

IMPLEMENTATION COMMITTEE
CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY
CONTEXT
PROTOCOL ON STRATEGIC ENVIRONMENTAL ASSESSMENT

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Ref. Follow-up on decision VI/2 of the Meeting of the Parties
(EIA/IC/S/4 Ostrovets nuclear power plant)

21 December 2018

Dear Ms. Malkina,

I am writing to you on behalf of the Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) and its Protocol on Strategic Environmental Assessment (Kyiv, 2003).

At its forty-third session, held in Geneva from 5 to 7 December 2018, the Committee took note of a letter from Belarus of 16 November 2018 to the Committee and the Bureau containing observations and comments on the Committee's deliberations and conclusions at its forty-second session (11–14 September 2018) in relation to the compliance matter concerning Belarus (Belarusian nuclear power plant in Ostrovets, EIA/IC/S/4). Although the item was not foreseen in its agenda and despite the urgency for it to progress with many pending matters, the Committee, chaired by its first Vice-Chair, addressed the points raised by Belarus. The deliberations were held in the absence of the Committee members from Belarus and Lithuania.

At the request of the Committee, I am now writing to you to convey the response of the Implementation Committee to your observations and comments on the Committee's deliberations and conclusions at its forty-second session.

The Committee noted in general that Belarus seems not to agree with the Committee's conclusions on your country's non-compliance with certain of its obligations under the Convention nor with the Committee's working methods for reaching them. In that respect, the Committee wish to reassure Belarus that all the Committee members, nominated

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by Parties and entrusted by the Meetings of the Parties to fulfil the objective and functions of the Committee, had carried out their heavy workload diligently, in full respect of the treaty provisions and the Committee's modus operandi. The Committee also continues to regularly review and improve its rules and working methods as its workload and composition evolved, including to ensure the avoidance of any direct and indirect conflict of interest of any of its members in its proceedings¹.

The Committee also noted that in accordance with the interpretation by Belarus of the Committee's operating rules (rule 13 (1)), Belarus should have been provided with an opportunity to comment on the Committee's recommendations to the Meeting of the Parties concerning its own country, as included in draft decision IS/1 (d), after the finalization of that draft decision at the Committee's forty-second session and before the decision had been submitted to the intermediary session of the Meeting of the Parties. For Belarus, that would have been justified because, in its opinion, the Committee's findings at its forty-second session related for the first time to the content of the environmental impact assessment documentation of Belarus, in particular, the site selection for the nuclear power plant in Ostrovets. Belarus further asserted that the Committee's findings did not derive from the analysis of the steps undertaken by Belarus as a follow-up to decision VI/2 adopted by the Meeting of the Parties at its sixth session (Geneva, 2–5 June 2014).

Regarding the above procedural concerns the Committee reiterates the clarifications from its previous session, which consisted of the following:

(a) Since the adoption of its operating rules in 2008 (through decision IV/2, annex IV), rule 13 (1) has been consistently applied only to the Committee's preparation of a document containing its findings and recommendations further to a new submission by a Party regarding another Party (or to a new Committee initiative), which also summarizes: facts and information about the compliance matter; the Committee's consideration and evaluation, and on that basis, the Committee's recommendations to the Meeting of the Parties.² The findings and recommendations on the submission in 2011 by Lithuania regarding Belarus adopted by the Committee at its twenty-seventh session (12–14 March 2013) were prepared following this rule (see ECE/MP.EIA/IC/2013/2, annex);

(b) In contrast, in accordance with the Committee's established practice, which applied to all Parties alike, the draft "follow-up" decisions to earlier decisions by the Meetings of the Parties have never been shared for comments with any Party whose compliance was in question. These draft decisions were prepared between the sessions of the Meetings of the Parties based on the progress reports, clarifications and other information received from the Parties concerned.³ Belarus had been informed about the Committee's deliberations since the seventh session of the Meeting of the Parties to the Convention in June 2017 through the Committee's reports and letters and had been given

1 ECE/MP.EIA/IC/2017/6, para. 5, ECE/MP.EIA/IC/2018/2, para. 60, ECE/MP.EIA/IC/2018/4, para. 8.

2 In accordance with operating rules 13(1) and (3), the draft findings and recommendations must be transmitted to the Parties involved, and, subsequently, at its meeting following the deadline for comments, the Committee should review and finalize them taking into account the comments received. Once finalized, the findings and recommendations are issued as an official document (usually annexed to the respective Committee reports) and transmitted to the Parties involved and the Meeting of the Parties. The Committee's document itself is not subject to comments by the Meeting of the Parties. Only the Committee's recommendations to the Meeting of the Parties on a given matter, included in a draft decision on compliance by the Meeting of the Parties, are subject to possible changes as agreed by the Parties during the session at which they are discussed.

3 ECE/MP.EIA/IC/2018/4, para. 8.

ample opportunity to influence the Committee's deliberations in a timely manner by providing the Committee with all the requested information, and comments. It could also have sought clarification should any of the Committee's questions have remained unclear to it.

Regarding the substance, the Committee pointed out that although article 4 (1) had not been explicitly referred to in the earlier decision VI/2 and draft decision VII/2, the Committee's findings relating to the contents of the environmental impact assessment documentation of Belarus and the issue of alternative sites to the nuclear power plant in Ostrovets were by no means new but on the contrary had been at the core of the disagreement between Belarus and Lithuania from the beginning.⁴ The Committee also stressed that its findings clearly and directly had built on and followed up on the findings from the previous intersessional period, 2014–2017⁵, and on draft decision VII/2 on compliance.⁶

The Committee's earlier conclusions, as set out in the reports on its sessions, included the following:

(a) Further to its analysis of the steps taken by both Parties since the Committee's twenty-seventh session, in March 2013, the Committee could not reach a final conclusion on the compliance of the steps taken by Belarus to reach the final decision with the provisions of the Convention because **“the essence of the compliance case was about unresolved substantive aspects of the environmental impact assessment documentation that could not necessarily be treated separately from the procedural aspects of environmental impact assessment”**;⁷

(b) In accordance with the Committee's past findings, **“the persistent disagreement between Belarus and Lithuania related in particular to scientific and other technical matters concerning the construction of the nuclear power plant, for example, regarding reasonable locational alternatives and the methodology and data used in determining the siting as described in the EIA documentation”**.⁸ In the Committee's view the description of locational alternatives to be included in the environmental impact assessment documentation in line with appendix II(b) should be especially required when an activity was planned near a city;⁹

(c) In 2016, the Committee had identified specific questions on the technical and scientific aspects of the environmental impact assessment documentation of Belarus to which it needed responses in order to reach its final conclusions.¹⁰ These questions were subsequently annexed to draft decision VII/2¹¹ submitted to the Meeting of the Parties at its seventh session, in June 2017. **One of the questions related to the criteria for selecting the Ostrovets site and the sufficiency of the data in the environmental impact assessment documentation for understanding the selection process.**¹²

The Committee notes that Belarus had not expressed opposition to the Committee's

4 See ECE/MP.EIA/IC/2013/2, annex, paras. 53–55 and 67–70 of the Committee's findings and recommendations from 2013.

5 Committee reports on its thirty-fourth to thirty-eighth sessions (from December 2015 to February 2017).

6 ECE/MP.EIA/2017/8, paras. 54–65, and annexes I and II.

7 ECE/MP.EIA/2017/4 – ECE/MP.EIA/SEA/2017/4, para. 39 and ECE/MP.EIA/2017/8, para. 5(d) and paras. 54–65

8 See for example ECE/MP.EIA/IC/2016/6; para. 26; ECE/MP.EIA/2017/4 – ECE/MP.EIA/SEA/2017/4, para. 40.

9 ECE/MP.EIA/IC/2013/2, annex, para. 68.

10 ECE/MP.EIA/2016/6, annex I.

11 ECE/MP.EIA/2017/8, annex I.

12 Ibid, annex, para.5.

technical and scientific questions, although they related to the contents of the environmental impact assessment documentation on the Belarusian nuclear power plant. Belarus, however, contested the Committee's decision to continue its examination of the site selection question over the past year to reach its final conclusions (see also next paragraph below). In that regard, the Committee asserts that it has revised the relevant parts of draft decision VII/2, as mandated by the Meeting of the Parties at its seventh session, taking into account the deliberations held during and in the margins of that session. Moreover, regarding the "justifications of the selection of the Ostrovets site" annexed to the letter of Belarus, the Committee confirms that it was already familiar with that information and that it had carefully considered it when preparing draft decision IS/1(d), together with all the other information on the issue of site selection that had been made available to the Committee by Belarus and the publicly available environmental impact assessment documentation. It emphasizes that it is the Committee's prerogative and responsibility to draw its conclusions and draft decisions based on a thorough consideration of all the relevant issues, including with a view to ensure the accountability, credibility and consistency of the Committee deliberations and conclusions.

With regard to the site-selection question, the Committee's decision-making included the following two steps:

(a) In February 2017, the Committee stated that the International Atomic Energy Agency (IAEA) report on its Site and External Events Design (SEED) mission conducted in January 2017¹³ "might provide answers to some of its questions". With a view to supporting constructive resolution of the compliance matter by the Parties, the Committee had agreed to examine the SEED report, provided that it "was released at least two weeks before the seventh session of the Meeting of the Parties".¹⁴ Although it had received the report from Belarus only one week before that session, in the afternoon of 5 June, it had agreed, exceptionally, to convene an ad hoc session in Minsk, four working days later, on 12 June, to consider the report. At the ad hoc session, the Committee had concluded that "although the report did not mention the application of the selection and exclusion criteria for the assessment of the suitability of the nuclear power plant site, it included a specific reference to the current seismic hazards at Ostrovets".¹⁵ It was on that basis that the Committee had decided to remove the question from the list of questions to be submitted to external expert advice;

(b) Subsequently, at its fortieth session (in December 2017), the Committee agreed that it had taken a hasty decision at its ad hoc session because the SEED mission report had not provided factual evidence on the site selection process. Consequently, the Committee decided to continue to examine that question together with the other remaining questions in order to reach its final conclusions.

The Committee stresses that its findings and conclusions are applicable to all Parties in identical situations and not specific only to Belarus. In the draft decision on general issues of compliance (IS/1), the Meeting of the Parties is invited to consider agreeing, following the opinions of the Committee, that "Procedural and substantive aspects of environmental impact assessment in accordance with the Convention cannot necessarily be treated separately when assessing compliance, in particular if the essence of the compliance case in

13 At the invitation of Belarus, as requested by decision VI/2, para. 64.

14 ECE/MP.EIA/IC/2017/2, para. 10.

15 Report on the ad hoc session of the Committee (ECE/MP.EIA/IC/ad-hoc/2017/INF.6, para. 10).

question pertains to substantive aspects". At the same time, the Committee points out that in comparison with the previous compliance matters, the one relating to Belarus and Lithuania had been particularly complex. The Committee has attempted over the past years all reasonable approaches to reach its conclusions. After the unsuccessful bilateral expert consultations between Belarus and Lithuania, and after having exhausted all the avenues for receiving external expert advice the Committee decided to examine the documentation prepared by Belarus under the environmental impact assessment procedure itself, seeking, as appropriate, the services of national scientific experts and other technical advice in accordance with its structure and functions. The Committee again emphasizes that as a rule the Committee does not have the resources to take on such a comprehensive workload and that it can do so only in exceptional cases, that is when it deems that the examination of the environmental impact assessment documentation is required for reaching its conclusions and no other options are available.

In conclusion, let me on behalf of the Committee reassure the Government of Belarus that the Committee considers all the compliance issues before it in a non-discriminatory, nonarbitrary and unbiased manner, and with the aim of securing constructive solutions.

Please accept, First Deputy Minister Malkina, the assurances of my highest consideration.

Yours sincerely,



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