

## **Ukraine's compliance with provisions of the Espoo Convention concerning realization of the project on renovation of Danube-Black Sea Deep-Water Navigation Route**

### **I. Summary of facts**

1. Decision IV/2 "Review of compliance" (ECE/MP.EIA/10) regarding Ukrainian project on renovation of the Danube-Black Sea Deep-water Navigation Route in the Ukrainian sector of the Danube Delta (hereinafter referred to as Project) was adopted at the 4<sup>th</sup> meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention, 19-21 May 2008, Bucharest, Romania).

1.1. As in p. 9 Decision IV/2 the Meeting of the Parties "*...urges the Government of Ukraine to repeal without delay the final decision of 28 December 2007 concerning the implementation of the project for the Danube-Black Sea Deep-Water Navigation Canal in the Ukrainian sector of the Danube Delta, and not to implement Phase II of the project before applying fully the provisions of the Convention to the project...*".

1.1. As in p. 10 Decision IV/2 the Meeting of the Parties "*Decides to issue a caution to the Government of Ukraine to become effective on 31 October 2008 unless the Government of Ukraine stops the works, repeals the final decision and takes steps to comply with the relevant provisions of the Convention*".

2. Report (ECE/MP.EIA/IC/2008/2) on Follow-up to decision IV/2 regarding Ukraine was adopted at the 15<sup>th</sup> meeting of the Espoo Convention Implementation Committee, held on 28-30 October 2008 in Geneva.

2.1. As in p. 28 of the Report the Implementation Committee "*...considered that the first condition (to stop the works) related to all works, but recognized that this condition was ambiguously expressed in decision IV/2 and that Ukraine could have interpreted it to mean that it related only to works in Phase II of the Project. The Committee agreed that this first condition had been fulfilled for Phase II, but it was concerned that the Government of Ukraine had not taken steps to apply the Convention to continuing works for Phase I...*".

2.2. As in p. 32 of the Report the Implementation Committee "*...decided to request the Government of Ukraine to report in writing to the Committee on steps taken to apply the relevant provisions of the Convention to:*

*(a) Any further works related to Phase I of the Project, including operation and maintenance works;*

*(b) Phase II of the Project.*"

3. Report (ECE/MP.EIA/IC/2009/2) concerning report received from the Government of Ukraine, further to a request made by the Committee, was adopted at the 16<sup>th</sup> meeting of the Espoo Convention Implementation Committee, held on 10-12 March 2009 in Berlin.

3.1. As in p. 10 of the Report the Implementation Committee "*...observed, however, that the report did not confirm that:*

*(a) Works, including operation and maintenance, on Phase I had stopped;*

*(b) Steps had been taken to apply the relevant provisions of the Convention to any further works related to Phase I of the Project.*"

### **II. Clarifications in regard with abovementioned**

4. As in p. 28 of Report of the Implementation Committee at its 15<sup>th</sup> meeting the Committee interprets p. 10 Decision IV/2 "Review of compliance regarding Ukraine" (ECE/MP.EIA/10) and states that p.10 Decision IV/2 is also related to all works under Phase I of the Project, including operation and maintenance works.

5. The Ukrainian Party can not agree with such interpretation taking into account the following:
- 5.1. In accordance with Appendix to Decision III/2 (ECE/MP.EIA/6) “Structure and functions of the Implementation Committee and Procedures for review of compliance” that defined the scope of competence of the Implementation Committee, and in accordance with Annex IV to Decision IV/2 (ECE/MP.EIA/10) “Operating rules of the Implementation Committee” **the Implementation Committee is not vested with competence to give official interpretations of the Meeting of the Parties decisions.**
- 5.2. P. 9 **Decision IV/2 envisages suspension of works only under Phase II** of the Project until applying the provisions of the Convention. Thus, **any demands to stop all the works under the Project are groundless.**
- 5.3. The fact that **p. 10 Decision IV/2 also refers to repealing final decision** (previously mentioned final decision on Phase II of the Project dated 28 December 2007) proves that **p.10 is related only to works under Phase II** of the Project. Besides, the **usage of article “the”** before “works” in **p.10 definitely means that the word “works” refers to the works mentioned in the text of previous p. 9 Decision IV/2.**
- 5.4. Part “**Recommendations**” of Annex I to Decision IV/2 “Implementation Committee’s findings and recommendations further to a submission by Romania regarding Ukraine” (ECE/MP.EIA/10) as well as “**Addendum to Findings and Recommendations** further to a submission by Romania regarding Ukraine” (EIA/IC/S/1) **refers only to suspension of works under Phase II of the Project until full implementation of the Convention.** These recommendations were reflected in the Decision IV/2 of the Meeting of the Parties.
6. “Implementation Committee’s findings and recommendations further to a submission by Romania regarding Ukraine” (ECE/MP.EIA/10) define that “*The Convention does not clearly stipulate what are the legal consequences of the final opinion of the Inquiry Commission...*” (p.50); “*... the final opinion of the Inquiry Commission should be understood as having only ex nunc effect.*” (p.51).
7. P. 69a) of “Implementation Committee’s findings and recommendations further to a submission by Romania regarding Ukraine” (ECE/MP.EIA/10) says that: “*The Committee finds that the fact of authorizing and implementing Phase I cannot be considered as being in clear non-compliance with the Convention at the time of the decision-making, because Ukraine assumed that the project was not likely to have a significant adverse transboundary impact*”.
8. **The Ukrainian Party implements Decision IV/2** of the Meeting of the Parties **and provides** the Espoo Convention Implementation Committee with **relevant reports.**
9. Ukrainian Danube-Black Sea Deep-Water Navigation Route is ranked in the UN Economic Commission for Europe “Blue Book” as category E (class VII) of inland international waterways (Depositary Notification C.N.670.2006.TREATIES-4 dated 28 August 2006). Currently the Danube-Black Sea Deep-Water Navigation Route is used by 50 countries of the world.
10. Present works under Phase I of the Project are implemented only on sea approach canal of the Danube-Black Sea Deep-Water Navigation Route in order to ensure navigation safety and in accordance with Ukraine’s obligations under international maritime law, which fully responds p.10 article 2 of the Espoo Convention.
11. Ukrainian Party started realization of Phase I of the Project in 2004. Ukrainian Party can not stop the operational and maintenance works under Phase I of the Project because it may cause significant adverse impact on environment due to increase of dredging works in the future in case of suspension of works today. Such suspension of works will contradict the principles of the Espoo Convention defined in Preamble (policy of anticipation and prevention of environmental impact) and p. 1 article 2 of the Convention: “*The Parties shall ... take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities*”.