.⁴
5. At its forty-ninth session (Geneva, 2–5 February 2021), the Committee noted that, since September 2020, with EU4Environment programme funding, the secretariat had assisted Belarus in reviewing its primary and secondary legislation with a view to aligning it with the Convention and the Protocol. It requested Belarus to provide the Committee, by 1 September 2021, with information about steps taken or to be taken by it to bring its environmental impact assessment legislation into compliance with the Convention and the Protocol.⁵
6. At its fifty-first session (Geneva, 4–7 October 2021), the Committee noted information from Belarus, dated 31 August 2021, about the steps taken by it since 2019 to bring its legislation into compliance with the Convention and the Protocol, including the legislative review carried out with the assistance of the secretariat under the EU4Environment programme. It requested Belarus to fully align its legislation with the Convention and the Protocol and invited it to inform the Committee, by 5 April 2022, of the steps taken for that purpose.⁶
7. At its fifty-second session (Geneva (online), 29–31 March 2022), the Committee examined a report prepared in the framework of the EU4Environment programme containing the results of the review of the legislation of Belarus regulating procedures on ecological expertise, environmental impact assessment and strategic environmental assessment in terms

¹ ECE/MP.EIA/IC/2017/4, para. 60.

² ECE/MP.EIA/IC/2018/6, para. 9.

³ ECE/MP.EIA/IC/2019/2, para. 25.

⁴ ECE/MP.EIA/IC/2019/6, 33–36.

⁵ ECE/MP.EIA/IC/2021/2, 44–45.

⁶ ECE/MP.EIA/IC/2021/6, paras. 46–49.

of its compliance with the Convention and the Protocol. It renewed its request to Belarus to fully align its legislation with the Convention and the Protocol without delay, taking into account the results of the Committee's preliminary assessment as presented in the Committee's letter, dated 2 January 2019, and the review of its legislation undertaken under the EU4Environment programme, and to inform the Committee, by 15 August 2022, of the steps taken by it to bring its environmental impact assessment legislation into compliance with the Convention and the Protocol. It invited Belarus to present those steps at the Committee's fifty-fourth session and requested a written update in advance of that session, by 15 August 2022.⁷

8. The Committee conducted informal online consultations with Belarus at its fifty-fourth session (Geneva (hybrid), 4–7 October 2022). It noted with regret that it had not received any written response from Belarus in advance of the session. The Committee noted the information provided by the delegation of Belarus and expressed regret that Belarus had not yet adopted the amended legislation and that it planned to do so only by December 2023. The Committee pointed out that the secretariat had assisted Belarus in aligning its legislation for the past 10 years, with funding from the European Union, and had recommended areas where improvements could be made.⁸

9. At its fifty-fifth session (Geneva (online), 31 January–3 February 2023), the Committee noted the letter by Belarus, dated 17 January 2023, informing the Committee about some of the proposed amendments to its Law on State Ecological Expertise, Strategic Environmental Assessment and Environmental Impact Assessment, including a timetable of the legislative process, according to which submission to the Belarusian House of Representatives was expected in March 2023. The Committee reviewed the information on the draft amendments contained in that letter and found inconsistencies with the Convention, despite its previously expressed concerns and the recommendations by consultants to the secretariat funded through the EU4Environment programme.⁹

10. At the Committee's fifty-sixth session (Geneva, 2–5 May 2023), it took note of the letter by Belarus, dated 18 April 2023, which presented progress in the adoption by Belarus of its amended legislation, with the draft law having passed its first reading in parliament and with its public discussion being held in 2022. Based on the information made available to it since 2016, through its and the international consultants' written communication with Belarus, and the informal consultations it had held with Belarus during its fifty-fourth session, the Committee decided to begin a Committee initiative further to paragraph 6 of its structure and functions. It preliminarily concluded that there was a profound suspicion of non-compliance by Belarus with its obligations under article 2 (2) of the Convention in respect of not having taken the necessary legal, administrative or other measures to implement the provisions of the Convention.¹⁰

11. The Committee agreed on the text of the draft findings and recommendations by electronic decision-making procedure on 6 July 2023, and transmitted the draft to Belarus for comments or representations by 8 August 2023. It finalized the draft at its fifty-seventh session (Geneva, 29 August–1 September 2023), taking into consideration the comments made by Belarus on 7 August 2023. At that session, the Committee also prepared the corresponding draft decision on compliance, to be submitted to the Meeting of the Parties to the Convention at its next session.

⁷ ECE/MP.EIA/IC/2022/2, paras. 16–17.

⁸ ECE/MP.EIA/IC/2022/7, paras. 41–42.

⁹ ECE/MP.EIA/IC/2023/2, paras. 31–32.

¹⁰ ECE/EIA/MP.IC/2023/4, paras. 39–41.

II. Summary of facts, information and issues

A. Introduction

12. Belarus deposited its instrument of acceptance of the Convention on 10 November 2005 and the Convention entered into force for it 90 days later, on 8 February 2006.

13. Between 2008 and 2016, Belarus amended its environmental impact assessment legislation several times. On 18 July 2016, Belarus adopted the Law on State Ecological Expertise, Strategic Environmental Assessment and Environmental Impact Assessment.¹¹ On 19 January 2017, it approved the following relevant secondary legislation: the Regulations on the Environmental Impact Assessment Procedure, Requirements on the Content of an Environmental Impact Assessment Report, and Qualification Criteria for Environmental Impact Assessment Experts (Environmental Impact Assessment Regulations) and the Regulations on the Strategic Environmental Assessment Procedure, Requirements on the Content of a Strategic Environmental Assessment Report, and Qualification Criteria for Strategic Environmental Assessment Experts (Strategic Environmental Assessment Regulations).¹² In addition, certain provisions set out in the Regulation on Organizing and Conducting Public Consultations to Discuss Environmentally Significant Decisions and Environmental Impact Assessment Reports, and Taking Account of Environmentally Significant Decisions (hereinafter, the Regulation on Public Participation),¹³ adopted on 13 January 2017, are of relevance, as well as the Law of Belarus on Environmental Protection, No.1982-XII of 26 November 1992.

14. In February 2017, United Nations Economic Commission for Europe (ECE) consultants funded under the Greening Economies in the European Union's Eastern Neighbourhood Programme¹⁴ provided comments on the Belarus environmental impact assessment legislative framework (the Law and the regulations). They listed the provisions of the Law and the regulations that were inconsistent with the Convention and the Protocol.

15. On 15 July 2019, Belarus introduced amendments to the Law that entered into force on 27 July 2019. Following that amendment, it also changed its secondary legislation, specifically the Environmental Impact Assessment Regulations,¹⁵ which entered into force on 17 November 2019.

16. In September 2020, a review of primary and secondary legislation was initiated in Belarus, taking into account the previous legislative assistance, with the support of the secretariat and funding from the EU4Environment programme, with a view to aligning its legislation with the Convention and the Protocol. The review report and a rationale for amending the legislation were discussed with the national authorities of Belarus at a round table in May 2021.

17. The legal experts finalized the review report¹⁶ based on comments provided by Belarus during a project meeting on 14 September 2021, and made it available on the

¹¹ Law No. 399-3.

¹² Approved by Belarusian Council of Ministers Resolution No. 47 on 19 January 2017.

¹³ Approved by Belarusian Council of Ministers Resolution No. 24 on 13 January 2017.

¹⁴ The [Greening Economies in the Eastern Neighbourhood programme](#) was a large regional programme implemented in the period 2013–2017 by the United Nations Economic Commission for Europe (ECE), the Organisation for Economic Co-operation and Development, the United Nations Environment Programme and the United Nations Industrial Development Organization to assist the six European Union Eastern Partnership countries – Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine – in their transition to green economy. The programme was financed by the European Commission, the four implementing organizations and other donors. ECE was in charge of implementing a programme component aimed at promoting the use of strategic environmental assessment and environmental impact assessment as essential planning tools for environmentally sustainable economic development.

¹⁵ Approved by Belarusian Council of Ministers Resolution No. 47 on 19 January 2017.

¹⁶ Review and analysis of the legislation of the Republic of Belarus on ecological expertise, strategic environmental assessment and assessment of the impact upon the environment in terms of its

Convention's website in English at the end of October 2021. The report recommended amendments to be made by Belarus to its legislation in order to align it with the Convention and the Protocol. On 29 September 2021, the European Union suspended further EU4Environment programme funding for activities involving the authorities of Belarus. Therefore, no consultancy support for the legal drafting to reflect the recommendations of the legislative review was available.

18. On 17 July 2023, Belarus adopted the Law on Amendments of the Law on State Ecological Expertise, Strategic Environmental Assessment and Environmental Impact Assessment.¹⁷ The Law will enter into force on 23 January 2024.

B. Review of existing legislation

19. The Committee reviewed the legislation of Belarus, considering also the analysis of the legislation by the consultants funded by the EU4Environment programme contained in the review report of October 2021 (see para. 17 above).

20. The Law of Belarus on State Ecological Expertise, Strategic Environmental Impact Assessment and Environmental Impact Assessment, as amended by law No. 296-3, (the Law)¹⁸ regulates, according to its preamble, "Relations in the field of State environmental expertise, strategic environmental assessment and environmental impact assessment and is aimed at ensuring the environmental safety of planned economic and other activities, as well as at preventing negative effects on the environment." The Law defines: environmental impact assessment and State ecological expertise in the design of pre-project (pre-investment) and project documentation; and strategic environmental assessment of State, regional and sectoral strategies, programmes and urban planning projects, as well as changes of the environment that may occur during the implementation of programmes and urban planning projects.

1. Environmental impact assessment legislation

21. In general, the environmental impact assessment system of Belarus reflects, to a certain extent, traditional approaches used by countries applying the system of State ecological expertise.¹⁹

22. The Regulations on Environmental Impact Assessment Procedure, Requirements on the Content of an Environmental Impact Assessment Report, and Qualification Criteria for Environmental Impact Assessment Experts (Environmental Impact Assessment Regulations, adopted in 2017 and amended in 2019, see paras. 13 and 15 above) define the procedure for an environmental impact assessment, taking into account transboundary impact, proposed economic and other activities, including activities relating to the use of nuclear energy, and establish requirements for the content of an environmental impact assessment report, as well as procedural and other requirements for the experts when conducting the assessment.

23. Neither the Law, nor the Environmental Impact Assessment Regulations include definitions of the terms "impact" and "competent authority", although some provisions for the competent authority are included in section II of the Law.

24. According to the Regulations, the environmental impact assessment and the expertise process include the following stages:

compliance with the Espoo Convention and the Protocol on SEA, 2021. Available at https://unece.org/sites/default/files/2021-10/EU4Environment%20%282021%29%2C%20Review%20EIA_SEA%20Belarus_ENG.pdf.

¹⁷ Law of the Republic of Belarus, 17 July 2023 No. 296-3.

¹⁸ In the absence of the provision of the English translation of the entire law by Belarus, the Committee used, to some extent, an unofficial translation.

¹⁹ For more details, see the General guidance on enhancing consistency between the Convention and environmental impact assessment within State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia (ECE/MP.EIA/2014/2).

- (a) Design and approval of the “environmental impact assessment programme”;²⁰
- (b) Drafting and public discussions of the environmental impact assessment report, in case of possible significant adverse transboundary impact of the proposed activity, with the participation of the affected Party, and finalization of the environmental impact report and approval by the project owner;
- (c) Submission of the project documentation for the proposed activity to State ecological expertise, taking into account the project specificities in order to ensure the environmental safety of the proposed activity, defined while performing the environmental impact assessment, as well as the submission of the approved environmental impact assessment report and materials of the public discussions of the environmental impact assessment report in compliance with international procedures (in case of possible transboundary impact of the proposed activity);
- (d) Submission of the approved environmental impact assessment report to the Ministry of Natural Resources and Environmental Protection to inform the affected Parties.

25. The Law and Regulations provide for public participation at different stages in the environmental decision-making process, but no evidence was provided to the Committee about whether and how comments from the public should be taken into account in the final decision, in accordance with article 6 of the Convention.

26. The amendment to article 7 of the Law in 2023 modifies the list of proposed activities for which an environmental impact assessment is required but still does not specifically include enrichment of nuclear fuels, trading ports and ports for inland waterway traffic, onsite extraction of metal ores and offshore hydrocarbon production, in accordance with, respectively, paragraphs 3, 9 and 14–15 of appendix I to the Convention. The Committee notes that the new article 7 (2) of the Law refers to obligations stipulated by international treaties in general, leaving the scope of that paragraph unclear.

27. In the event of a possible transboundary impact of the proposed activity, consultations with the affected Parties are foreseen at different stages of the procedure. Comments and suggestions received by the affected Parties have to be incorporated into the environmental impact assessment report.

2. Strategic environmental assessment

28. Although Belarus is not a Party to the Protocol on Strategic Environmental Assessment, it has legislation in place for strategic environmental assessment. The Law on State Ecological Expertise, Strategic Environmental Assessment and Environmental Impact Assessment also constitutes the basis for the conduct of strategic environmental assessment. Guidance for aligning the legislation with the Protocol has been part of the legislative assistance provided to Belarus and resulted in recommendations to Belarus for areas where improvements could be made. In the context of its initiative, the Committee limited its analysis and its considerations to the environmental impact assessment legislation.

²⁰ Article 10 of the regulations defines “environmental impact assessment programme”. The environmental impact assessment programme defines the structure of the environmental impact assessment report, the schedule, scope and level of detail of the assessment based on the characteristics of the proposed activity and the complexity of natural, social and man-caused conditions. The level of detail and scope of the environmental impact assessment shall be sufficient for the preliminary evaluation and estimation of the possible impacts in the field of environmental protection and rational usage of natural resources and related social and economic impacts, other impacts of the proposed activity on the environment, including human health and safety, fauna, flora, land (including soils), subsoils, atmospheric air, water resources, climate, landscape, natural territories subject to special protection, as well as for objects of historical and cultural value, and (if there is any) the relationship between these impacts.

3. Transboundary issues

29. The Regulations provide measures to identify transboundary impacts of proposed activities. Although the term “affected Party” is explained, the definition of the term “Party of origin” has yet to be transposed.

30. The Regulations indicate that, in case of a possible transboundary impact of a proposed activity, the affected Parties hold public discussions on the environmental impact assessment report on their territory, in accordance with “international treaties” and their respective national legislation. Upon the initiative of the affected Parties, representatives of the project owner and the authorized project organization, as well as, if necessary, representatives of the Ministry of Natural Resources and Environmental Protection on behalf of Belarus, participate in public discussions on the territory of the affected Parties.

31. Pursuant to the Regulations, the conclusion of the State ecological expertise is “made based on the materials of the approval of the environmental impact assessment report” by the affected Parties (for economic and other activities proposed in the territory of Belarus that may have a transboundary impact).

32. Although the Regulations include provisions about post-project analysis of the proposed activity, post-project analysis is only foreseen “on a need basis”. The procedure in accordance with article 7 of the Convention is fragmented throughout several laws and it remains unclear whether it is comprehensive.

C. Amendments

33. Since 2020, Belarus has repeatedly informed the Committee about the ongoing legislative process to amend its legislative framework on State ecological expertise, strategic environmental assessment and environmental impact assessment. In August 2023, Belarus provided the Committee with the text of the amendments to the Law that would enter into force in 2024. In its communication with the Committee, Belarus stated that the amendments aim to: take account of the practice of law enforcement; remove uncertainties; and harmonize interpretation and consistency with other acts (such as the building/construction codex). Although it has not ratified the second (2004) amendment to the Convention, Belarus indicated that its legislative framework, as amended, would be aligned with the Convention, including the list of activities in appendix I.

III. Consideration and evaluation

34. The Committee considered that the legislation of Belarus reflected conceptual approaches to environmental impact assessment and the role of the environmental impact assessment documentation that lead to inconsistencies with the Convention. Environmental impact assessment procedure and documentation were not prescribed as parts of the competent authority’s decision-making procedure on a proposed activity. According to the Law, the project proponent is responsible for organizing and conducting environmental impact assessment of a given proposed activity in the framework of the project development, and documenting its results in a report, while the role and mandate of the competent authority is absent or limited at most stages of the procedure.

35. The Committee considered that the lack of certain definitions (see paras. 23 and 29 above) and key elements for implementing the Convention, for example, whether comments from the public are properly taken into account in the final decision, as well as insufficient environmental authority control mechanisms regarding compliance with the Convention, reduce the effectiveness of the environmental impact assessment legislation of Belarus.

36. The Committee concluded that its above analysis and the ensuing recommendations concur with the review and analysis of the legislation conducted under the EU4Environment programme, and that certain aspects of the environmental impact assessment legislation of Belarus still need to be amended, to ensure compliance with the Convention.

37. The Committee also concluded that, despite the efforts by Belarus, through the amendment of July 2023, to align its legislation with the second (2004) amendment to the Convention, which it is yet to ratify, the legislation of Belarus is still not fully consistent with the Convention, especially regarding the list of activities in appendix I.

IV. Findings

38. 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 to the Convention.

39. The Committee welcomed the improvement by Belarus of its national legislation through the adoption in July 2023 of the Law of the Republic of Belarus No. 296-3 on the Amendment of the Law on State Ecological Expertise, Strategic Environmental Assessment and Environmental Impact Assessment, submitted for the Committee's analysis during the intersessional period.

40. However, the Committee expressed regret that not all deficiencies of the previous legislation were addressed. Despite the support by the secretariat since 2013 with European Union funding, including most recently (2019–2021) under the EU4Environment programme, Belarus has not yet adopted fully compliant legislation.

41. The Committee found that the conceptual differences between the legislation of Belarus and the Convention (see para. 35 above) need to be addressed.

42. Based on the information available to it, the Committee considered that the following areas were insufficiently addressed or are unclear in the legal framework of Belarus:

(a) Definitions are either missing or not fully compliant with the Convention, for example, as regards impact, competent authority, or Party of origin;

(b) The list of activities does not explicitly contain activities listed in paragraphs 3, 9 and 14–15 of appendix I to the Convention (prior to its amendment by the second amendment);

(c) A wide range of exemptions for environmental impact assessment can be established by the President of Belarus;

(d) The final decision does not provide information on the rationale for its adoption;

(e) The legal framework for post-project analysis is not in line with article 7 of the Convention.

43. Based on the above, the Committee concluded that Belarus was in non-compliance with its obligations under article 2 (2) of the Convention for not having taken the necessary legal, administrative or other measures to implement the provisions of the Convention.

V. Recommendations

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

(a) Endorse the findings of the Implementation Committee that Belarus was in non-compliance with its obligations under article 2 (2) of the Convention for not having taken the necessary legal, administrative or other measures to implement the provisions of the Convention;

(b) Encourage Belarus to align its legislation with appendix I, as amended by the second amendment, and to ratify that amendment, in order to facilitate the application of the Convention between Parties;

(c) Request Belarus to amend its legislation in accordance with the Committee's findings, and to adopt it to ensure full implementation of the Convention;

(d) Request Belarus to report to the Implementation Committee, by the end of 2024, on the progress made.

Annex II

[English only]

Findings and recommendations on 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**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 Committee revised its findings and recommendations on 16 February 2023. On 27 March 2023, the Committee received comments from Aarhus Centar and Centre for Environment in Bosnia and Herzegovina, and from Green Home and Environmental Movement Ozon in Montenegro.

13. On 12 May 2023, the Committee received comments from Montenegro on the findings and recommendations as revised, adding that Bosnia and Herzegovina during the 2012/2013 procedure had not set a time frame for Montenegro to submit its transboundary comments. Furthermore, Montenegro alleged that Bosnia and Herzegovina had never informed Montenegro of the final decision/environmental permit from 2013 and, consequently, Bosnia and Herzegovina was also in non-compliance with article 6 of the Convention. On 29 May 2023, the Committee received comments from Montenegro on the draft decision.

14. In a letter dated 14 June 2023, the Committee invited Bosnia and Herzegovina to comment on the information and new allegations provided by Montenegro. On 7 July 2023, Bosnia and Herzegovina submitted an answer to the Committee that required clarification. On 11 July 2023, the Committee sent follow-up questions to Bosnia and Herzegovina on whether it had set a time limit for Montenegro to respond in the 2012/2013 environmental impact assessment procedure, and, if so, how long the time limit was, and when and how the time limit had been communicated to Montenegro and to provide evidence to substantiate its answers.

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.

15. Bosnia and Herzegovina responded on 21 July 2023 and Montenegro commented, on 4 August 2023, on the letter by Bosnia and Herzegovina, pointing out that the answers from Bosnia and Herzegovina in principle only referred to the time limit that Montenegro had set for consulting its own public on the environmental impact assessment documentation.

16. Bosnia and Herzegovina was invited again to respond to the arguments of Montenegro. Bosnia and Herzegovina alleged, in a letter dated 15 August 2023, that, at the bilateral meeting in Banja Luka (Bosnia and Herzegovina) on 30 November 2012, the Parties had agreed orally on the dates for Montenegro to respond. Bosnia and Herzegovina further stated that the Ministry of Spatial Planning, Construction and Ecology did not set any time limit, because the consultation process and future steps were agreed upon at the meeting.

17. In an email dated 21 August 2023, Montenegro commented on the statements of Bosnia and Herzegovina, arguing that there was no agreement on the timeline for Montenegro to respond to Bosnia and Herzegovina. According to Montenegro, the time limit (deadline) was never mentioned or discussed during that meeting. In the view of Montenegro, that meeting marked the beginning of further communication on the issue. Furthermore, Montenegro did not receive from Bosnia and Herzegovina any official letter after that meeting, or the minutes from the meeting, or other written or oral confirmation regarding the timing. Montenegro further alleged that no reminder in any form was received from Bosnia and Herzegovina regarding the timing for a response. In an email dated 23 August 2023, Bosnia and Herzegovina reiterated that a time frame was provided at the meeting in Banja Luka.

18. At its fifty-seventh session (Geneva, 29 August–1 September 2023) the Committee decided to revise its previous findings and recommendations and the corresponding 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). It transmitted the revised draft findings and recommendations to the Parties concerned for comments or representations by 6 October 2023. It finalized by electronic decision-making procedure the revised findings and recommendations on 16 October 2023, after having considered the comments and representations received by Bosnia and Herzegovina and Montenegro dated 4 and 6 October 2023, respectively.

II. Summary of facts, information and issues

19. 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

20. 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.

21. 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

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.

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.

22. 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.

23. 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

24. 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.

C. Interlinkages with other international agreements

25. 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

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

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

26. 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.

27. 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.

28. 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 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.

29. 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

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

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”.

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

30. 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

31. 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.

32. 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.

33. 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.

34. 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.

35. 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

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

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.

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.

36. 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.

37. 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

38. 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.

39. 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.

40. 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

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.

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

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

41. 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.

42. 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.

G. Bilateral cooperation

43. 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

44. 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.

45. The Committee emphasizes that Parties, especially when making a submission, should, at the earliest stage in the proceedings, provide the Committee with all allegations and information on facts they want to refer to and that are relevant for the outcome of the case. This applies especially to the legal and procedural errors that a Party wants the Committee to consider. To wait until all steps have been taken by the Committee in order to present a case for the Meeting of the Parties and then to forward new allegations on errors regarding procedural steps that should/could have been stated already in the submission, jeopardizes the entire system of review of compliance under the Convention. Furthermore, such practice may cause problems to the other Party concerned when critical factors, not previously questioned, are forwarded at a very late stage. Especially in a case when no request has been made to stop further developments of a project, the project may proceed; to rectify errors to implement the Convention at a very late stage may cause considerable economic costs and irreversible damage on nature.

46. According to the Convention, the Party of origin for a proposed activity that falls under the Convention shall notify any Party which it considers may be an affected Party and indicate in the notification a reasonable time within which a response is required (art. 3 (1)–(2) (c)). Article 3 (3) obliges the affected Party to respond to the Party of origin within the time specified in the notification. The Committee emphasizes that, when setting a time limit (providing a reasonable time), it is important for the affected Party to be given the opportunity to properly analyse the matter and to conduct consultations with its public. Conversely, it is important for the Party of origin to have a fixed last date for a response, as the expiration of that limit without any response from the affected Party means that it can proceed with its national procedures (art. 3 (4)). In the absence of a time limit, the time to respond would be unlimited.

47. In this specific case, where Bosnia and Herzegovina failed to notify Montenegro and the procedure commenced following the initiative of Montenegro as the affected Party, it would still have been possible for Bosnia and Herzegovina to remedy the previous error by deciding at a later stage on a reasonable time for response. In such a case, however, Bosnia and Herzegovina as the Party of origin has to bear the burden of proof that a (reasonable) time limit was set. If the Parties had made an oral agreement on the time limit, Bosnia and Herzegovina should have ensured that there was a common understanding on the contents of that agreement, by sending minutes of the meeting to Montenegro, or in other ways reminding Montenegro of what Bosnia and Herzegovina considered had been agreed on. By doing so, Montenegro would have been given the opportunity to intervene had it objected to the agreement.

A. Legal basis

48. 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.

49. 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”.

50. 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.

51. 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))

52. 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”.

53. The Committee noted that the Parties concerned disagreed essentially about the likelihood of a significant adverse transboundary impact (see paras. 26–30 above).

54. 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.

55. 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.

56. On the basis of paragraphs 52–55 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

57. 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.

58. Subsequently, however, as described in paragraphs 35–37 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.

59. The Committee took note of the statement by Montenegro that Bosnia and Herzegovina had not provided any information or evidence that a specified time limit was set for Montenegro to respond to Bosnia and Herzegovina. The Committee points out that the Parties do not agree on what was decided at the 2012 meeting in Banja Luka. Bosnia and Herzegovina has not provided any evidence contradicting the allegation from Montenegro on the non-existence of a time limit for it to respond and the more specific content of such an agreement. Furthermore, Bosnia and Herzegovina has neither sent any minutes from that meeting nor in other ways reminded Montenegro of what Bosnia and Herzegovina considered the Parties to have orally agreed on.

60. The Committee further 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.

61. 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. 56 above). However, given that, subsequently, bilateral consultations and exchange of information took place (paras. 35 and 57 above), the Committee was of the view

that such steps could have remedied the initial breach of the Convention. However, by not initially setting a specified time limit for Montenegro to respond, or confirming its opinion from the bilateral meeting in Banja Luka that the Parties had reached an oral agreement on the timing, being aware of the great interest Montenegro had shown regarding the proposed activity, and then not reminding Montenegro that it had not received any response and at least at that point setting a specified time limit, must be seen as violating the requirements in article 3 (2) (c) in conjunction with article 3 (3) of the Convention. The Committee furthermore found that there was a subsequent obligation under article 6 of the Convention for Bosnia and Herzegovina to send the final decision to Montenegro, with which it did not comply. As a result, Montenegro was not aware of the fact that the project had been approved and permitted in 2013. Consequently, the Committee considered that the environmental impact assessment procedure of 2012/2013 and the subsequent final decision (the permit issued) in 2013 should not be recognized as valid under the Convention.

62. Regarding the content of the environmental impact assessment, the Committee further 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.

63. 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 United Nations Educational, Scientific and Cultural Organization (UNESCO) Man and the Biosphere Programme and as a World Heritage site (encompassing the territories of Durmitor National Park and Biogradska Gora National Park).

64. 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.

3. Relevance of a past environmental impact assessment procedure for a new environmental permit; the 2019 procedure

65. The Committee then deliberated whether the environmental impact assessment conducted in 2012/2013 for authorizing the proposed activity could be the basis for a new permit procedure. In the Committee's view, a fundamental prerequisite for such a practice is that the previously conducted environmental impact assessment was recognized as valid under the Convention. As the Committee has already found (see para. 61 above) the environmental impact assessment conducted in 2012/2013 was in non-compliance with the Convention. That environmental impact assessment accordingly could not be used in a new permit procedure. A transboundary environmental impact assessment in accordance with the requirements of the Convention consequently had to be conducted for the new permit procedure in 2019.

66. 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. 39 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.

67. 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.

4. Bilateral cooperation

68. 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.

69. 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.

70. 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.

5. Contested strategic environmental assessment procedure

71. 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.

72. 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.

73. 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.

74. 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

75. 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)

76. 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))

77. 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.

78. 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

79. The Committee found that Bosnia and Herzegovina was in non-compliance with article 3 of the Convention for not notifying Montenegro of the proposed activity. Notwithstanding the subsequent cooperation and exchanges of information, the Committee found that Bosnia and Herzegovina has not provided any evidence that it, in writing or by an oral agreement, had set a specified time limit within which Montenegro had to respond. Despite the great interest Montenegro had shown regarding the proposed activity, furthermore Bosnia and Herzegovina did not remind Montenegro that it had not received any response on the environmental impact assessment and consequently did not even at that time, either in writing or orally, provide Montenegro with a specified time limit within which to respond. By not doing so, Bosnia and Herzegovina failed to fulfil its obligations under article 3 (2) (c) and (3) of the Convention.

80. The Committee furthermore found that the environmental impact assessment procedure conducted in 2012/2013 had shortcomings regarding the investigation of transboundary effects. Hence, the Committee found that the environmental impact assessment procedure finalized in 2013 should be regarded as being in breach of the Convention.

81. Having found that the subsequent cooperation and exchanges of information did not remedy the lack of notification by Bosnia and Herzegovina, the Committee found that Bosnia and Herzegovina was in non-compliance with articles 4–6 of the Convention.

4. 2019 procedure

82. The Committee found that because the environmental impact assessment procedure in 2013 should be regarded as being in breach of the Convention, it could not be taken into account in procedures for subsequent permit decisions.

83. The Committee found that Bosnia and Herzegovina had been obliged to conduct a new environmental impact assessment before issuing a new environmental permit in 2019. By not conducting a new environmental impact assessment and not notifying Montenegro on the proposed activity, Bosnia and Herzegovina consequently failed to comply with its obligations under articles 2 (2)–(3) and 4 (1) of the Convention.

5. Contested strategic environmental assessment procedure

84. 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

85. The Committee recommended that the Meeting of the Parties:
- (a) Endorse the findings of the Implementation Committee that:
 - (i) The concerned Parties should, at the earliest stage possible, provide the Committee with all claims, allegations and relevant facts that they want to refer to the Committee to consider. The allegation of Montenegro regarding the absence of any time limit set by Bosnia and Herzegovina during the 2012/2013 procedure was delivered only after it had received the Committee's revised draft findings and recommendations. Such late delivery of new claims by Montenegro considerably obstructed the work of the Committee;
 - (ii) 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;
 - (iii) The above non-compliance was not rectified by subsequently setting a time limit in accordance with article 3 of the Convention: Bosnia and Herzegovina did not provide evidence of, nor did it follow up on, what it considered to be an agreement to that effect with Montenegro;
 - (iv) By not providing Montenegro with the final decision, Bosnia and Herzegovina failed to fulfil its obligations under article 6 (2);
 - (v) The environmental impact assessment procedure conducted by Bosnia and Herzegovina in 2013 was in breach of the Convention and, therefore, would not be valid for subsequent permit decisions;
 - (vi) By not conducting a new environmental impact assessment before issuing a new permit in 2019 for the planned activities at the Buk Bijela hydropower plant, Bosnia and Herzegovina failed to comply with its obligations under articles 2 (2)–(3) and 4 (1) of the Convention;
 - (vii) Bosnia and Herzegovina was not in non-compliance with its obligations under the Protocol, as the Protocol 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) Request Bosnia and Herzegovina to conduct a transboundary environmental impact assessment procedure including Montenegro and, as needed, other affected Parties, including, by:
 - (i) Concluding consultations with authorities and the public of the affected Parties based on the environmental impact assessment documentation, as set out in articles 3 (8) and 4 (2) and 5 of the Convention;
 - (ii) Revising the final decision on the lifetime extension of the Buk Bijela hydropower plant, taking due account of the outcomes of the environmental impact assessment procedure, including the environmental impact assessment documentation and comments received from the affected Parties, further to article 6 of the Convention;
 - (iii) Providing the affected Parties with the revised final decision;

(e) Also request Bosnia and Herzegovina to provide the Implementation Committee, as soon as possible and no later than 15 January 2024, with a detailed plan with a timetable for implementing the steps foreseen in the above recommendations;

(f) Further request Bosnia and Herzegovina to report by the end of each year to the Implementation Committee on the steps taken to complete the transboundary environmental impact assessment procedure;

(g) Request the Committee to report to the Meeting of the Parties to the Convention at its tenth session on compliance by Bosnia and Herzegovina in respect of the permit for the Buk Bijela hydropower plant.
