

## **Economic Commission for Europe**

Meeting of the Parties to the Convention  
on Environmental Impact Assessment  
in a Transboundary Context

### **Ninth session**

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

### **Fifth session**

Geneva, 12–15 December 2023  
Items 3 (a) and 8 (a) of the provisional agenda

**Outstanding issues: draft joint decisions**

**Adoption of decisions: decisions to be taken jointly**

## **Rationale for the proposed amendments to the Implementation Committee's structure and functions and operating rules**

**Note by the Implementation Committee**

### *Summary*

The present informal document complements document ECE/MP.EIA/2023/5 – ECE/MP.EIA/SEA/2023/5 on Proposed amendments to the Implementation Committee's structure and functions and operating rules and informal document ECE/MP.EIA/2023/INF.7 on Track-changes version of the proposed amendments to the Implementation Committee's structure and functions and operating rules. It explains the rationale for the Committee's amendment proposals, for information to the Meetings of the Parties.

## I. Appointment of Committee Members

1. The Implementation Committee emphasizes the importance for the Parties to understand their obligations when nominating representatives to serve on the Committee, including to ensure that appropriate time and resources are allocated, to allow Committee members to accomplish their tasks. In addition to participating in the Committee's sessions, which are held, as a rule, three times a year, the Committee members must prepare for them by reviewing the information available on all compliance cases and other agenda items to be considered. Moreover, as assigned curators for some cases, the members are required to thoroughly analyse all information on them and to prepare related written in-depth reports in a timely manner. As required, in-between the sessions, the Committee members may also need to hold online consultations and to take decisions using a written procedure. The Committee stresses that good preparation for the sessions is a prerequisite for the effectiveness of the Committee's work. Practice has shown that preparation for the sessions was often more time-consuming than the participation therein.

2. For ensuring the continuity of the Committee's work and the sharing of the Committee's workload amongst its members, the appointment by Parties of an alternate member in addition to a permanent member is essential.

3. In the light of the above, the Committee proposes the following changes:

(a) Replace the second sentence in paragraph 1 (a) of the structure and functions with the following:

“Each of the eight Parties shall appoint a permanent and an alternate member of the Committee.”

(b) Insert a footnote in paragraph 1 (a) of the structure and functions, third sentence, after the expression “Committee's sessions”. The footnote should read as follows:

It is important for the Parties to understand their obligations when nominating representatives to serve on the Committee, including to ensure that appropriate time and resources are allocated to allow their nominated members to accomplish their tasks as Committee members. In addition to participating in the Committee sessions, the work of the Committee members involves: preparing for the sessions by reviewing the information available on all compliance cases and other agenda items to be considered; and, as an assigned curator for some of the cases, thoroughly analysing them and preparing the related written in-depth reports in a timely manner. Good preparation for the sessions is a prerequisite for the effectiveness of the Committee's work. Moreover, consultations in between the ordinary sessions can take place.

(c) Replace paragraph 1 of operating rule 4 with the following:

1. The Meeting of the Parties shall elect Parties for serving two terms in the Committee. Each Party elected by the Meeting of the Parties shall appoint a permanent and an alternate member of the Committee for two terms. The term of office of a member shall commence with the appointment by a Party. This paragraph shall apply without prejudice to the right of a Party elected by the Meeting of the Parties to appoint in exceptional cases a permanent replacement for the permanent or the alternate member.

## II. Harmonization of rules for decision-making

4. The Committee identified a contradiction between the wording “The Committee shall decide on any report or findings and recommendations by consensus” in paragraph 9 of the structure and functions and the general rule on decision-making in operating rule 18 which reads: “The Committee should make every effort to reach its decisions by consensus. If all efforts to reach a consensus have been exhausted and no agreement has been reached, any other decision should, as a last resort, be taken by a majority vote of the members present and voting, if at least five members are present. For decision-making, each member should

have one vote. Where consensus is not possible, the report should reflect the views of all members.” Consequently, the Committee proposes the following changes:

(a) Delete the wording “decide on the content of any report or findings and recommendations by consensus” in the last sentence of paragraph 9 of the structure and functions as well as the third and fourth sentences in paragraph 11 of the structure in functions, so that henceforth the decision-making process within the Committee is regulated exclusively by operating rule 18.

(b) The last sentence in paragraph 9 of the structure and functions should read:

“The Committee shall send the draft findings and recommendations to the Parties concerned and shall take into account any representations from such Parties in their finalization (see also operating rule 11, para. 2).”

### III. Entitlement to participate in the Committee’s sessions

5. The current provisions concerning the entitlement of Parties or the public to participate in the Committee’s sessions do not cover all situations where this would be necessary. Paragraph 3 of the structure and functions reads “Parts of meetings dealing with any matter concerning submissions relating to compliance shall not be open to other Parties or the public, unless the Committee and the Party whose compliance is in question agree otherwise”. There is no reason for limiting this rule to submissions; it should cover all Committee’s deliberations concerning compliance matters such as information gathering or Committee initiatives. On that basis, the following changes are proposed:

(a) Replace the second sentence in paragraph 3 of the structure and functions with the following:

“Parts of meetings dealing with compliance matters shall not be open to other Parties or to the public, unless the Committee and the Party whose compliance is in question agree otherwise.”

(b) Replace paragraph 1 of operating rule 17 with the following:

1. Meetings of the Committee should be open to observers (other Parties, States, bodies, agencies and the public), unless the Committee decides otherwise. Parts of meetings dealing with compliance matters should not be open to observers, unless the Committee and the Party whose compliance is in question agree otherwise (see also paragraph 3 of the Committee’s structure and functions). Observers should register with the secretariat in advance of each meeting.

6. According to the current wording of paragraphs 2 and 3 of operating rule 17, a Party in respect of which a submission is made or which makes a submission and in respect of which a Committee initiative has been initiated shall never participate in or be present during the consideration of the Committee of that matter. This should be amended: Rule 17 should apply to all proceedings concerning the compliance of a certain Party and thus cover also the stage of information gathering. The Committee, therefore, proposes the following changes to its operating rules:

(a) Replace paragraph 2 of operating rule 17 with the following:

2. A Party concerned by a particular compliance matter shall not participate in, or be present during, the consideration by the Committee of that matter, including the preparation and adoption of any part of the findings or recommendations of the Committee relating to that matter (see also para. 9 of the Committee’s structure and functions).

(b) Delete paragraph 3 of operating rule 17.

7. As an exception to the rule restricting the participation of a concerned Party in the Committee’s consideration of compliance matters, paragraph 9 of the structure and functions provides for the participation of Parties in respect of which a submission is made or which make a submission, at the invitation of the Committee (in “hearings” held during the

Committee's sessions). There is no reason why this provision should not be applicable also to Committee initiatives. The concerned Party should be allowed to attend these proceedings as well. Furthermore, the practice of the Committee to invite other concerned Parties (especially possibly affected Parties) to those hearings should be reflected in the rules. Therefore, the Committee proposes to amend paragraph 9 of the structure and functions so that the first two sentences of this paragraph read:

9. At the invitation of the Committee, a Party in respect of which a submission is made or a Committee initiative opened, or which makes a submission, shall be entitled to attend the Committee's session and present to the Committee information and opinions on that matter, but shall not take part in its consideration, including the preparation and adoption of any report or of findings and recommendations of the Committee. The Committee may also invite other concerned Parties to attend its sessions, in order to present information and opinions, as appropriate.

#### **IV. Conflict of interest and quorum**

8. At its fifty-first session (Geneva, 4–7 October 2021) the Committee observed that nuclear related cases, including lifetime extension of nuclear power plants, involved numerous concerned Parties. Consequently, a majority of the Committee members would find that they had a direct or indirect conflict of interest with respect to several of the issues in question. The Committee considered that, in order to fulfil its mandate, it should proceed with its consideration of the cases in an objective and unbiased manner, involving the maximum number of its members. It emphasized that some of the cases had been before it since 2014 and that, during the intersessional period 2017–2020, its conclusions on those cases had been further delayed pending the preparation of guidance on the applicability of the Convention to the lifetime extension of nuclear power plants, endorsed by the Meetings of the Parties to the Convention in December 2020. Consequently, with respect to situations of conflict of interest, the Committee decided to exceptionally and provisionally abstain from applying rule 5 of its operating rules, unless the Committee members in question chose, nevertheless, not to take part in the Committee's related deliberations. The Committee believed that such an approach provided for its most unbiased deliberations on the cases given the representation in its current composition of Parties that used nuclear power and Parties that did not. The Committee also decided to prepare proposals to the Meetings of the Parties for amending its modus operandi based on the experience it had gained.<sup>1</sup>

9. The potential difficulties for the Committee to meet its quorum rules concern mainly the numerous current and future nuclear power plant related cases. As the operation of nuclear power plants may affect a wide area and concern multiple Parties, there are practical reasons to apply special rules for these cases. On the other hand, the rules on conflict of interest are critical for the reputation and credibility of the Committee as an objective body.

10. The different rules that address the conflict of interest are spread over several provisions: paragraph 10 of the structure and functions and operating rule 5. Operating rule 4 paragraph 4 also refers to these provisions.

11. To address the issues described in paras. 8-10 above and to enhance the Committee's stability and capacity to act, the Committee suggests the following set of proposals:

(a) Merge paragraph 10 of the structure and functions with operating rule 5, leaving the main provision only in paragraph 10 of the structure and functions with the wording of the former operating rule 5. For the existing text of paragraph 10 of the structure and functions substitute:

10. The following rules apply to the participation of the members of the Committee:

(a) Each member should, with respect to any matter that is under consideration by the Committee, avoid direct or indirect conflict of interest. Where a member finds himself or herself faced with a direct or indirect conflict of interest, that member

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<sup>1</sup> ECE/MP.EIA/IC/2021/6, paras 56-58.

should bring the conflict of interest to the attention of the Committee before consideration of that particular matter. The concerned member should not participate in the elaboration and adoption of any part of a report or findings and recommendations of the Committee in relation to that matter.

(b) A member who represents a Party in respect of which a submission is made, or which makes a submission, should not participate in the consideration by the Committee of that submission or the follow-up to a related decision by the Meeting of the Parties, and should not participate in, or be present during, the preparation and adoption of any part of a report or findings and recommendations of the Committee that relates to that submission. This paragraph should be applied, *mutatis mutandis*, in the case of a Committee initiative (see also operating rule 5 para. 1).”

(b) The new paragraph 10 of the structure and functions should be interpreted in such a manner as to disqualify the participation of members that are appointed by the Party of origin and members appointed by a Party that has been actively engaged in the information gathering phase. On the other hand, treating all potentially affected Parties in an identical way as the Party of origin or as a Party that has made a submission, seems not to be reasonable. The potentially affected Parties often represent a wide range of interests, from those that do not wish to participate in a transboundary environmental assessment procedure of a proposed activity in question to those that want to be consulted by the Party of origin and those that oppose the project in question but have not referred the matter to the Committee. In such a situation, the individual Committee member may abstain from participating, depending on his or her previous involvement in any procedures regarding the particular project.

(c) As a proposed new provision, Parties should have the opportunity to express their objections regarding Committee members’ participation at an early stage. It ought to be then up to a Party to object the participation of a Committee member appointed by a specific Party. This procedure should be included as a new paragraph 1 of operating rule 5 and the current paragraph 3 should be maintained as a new paragraph 2. Replace operating rule 5 with the following:

#### Rule 5

1. If a Party considers that a member of the Implementation Committee is faced with a direct or indirect conflict of interest with respect to a matter concerning it that is under consideration by the Committee, that Party must raise an objection through the secretariat within two months from the reception of a communication from the Committee and/or the publication of the meeting report on the United Nations Economic Commission for Europe website. The Party shall state the facts giving rise to the objection. A member being the subject of such an objection, if deemed justified by the Committee in accordance with paragraph 10 of its structure and functions, shall not take part when the Committee considers the matter.

2. The members and the secretariat may accept invitations to present the Convention’s compliance mechanism at appropriate events, such as conferences and workshops.

12. A second tool for enhancing the stability and capacity of the Committee to act is to strengthen the role of the Committee members elected for Protocol matters only. The current operating rule 4, paragraph 4, allows Committee members elected for Protocol matters only to participate in the consideration of an issue relating to compliance with the Convention provided that there is no objection by a Committee member elected for Convention matters. However, a Committee member elected for Protocol matters should not take part in decision making concerning Convention matters and should not act as curator for an issue relating to compliance with the Convention, but might provide information, opinions and advice. In connection to this, the Committee proposes to:

(a) Amend rule 4 paragraph 4 so that the Committee members who represent Parties to the Convention and the Protocol but are elected for Protocol matters only should be permitted to participate in the considerations and decision making, provided that there is no objection by a Committee member elected for Convention matters and vice versa.

(b) Replace paragraph 4 of operating rule 4 with the following:

4. Committee members elected for Protocol matters only, but representing a Party to both the Protocol and the Convention, shall participate in the consideration and decision-making of an issue relating to compliance with the Convention, provided that there is no objection by a Committee member elected for Convention matters. However, a Committee member elected for Protocol matters should not act as curator for an issue relating to compliance with the Convention. This rule should be applied, *mutatis mutandis*, in the case of a Committee member elected for Convention matters only, but representing a Party to both the Convention and the Protocol. Furthermore, this rule should be applied without prejudice to paragraphs 10 (entitlement to participate) and 12 (competence) of the structure and functions of the Committee and procedures for review of compliance, and without prejudice to the Committee's operating rules 5 (members), and 18 and 19 (decision-making).

13. As a third measure to enhance its stability and capacity to act, the Committee proposes lowering the quorum necessary for decision-making in order to avoid a situation when the matter in question would have to be referred to the Meetings of the Parties. Given the fact that the Meetings of the Parties have no means to effectively carry out review of compliance procedures and that their sessions are convened only every three years, the existing provision in paragraph 12 of the structure and functions does not provide an adequate solution to the problem. The Committee proposes, therefore, that paragraph 12 of the structure and functions is replaced with the following:

“Competence of Committee members

12. If, as a result of the operation of paragraph 10, the size of the Committee is reduced to fewer than four members, the Committee shall forthwith refer the matter in question to the Meeting of the Parties.”

(b) The Committee further suggests adapting the quorum accordingly also in operating rule 18 paragraph 1, so that this rule should read:

Rule 18

1. The Committee should make every effort to reach its decisions by consensus. If all efforts to reach consensus have been exhausted and no agreement has been reached, any other decision should, as a last resort, be taken by a majority vote of the members present and voting, if at least four members are present. For decision-making, each member should have one vote. Where consensus is not possible, the meeting report should reflect the views of all members.

## V. Publication of documents

14. The Committee noted that its operating rules, which guided the Committee in the execution of its functions, did not cover ad hoc sessions nor did it provide for the publication of informal documents, including reports of ad hoc sessions. It agreed, however, that it could be useful to develop a rule that would enable the publication of such documents in certain circumstances. To that end, the Committee proposes amending operating rule 16 paragraph 2, by adding a second sentence at the end of the paragraph:

“The Committee may disclose further documents, as it deems appropriate.”

15. The Committee also considered that correspondence from Parties to the Committee regarding compliance matters should be made available to all Parties concerned, whenever necessary. That would promote transparency and consistency and would increase the efficiency of the Committee's work. Moreover, correspondence further to information from other sources, such as NGOs, should be shared with the Parties concerned, based on the correspondent's consent. To that end, the Committee proposes that a new paragraph 9 after paragraph 8 of operating rule 16 should be inserted, and subsequent paragraphs renumbered accordingly:

“9. In the absence of any reasoned objections from the Party or other sources concerned, copies of all correspondence between the Party or other sources and the Committee should be made available to other Parties or sources involved in a particular compliance matter and its related Committee proceedings upon their request.”

## VI. Use of electronic means of communication

16. Due to the increasing number and complexity of issues brought before the Committee, it considered possibilities to improve the effectiveness of its work including through regular online meetings and generally for an extended use of electronic means of communication. The related proposals already reflect the practice of the Committee, in particular, since the outbreak of the pandemic. To also adapt its rules accordingly, the Committee proposes to replace operating rule 19 with the following:

### Rule 19

1. Meetings of the Committee can be held online.<sup>2</sup>
2. In between meetings, electronic means of communication may be used by the members for the purpose of any aspect of the Committee’s work to be discussed at the ordinary session and of conducting informal consultations on issues under consideration in order to ensure efficient management of its workload.
3. The decision-making procedure by electronic means includes:
  - (a) Circulation, at the request of the Chair by the secretariat, of a draft document subject to a decision-making procedure, with an invitation to all Committee members to provide comments to the draft document, or to agree with the Chair’s proposal (also by not replying at all) by the deadline set by the Chair; if specified by the Chair in advance, in the absence of any objections from a member by the deadline set, the proposal is deemed adopted by the Committee;
  - (b) If, based on the comments received, it becomes clear that the matter is not suitable for the decision-making procedure between meetings, the Chair may decide to postpone the decision-making procedure to the next ordinary session.
4. Decisions by electronic means of communication shall be made further to the Committee’s operating rule 18. Any decision made in between ordinary meetings by electronic means of communication shall be reflected in the report of the meeting of the Committee that follows the making of the decision.

## VII. Additional recommendations regarding a Party’s follow-up on recommendations

17. The operating rules of the Committee lack clarity on the procedure to be followed when new relevant information on a compliance matter becomes available before the Meetings of the Parties endorse the draft decision on that matter. To that end, the Committee proposes inserting a new paragraph 4 at the end of operating rule 13 as follows:

“4. If, after the transmission of findings and recommendations to the Meeting of the Parties in accordance with rule 13, paragraph 3, substantial information that could have an influence on the findings and recommendations becomes available to the Committee, it may communicate additional information to the Meeting of the Parties and reflect any changes in the corresponding decision on compliance.”

18. According to current practice, the Committee’s findings and recommendations further to a submission or a Committee Initiative can be issued not only as an addendum to

<sup>2</sup> Provided that interpretation between English and Russian is not needed or not available, and the meeting is held in English only; or that sufficient financial and secretariat staffing resources are available for organizing meetings with remote simultaneous interpretation.

the report of the meeting (as previously stated), but as a separate official document. This is due to the increased number of cases before the Committee and the word limit for official documents. To adjust the rules with the current practice, the Committee proposes replacing paragraph 3 of operating rule 13 with the following:

“3. At its meeting following the deadline for comments, the Committee should review and finalize the draft findings and recommendations taking into account the comments received. The findings and recommendations should be prepared as an addendum to the report of the meeting or issued as a separate document (i.e. as an official document), and transmitted to the Parties involved and to the Meeting of the Parties.”

## **VIII. Timeliness of Parties’ responses**

19. The Committee stressed that respect for deadlines by the concerned Parties was crucial when providing information, responding to the Committee’s inquiries and delivering progress reports. Late submission of information or submission of information of insufficient quality by the Parties concerned significantly hinders the Committee’s work.

20. Consequently, and further to decision IV/4, paragraph 99 of the Meeting of the Parties to the Convention which urges Parties to facilitate the Committee’s work in good faith by providing it with the requested information in a timely manner and in good quality, the Committee proposes to state explicitly that if a Party does not provide information, the Committee is free to disregard any late information. To that end, the Committee suggests adding a new paragraph 8 at the end of operating rule 11 as follows:

“8. Parties are requested to respond to the Committee’s requests for information by the deadline set by the Committee. The Committee may disregard any late information.”

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