6 Hazardous installations outside the EU

The Espoo Convention's Implementation Committee's proceedings concerning Lithuania and Belarus

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1. Introduction

It is incontrovertible that energy production and consumption cause significant transboundary harm and are a major contributor to greenhouse gas (GHG) emissions.[1] The "energy as environmental threat" narrative is associated with concerns where large ultrahazardous energy activities are executed.[2]

Concerns about the effects of such activities were heightened by the Chernobyl and Fukushima nuclear incidents. The storage of spent nuclear power fuel is environmentally problematic, and in the event of a malfunction, nuclear power plants (NPPs) can create an environmental catastrophe that can change the ecosystem for a prolonged period of time.[3] Protection of the environment was not a major concern for the original drafters of the international nuclear law conventions, but this has changed over time.[4] Environmental sustainability as a purpose came along the way, starting in the 1970s, and its regulation is less close to the core of the transaction than security and safety considerations.[5]

As the nature of nuclear energy-related activities involves a potentially wide scope of severe impacts, a great deal of public concern has been raised by this issue, not to mention the potential impact on national interest, in view of which the sound and transparent transboundary environmental impact assessment (EIA) procedure is of great importance. EIAs have emerged as an essential element of a preventive approach to environmental protection and sustainable development.[6]

1 C. Redgwell, "Energy," in L. Rajamani and J. Peel (eds.), *The Oxford Handbook of International Environmental Law* (2nd ed., Oxford Academic 2021) 849.
2 Ibid.
3 F. G. Sourgens and L. Sempertegui, *Principles of International Energy Transition Law* (Oxford Academic 2023) 41.
4 S. Emmerechts, "Environmental law and nuclear law: A growing symbiosis" [2008] 82 Nuclear Law Bulletin 92.
5 J. E. Viñuales, *The International Law of Energy* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2022) 306.
6 O. Elias and M. Wong, "Environmental impact assessment," in M. Fitzmaurice, M. Brus, P. Merkouris, and A. Rydberg (eds.), *Research Handbook on International Environmental Law* (Edward Elgar 2021) 188.

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EIA is a component of a planning process through which environmental considerations are integrated into governmental decision-making.

The Convention on Environmental Impact Assessment in a Transboundary Context[7] (otherwise referred to as the Espoo Convention) is a key instrument in terms of establishing rules for domestic action and international cooperation in preventing, reducing, and controlling significant adverse transboundary environmental impacts.

The construction of Belarus's first NPP is taking place in Ostrovets, near the border with Lithuania. In line with the Espoo Convention, a transboundary EIA for the construction of this NPP was initiated to assess this project's potential environmental impact. The implementation of the transboundary EIA has led to a degree of misunderstanding and disagreement between these neighbouring countries, with the issue being escalated to the Espoo Convention's Implementation Committee.[8] An analysis of the proceedings between Lithuania and Belarus has revealed the peculiarities and limitations of the practical implementation of an EIA.

In addition to the Lithuanian and Belarusian proceedings, the Implementation Committee has opened more non-compliance proceedings concerning EIAs for NPP projects. These proceedings concern the planned construction of the Hinkley Point C NPP in England[9] and the construction of a nuclear power station in Metsamor, Armenia.[10]

The activation of transboundary EIAs in connection with nuclear-related activities has gained attention in terms of scientific examination.[11] While the challenges of cross-border negotiations regarding the Ostrovets NPP have been examined,[12] this article focuses more on a detailed analysis of the Implementation Committee's compliance review procedures.

7 1989 UNTS 309.

8 UNECE, "EIA/IC/S/4 Belarus" <https://unece.org/environmental-policy/environmental-assessment/eiaics4-belarus>.

9 UNECE, "EIA/IC/CI/5 United Kingdom" <https://unece.org/environment-policy/environmental-assessment/eiaicci5-united-kingdom>.

10 UNECE, "EIA/IC/S/3 Armenia" <https://unece.org/environment-policy/environmental-assessment/eiaics3-armenia>.

11 L.-A. Duvic-Paoli and P. Lueger, "A democratic nuclear energy transition? Public participation in nuclear activities" [2022] 31/2 *Review of European, Comparative & International Environmental Law* 199; J. Handrlica, "The unbearable lightness of nuclear jurisprudence" [2021] 39/3 *Journal of Energy & Natural Resources Law* 375; I. Cenevska, "Environmental protection meets security of electricity supply: Case C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil Des Ministres, Court of Justice of the European Union" [2021] 10/2 *Transnational Environmental Law* 365; Anon., "The application of the Espoo Convention on environmental impact assessment in a transboundary context to nuclear energy-related activities" [2016] 97 *Nuclear Law Bulletin* 63; S. Emmerechts and P. Bourdon, "Environmental impact assessments and long-term operation of nuclear power reactors: Increasing importance of environmental protection in the European Union?" [2020] 2 *Nuclear Law Bulletin* 7.

12 A. K. Abashidze, V. M. Filippov and A. M. Solntsev, "Belarusian Ostrovets nuclear power plant: The challenge of cross-border negotiations to balance economic development and environmental protection" [2020] 13 Journal of World Energy Law and Business 157.

This chapter aims to examine and analyse the proceedings between Lithuania and Belarus, No. EIA/IC/S/4 under the Espoo Convention, regarding the construction of an NPP in Ostrovets. Furthermore, the chapter aims to analyse the legal framework behind the transboundary EIA under the Espoo Convention, analyse the main aspects of the EIA procedure and the proceedings between Lithuania and Belarus (No. EIA/IC/S/4) under the Espoo Convention, and evaluate the proceedings between Lithuania and Belarus (No. EIA/IC/S/4) under the Espoo Convention.

2. The legal framework behind the Espoo Convention and the transboundary EIA

The Espoo Convention, which was adopted in Espoo, Finland, in 1991, entered into force on 10 September 1997.[13] It was signed by twenty-nine countries and the EU itself. Currently, there are forty-five parties to the Espoo Convention.[14] The Espoo Convention is a key instrument in terms of establishing rules for domestic action and international cooperation in preventing, reducing, and controlling significant adverse transboundary environmental impacts in connection with the proposed activities listed in Appendix 1 and which are likely to result in a significant adverse transboundary impact. Appendix 1 provides various activities for which an EIA must be carried out if the proposed activity may cause a significant adverse transboundary impact, including activities that may be related to the construction of nuclear power stations and other nuclear reactors.

As one of several international environmental law instruments, the Espoo Convention serves to regulate nuclear activities. The Implementation Committee notes that, "for certain activities, and in particular nuclear energy-related activities, while the probability of a major accident, accident beyond design basis or disaster occurring is very low, the likelihood of a significant adverse transboundary impact of such an accident can be very high and the consequences severe".[15] The current methodological guidelines were adopted by taking these factors into account, with the result that those guidelines were formed into the *Good Practice Recommendations on the Application of the Convention for Nuclear Energy-related Activities*[16] and the *Guidance for the Applicability of the Convention to the Lifetime Extension of Nuclear Power Plants.*[17]

13 UNECE, "More on the Convention" <https://unece.org/more-convention>.

14 "United Nations Treaty Collection" <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&clang=_en>.

15 United Nations, "Opinions of the Implementation Committee (2001–2020)" (2020) para 47 <https://unece.org/sites/default/files/2021-02/Implementation%20Committee%20opinions%20to%202020_MOP-8_2020.pdf>.

16 UNECE, "Good practice recommendations on the application of the convention to nuclear energy-related activities" <https://unece.org/fileadmin/DAM/env/documents/2017/EIA/MOP7/28_04_2017_ece_mp.eia_2017_10_e.pdf>.

17 UNECE, "Guidance on the applicability of the convention to the lifetime extension of nuclear power plants" <https://unece.org/sites/default/files/2022-10/Guidance_LTE_NPP_2106311_E_WEB-Light.pdf>.

The Espoo Convention is a procedural instrument which, subject to certain conditions being met, requires the party of origin to notify as early as possible any other party which it considers may be an affected party for the purposes of ensuring adequate and effective consultations (Art. 3 (1)). The Espoo Convention sets out obligations for the parties in order that the environmental impact of certain activities can be assessed at an early stage of planning. The general obligation of the parties is to notify and consult each other on all major projects that are under consideration and are likely to have a significant adverse environmental impact across boundaries. A transboundary EIA should be carried out before the decision is taken in regard to authorising or undertaking these activities.

The Espoo Convention establishes an inquiry procedure and contains a mechanism that makes it possible to review compliance and settle disputes. The Meeting of the Parties to the Convention (MOP) served to establish an Implementation Committee in 2001 that would handle the review of compliance by the parties with their obligations under the convention, with a view to assisting them to fully meet their commitments.[18] The Implementation Committee has the dual task of developing the reporting system and considering individual cases of non-compliance. If the committee provisionally finds that a party is not in compliance, it should then consider and agree upon possible recommendations to the MOP. Compliance concerns both legal implementation and practical application.

Paragraph 5 (a) of the Appendix to Decision III/2,[19] covering structure, functions, and operating rules, provides that a submission may be brought before the Implementation Committee by one or more parties to the convention where any of those parties have concerns about another party's compliance with its obligations under that instrument. The Implementation Committee held that this right, however, should not be abused. The Implementation Committee expects that all concerned parties act in good faith and provide substantial proof of their concerns.[20] The compliance mechanisms within the Espoo Convention support the idea that the party that triggers the convention's protections must provide supporting information without having to prove involvement or interest (this differs from any other mechanisms which require proof of an interest that may impose an effect, a detached involvement, or a direct involvement).[21]

As a party to the Espoo Convention, the EU, of which Lithuania is a member, has a well-established regulatory regime for EIA. The main instrument is the EIA Directive 2011/92, as amended by Directive 2014/52/EU.[22] Generally,

18 United Nations (n. 15) para 1.

19 UNECE, "Decision III/2 review of compliance," ECE/MP.EIA/6 <https://unece.org/DAM/env/documents/2004/eia/decision.III.2.e.pdf>.

20 United Nations (n. 15) para 9.

21 N. Goeteyn and F. Maes, "Compliance mechanisms in multilateral environmental agreements: An effective way to improve compliance?" [2011] 10/4 *Chinese Journal of International Law* 791, 818.

22 Directive 2011/92/EU of the European Parliament and Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, Official Journal of the European Union, L 26 (2012), pp. 1–21; and Directive 2014/52/EU of the European Parliament

the EIA Directive is applied to intra-EU relations if a project only has an impact within EU territory. Article 7 of the EIA Directive includes special provisions that should be observed or implemented when a project to be implemented within one Member State is likely to have a significant effect on the environment of another Member State. If it has broader transboundary impacts, compliance with the Espoo Convention is required in addition to Article 7 of the EIA Directive.[23] It is also worth noting that the European Court of Justice has provided an interpretation of the matter: "Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions of that directive, without prejudice, however, to Article 7 of that directive on the obligations incumbent on Member States in whose territory a project that is likely to have significant effects on the environment in another Member State is intended to be carried out".[24] Given that the NPP in question is being constructed in Belarus, which is not a member of the EU, the EIA Directive is not applicable in this case.

EIA transboundary procedures are carried out in accordance with national legislation. The national legal and regulatory frameworks, including those that cover NPPs, vary between parties. Most national legislation that connects parties to the convention already fully covers those nuclear energy-related activities and installations listed in paragraphs 2 (b) and 3 of the revised Appendix 1 contained in the second amendment to the Espoo Convention.[25] The stages of the EIA transboundary procedure should comply with the Espoo Convention regardless of whether the party of origin is an EU or non-EU country.

3. The main aspects of the EIA procedure and proceedings between Lithuania and Belarus (No. EIA/IC/S/4) under the Espoo Convention

All activities falling within the scope of the Espoo Convention require the country of origin to consult with the potentially affected countries (usually neighbouring countries, but not necessarily). Lithuania and Belarus are neighbouring countries and parties to the Espoo Convention (Lithuania has been a party to the Espoo

and Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, Official Journal of the European Union, L 124 (2014), pp. 1–18.

23 European Commission, *Guidance on the Application of the Environmental Impact Assessment Procedure for Large-Scale Transboundary Projects* (European Commission 2013) 3.

24 Case C–411/17, *Inter-Environnement Wallonnie ASBL, Bond Beter Leefmilieu Vlaanderen ASBL v Council of Ministers* [2019], ECLI:EU:C:2019:622, para 96.

25 United Nations, *Good Practice Recommendations on the Application of the Convention to Nuclear Energy-Related Activities: Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)* (UN 2018) 11.

Convention since 11 January 2001,[26] and Belarus since 10 November 2005).[27] One of the activities listed in Appendix I of the Espoo Convention includes nuclear power stations and other nuclear reactors. Hence, Belarus, in accordance with the procedure enshrined in the Espoo Convention, was required to consult potentially affected countries, including Lithuania, about its plans to construct an NPP.

The planning and construction of the Belarusian NPP in Ostrovets, located only twenty kilometres from the Lithuanian border and fifty kilometres from the Lithuanian capital of Vilnius – the country's largest city with about six hundred thousand inhabitants – caused a conflict between Lithuania and Belarus for many reasons. These reasons include, but are not limited to, procedural non-compliance in the transboundary EIA carried out by Belarus and Lithuania's efforts to ensure the safety of its population and environment, which could be severely affected in the event of an incident at the Belarusian NPP. Lithuania even passed a law[28] declaring the Belarusian NPP unsafe, stating that it poses a threat to national security, the environment, and public health.

According to the Espoo Convention, the EIA procedure begins with the formal and mandatory notification of the potentially affected countries by the country of origin. If the potentially affected countries decide to participate in the EIA procedure, the country of origin must provide all the relevant documentation,[29] including alternatives to the planned activity. After this, the public in potentially affected countries must be informed and given the opportunity to submit comments. Public participation is a crucial step and may involve multiple rounds. Public participation is followed by consultations between the party of origin and potentially affected countries, which may include alternatives to the proposed activity. Only after these consultations can the country of origin make a final decision regarding the activity.

All these steps imply that the negotiation process regarding the construction itself (whether it can take place or not), as well as the exact location and other aspects, is lengthy and must involve all potentially affected countries (if they wish to be included after formal notification by the country of origin), along with the public and other stakeholders. However, Belarus decided that the NPP would be built at the specific location (in Ostrovets) even before notification according to Espoo Convention provisions and consultations with the potentially affected countries. At that time, Belarus had not submitted the EIA documentation to Lithuania (only on 24 August 2009 did Belarus notify Lithuania in accordance with the Espoo Convention provisions about the proposed NPP activity). On 19 March 2009, Belarus informed Lithuania that on 20 December 2008, a special state commission had decided that the Ostrovets site had been prioritised over two others.

26 United Nations, "Convention on Environmental Impact Assessment in a Transboundary Context" <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&clang=_en>.

27 Ibid.

28 The Law of the Republic of Lithuania of 15 June 2017 No XIII-451.

29 Appendix II of the Espoo Convention provided the list of the documentation that has to be included.

During the 2010–2011 period, Belarus attempted to conduct a transboundary EIA for the NPP project; however, the ongoing process continued to raise fundamental questions for Lithuania. As a result, on 16 June 2011, the Lithuanian government made a submission to the Implementation Committee, expressing concerns about Belarus's compliance with its obligations under the Espoo Convention regarding the planned NPP at Ostrovets.[30]

Lithuania's submission asserted that Belarus had violated key provisions of the Espoo Convention and failed to fulfil its obligations.[31] The submission was based on the following main arguments: (i) concerns that the Ostrovets NPP site was selected before the EIA procedure was conducted, revealing a lack of clarity in Belarus's legal regulations of the planning system in Belarus and its harmonisation with the Espoo Convention;[32] (ii) improper implementation of the procedure for providing public information and conducting bilateral consultations, such as holding a public hearing without providing an appropriate translation into Lithuanian, the poor quality of the English version of the EIA report, the unexpected amendment of that same EIA report immediately prior to the meeting, and a lack of access to the full EIA documentation;[33] (iii) the notification not including the nature of any other possible decisions;[34] (iv) the preliminary EIA report lacking essential information, and the EIA documentation failing to provide a reasonable assessment of alternatives to the proposed activities;[35] (v) no access to the full EIA documentation;[36] (vi) the inappropriate adoption of the final decision, which resulted of a lack of transparency; and (vii) the start of preparatory construction work despite the incomplete EIA procedure.[37]

In the submission, Lithuania requested that the Implementation Committee not only take action by insisting that the Belarussian side fully comply with the requirements of the Espoo Convention and restart the EIA process but also that Belarus be asked to suspend all construction activities until the EIA process is fully completed. Furthermore, Lithuania requested that the decision be revised and that the NPP be relocated from the proposed Ostrovets site.

Three months after the submission, on 15 September 2011, Belarus approved the location of the NPP in Ostrovets through a presidential decree. This decision

30 UNECE, "Submission by Lithuania having concerns about the compliance of the Republic of Belarus with its obligations under Espoo Convention with respect to the construction of the nuclear power plant in the Republic of Belarus" (7 June 2011) <https://unece.org/DAM/env/documents/2019/ece/Restart/Belarus/Submission_by_Lithuania_received_June_2011_ref._5314.pdf>.

31 These obligations relate to legal, administrative, and other measures that are required for the establishment of an EIA procedure (Article 2 (2)); public participation (Article 2 (6)); the contents of a notification (Article 3 (2) (a–c)); the preparation of EIA documentation (Article 4 (1–2)); consultations on the basis of the EIA documentation (Article 5); and the final decision (Article 6 (1–2)).

32 Non-compliance with Article 2 (2) of the Espoo Convention.

33 Non-compliance with Article 2 (6) of the Espoo Convention.

34 Non-compliance with Article 3 (2) (a-c) of the Espoo Convention.

35 Non-compliance with Article 4 (1) and 4 (2) of the Espoo Convention.

36 Non-compliance with Article 5 of the Espoo Convention.

37 Non-compliance with Article 6 (1) and 6 (2) of the Espoo Convention.

was not communicated to Lithuania, did not include the reasons and considerations on which it was based, and did not take due account of Lithuania's comments. However, during the proceedings, this presidential decree was understood as the first final decision, understood according to Article 6 of the Espoo Convention. The second final decision, pertaining to permitting the construction at that specific location, was adopted on 2 November 2013.

The Implementation Committee took note of Lithuania's submission and considered the matter at its twenty-third to twenty-sixth sessions (10 January 2012[38]19 December 2012).[39] Before finalising its findings and recommendations, the Implementation Committee sent its draft to the parties concerned and invited them to submit their comments or representations. At its twenty-seventh session (12–14 March 2013), the Implementation Committee examined the main issues and adopted the following findings (presented according to specific aspects):[40]

Firstly, **EIA legislation in Belarus**. Following the recent legislative changes in Belarus, the country has improved its legal framework in terms of the EIA, and the Implementation Committee had no grounds for finding any instance of non-compliance with Article 2 (2) of the Espoo Convention.[41]

Secondly, **notification**. During the Implementation Committee's hearing, the two parties themselves agreed that requirements concerning the notification had been fulfilled by means of the notification of 24 August 2009. Therefore, the Implementation Committee found that Belarus was not currently failing to comply with Article 3 (2) (a–c).[42]

Thirdly, **public participation**. According to Belarus, it organised a public hearing in Ostrovets on 9 October 2009, which included the participation of some Lithuanian citizens. Lithuania did not receive an official invitation to participate in this public hearing. On 2 March 2010, a public hearing was organised in Vilnius, as proposed by Lithuania. After this event, in its letter to Belarus of 7 May 2010, Lithuania complained that the Belarusian representatives were "not sufficiently well-prepared for the public hearing regarding the EIA report"; in addition, they had failed to provide a "quality" translation into the Lithuanian language and had requested another public hearing in Lithuania based on the "amended" or "supplemented" EIA report which had been posted on the Belarusian website between 2–4 March 2010 but which had not been made available for the public hearing of 2 March 2010. The Implementation Committee held the opinion that "the concerned Parties should share the responsibility for ensuring that the opportunity provided to the public of the affected Party was equivalent to that provided to the

38 UNECE, "Report of the Implementation Committee on its twenty-third session" (10 January 2012) <https://unece.org/DAM/env/documents/2011/eia/ic/ece.mp.eia.ic.2011.8.e.pdf>.

39 UNECE, "Report of the Implementation Committee on its twenty-sixth session" (19 December 2012) <https://unece.org/DAM/env/documents/2012/eia/ic/ece.mp.eia.ic.2012.6.e.pdf>.

40 UNECE, "Report of the Implementation Committee on its twenty-seventh session" (12–14 March 2013) <https://unece.org/DAM/env/documents/2013/eia/ic/ece.mp.eia.ic.2013.2e.pdf>.

41 Ibid, para 60.

42 Ibid, para 61.

public of the Party of origin, including access to at least relevant parts of the documentation in a language the public could understand". On the above grounds, the Implementation Committee found that Belarus had failed to comply with Article 2 (6) but was in compliance with its obligations under Article 3 (8) of the Espoo Convention.

Fourthly, **EIA documentation**. Lithuania considered the preliminary EIA report, which had been provided by Belarus on 15 September 2009, to be only an EIA programme or a scoping document. Furthermore, as far as Lithuania was concerned, the bilateral meeting of 18 June 2010 was "to be considered as a preliminary discussion of the EIA process" (letter dated 9 July 2010). Following modifications to the preliminary report, Belarus provided "a final EIA report" on 11 February 2011. Lithuania, however, claimed (in its letter of 18 March 2011 and in its submission of 7 June 2011) that that report could not be considered "final" because it failed to fully answer Lithuania's previous comments and requests for information. By not informing Lithuania of the availability of the final EIA report and by not submitting it to Lithuania for comments, including those which could be made by members of the public, the Implementation Committee found that Belarus had failed to comply with the requirement of Article 4 (2) to furnish the affected party with the final EIA documentation for the purposes of public participation.

Fifthly, **consultations**. During the transboundary EIA procedure, the two parties consulted each other through an exchange of letters and on the occasion of two bilateral meetings. The Implementation Committee found that the lack of response to several specific questions put to Lithuania by Belarus, as well as delays in answering, rendered such consultations purely formal. On these grounds, the Implementation Committee found that Belarus was not yet fully compliant with the requirements of Article 5.

Sixthly, **alternative sites**. The Espoo Convention requires the EIA documentation to include possible alternatives to the proposed activity. The choice of location for the proposed activity should result from the EIA procedure and should not be determined before the final EIA report is issued unless the choice of location was determined as part of an appropriate strategic environmental assessment (SEA) that includes a transboundary procedure. Ostrovets was chosen as the priority site at the beginning of the process in 2008, prior to the provision of any notification and prior to the completion of the final EIA (the response by Belarus to the Implementation Committee dated 15 June 2012, para 17). The Aarhus Convention[43] Compliance Committee, in its findings and recommendations on communication concerning the Ostrovets project, referred to 2007 in this regard (ECE/MP.PP/C.1/2011/6/Add 1, para 75). The Compliance Committee also stated that "it appears that the option of not building the NPP at this specific location was no longer open for discussion" and "once the decision to permit the proposed activity in the Ostrovets area had already been taken without public involvement, making provision for such an

43 Aarhus Convention, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 UNTS 2161, p. 447.

involvement at a subsequent stage could under no circumstances be considered as meeting the requirement under article 6, paragraph 4 to provide for early public participation when all options are open" (ECE/MP.PP/C.1/2011/6/Add 1, para 76). The Implementation Committee found that Belarus was not yet in full compliance with Article 5 (a) in relation to Appendix 2 (b), (c), and (d).

Seventhly, **final decision**.[44] The Implementation Committee noted that, for the Ostrovets NPP, Belarus split the final decision into two parts: the decision on the location and the decision on permitting construction at that specific location. The Implementation Committee found that when parties split their final decisions into several parts, all such parts of the final decision have to comply with Article 6 of the Espoo Convention. The Belarusian presidential decree of 15 September 2011 approved the location of the future NPP, that is, the Ostrovets site, without taking into account the requirements of the Espoo Convention as set out in Article 6. The decision on the location was not provided to Lithuania. It did not include the reasons and considerations upon which it was based, and it did not take due account of comments by Lithuania. The committee therefore found that Belarus had not complied with Article 6 (1–2) of the Espoo Convention in regard to the decision on the location. The Implementation Committee considered the decision regarding the provision of a green light for construction at the Ostrovets site as not yet having been supplied and, therefore, found that Belarus had not failed to comply with Article 6 (1–2) in regard to this decision.

On 14 March 2013 (the adoption date for the report on its twenty-seventh session), the Implementation Committee found that Belarus had complied with its obligations under Article 3 (2) (a) and (c) and Article 3 (8) but failed to comply with its obligations under Article 2 (6), Article 4 (2), Article 5 (a), and Article 6 (1–2) of the Espoo Convention in relation to those activities referred to in the submission. The Implementation Committee requested that the Belarusian government reach a final decision in regard to site selection in order that Lithuania be provided with such a final decision in regard to the proposed activity that would be undertaken in accordance with the previous recommendation and to continue to undertake the transboundary EIA procedure on the basis of the final EIA documentation. The Implementation Committee also requested that Belarus and Lithuania ensure that the Lithuanian public remain informed about the final EIA report and encouraged Belarus and Lithuania to continue consultations.

After the findings and recommendations were sent to Belarus and Lithuania, both parties expressed their willingness to follow the Implementation Committee's recommendations and sent a substantial amount of additional information to the committee, including correspondence between both parties in regard to activities undertaken in that regard.[45] The Implementation Committee then decided against

44 Belarus's final decision regarding the NPP project in Ostrovets.

45 UNECE, "Report on the activities of the Implementation Committee" (24 March 2014) paras 53–56 <https://unece.org/DAM/env/documents/2014/EIA/MOP/ECE.MP.EIA.2014.4-ECE.MP.EIA.SEA2014.4_E.pdf>.

revising its recommendations to the MOP of March 2013, as it considered that such a re-evaluation would imply a detailed examination of all unsolicited information that had been provided by both parties. The MOP endorsed the Implementation Committee's findings by means of Decision VI/2, which was adopted in Geneva on 2–5 June 2014.

In the 2014–2017 intersessional period, the Implementation Committee considered its follow-up to Decision VI/2 regarding Belarus (paras 48–64). This included additional recommendations made by the Implementation Committee after it had considered extensive documentation submitted by Belarus and Lithuania prior to the sixth session of the MOP covering those steps that had been taken in order to achieve compliance with the committee's earlier findings. In addition, when issuing Decision VI/2, the MOP requested that the committee thoroughly analyse those steps that had been undertaken by the two parties following the adoption of the committee's report on its twenty-seventh session in order to be able to reflect the conclusion of its analysis, to be issued within the report on its thirty-third session at the latest, and to report on the matter to the MOP during its seventh session.

It should be mentioned separately that the need to solve substantive and scientific issues emerged during these proceedings. The Implementation Committee considered, in essence, that the submission covered some very substantive issues, while Lithuania claimed that its objections and requests for information had not been taken into account or had only been partially answered during the related transboundary EIA procedure. The Implementation Committee stated that it was not within its capacity or mandate to examine – or to take a position in regard to – the environmental or scientific issues raised by Lithuania such as, for example, in terms of the scientific assessment of alternative sites, the criteria and reasons for choosing a site near Vilnius, and the alleged violation of Principle 4 of the IAEA's Fundamental Safety Principles (2006) in regard to "the management of radioactive waste", "emergency situations and the potential impact of any accidents", or "geological data" or other substantive issues. However, it stated that it would focus its attention on examining the application of the Espoo Convention's relevant provisions during the EIA procedure.[46] As the Espoo Convention itself is a procedural instrument, the intention to examine substantive and scientific issues required additional effort for the Implementation Committee.

In its draft decision on the review of compliance with the Espoo Convention,[47] the Implementation Committee recognised the efforts that had been made by Belarus when it came to implementing Decision VI/2 but acknowledged that it was not within the Implementation Committee's capacity or mandate to examine the environmental and scientific issues raised in connection with the planned activity at Ostrovets. Further, it acknowledged the need for expert advice in order to be

46 UNECE (n. 40).

47 UNECE, "Draft decision on the review of compliance with the Convention" (13–16 June 2017) paras 57–60 <https://unece.org/DAM/env/documents/2019/ece/IC/Ostrovets/Draft_decesion_VII_2.pdf>.

able to answer the questions listed in Annex 1 to this decision. The Implementation Committee also made it clear that the procedural and substantive aspects of any EIA procedures cannot necessarily be treated separately when assessing compliance. This is particularly true if the essence of the compliance case pertains to substantive aspects.

In order to reach its final conclusion, the Implementation Committee identified the need for additional resources and specific expertise even though it itself had already exhausted all avenues through which it might receive external expert advice, including via the two concerned parties and the International Atomic Energy Agency (IAEA). The Implementation Committee decided, somewhat exceptionally, to examine the documentation prepared by Belarus under the EIA procedure. At its forty-second session (Geneva, 11–14 September 2018),[48] the committee considered the results of its examination of the EIA documentation for the NPP in Ostrovets. This had been prepared by Belarus with regard to the question concerning population density and the size of the area to be considered within the EIA documentation. Questions regarding the contamination of rivers and groundwater, how radioactive waste and spent fuel would be handled, and how the process of site selection was being handled were also examined. The Implementation Committee agreed that the first three of these questions were taken into consideration by Belarus in the EIA documentation and that such consideration had been undertaken in an acceptable manner. The Implementation Committee noted that it had provided Belarus with several opportunities to demonstrate that the issue of site selection had been properly addressed but that Belarus had failed to provide the committee with information to sufficiently justify the selection of the Ostrovets site over the alternatives and that the issue had not been addressed in an acceptable manner under the Espoo Convention to support any final decision on the activity.[49]

Decision IS/1d was adopted between 5–7 February 2019 during the MOP intermediary sessions.[50] This endorsed the findings of the Implementation Committee with respect to Belarus having taken all required procedural steps in order to reach its final decision on the planned activity at Ostrovets, as provided in the Espoo Convention.[51] The Implementation Committee agreed on its findings that the EIA documentation, which had been made available to the affected parties and the general public, made reference to location-related alternatives for an NPP and to criteria for the site selection but did not provide sufficient information that could support or justify the selection of the Ostrovets site when it came to being able to reach a

48 UNECE, "Report of the Implementation Committee on its forty-second session" (11–14 September 2018) paras 21–24 <https://unece.org/DAM/env/documents/2019/ece/IC/Ukraine_S1/42_ece.mp.eia.ic.2018.4e_Advance_copy.pdf>.

49 Ibid, para 27.

50 "Decision IS/1d regarding compliance by Belarus with its obligations under the Convention in respect to the proposed Belarusian nuclear power plant in Ostrovets" (5–7 February 2019) <https://unece.org/DAM/env/eia/meetings/2019/IS_MOP_5-7_February_2019__Geneva/Decision_IS.1d_.pdf>.

51 Ibid, para 5.

final decision in regard to the activity in accordance with the Espoo Convention. By not providing information under Appendix 2 of the Espoo Convention in the EIA documentation and the final decision in regard to the activity in question, Belarus thus failed to comply with Article 4 (1), Article 5 (a), and Article 6 (1) of the Espoo Convention.[52]

The Implementation Committee then turned to information that had originated from other sources (involving information-gathering cases) in regard to compliance with the Espoo Convention. The Implementation Committee paid some consideration regarding the follow-up by Belarus to the decision regarding the Ostrovets NPP[53] and the information provided by international consultants in relation to the recent adoption by Belarus of the law and subsequent regulations on EIA and SEA, as well as to state ecological expertise (committee reference no. EIA/IC/INFO/21).[54]

4. Evaluation and lessons from the proceedings between Lithuania and Belarus (No EIA/IC/S/4) under the Espoo convention

4.1. Article 14 bis of the second amendment to the Espoo Convention sets out the compliance procedure as a non-adversarial and assistance-oriented procedure. The aforementioned proceedings between Lithuania and Belarus are characterised as non-adversarial and assistance-oriented. It is important to note that the role of the Implementation Committee was not only to determine whether Belarus had complied with the provisions of the Espoo Convention but also to provide assistance to Belarus in order to meet its commitments and improve compliance. Despite the fact that the MOP had endorsed the findings and recommendations subsequent to the receipt of a submission by Lithuania regarding Belarus on 12–14 March 2013, this being the date of the Implementation Committee's adoption in its report, the request made was that the committee analyse the steps which the parties had undertaken following the adoption of the Implementation Committee report.[55] In addition, according to the factual situation, requests were made regarding Belarus alone (such as, for example, in terms of taking a final decision on site selection and continuing the transboundary EIA procedures on the basis of the final EIA documentation) or regarding both Belarus and Lithuania together (such as, for example, by ensuring that Lithuania's general public was informed about the final EIA report and in regard to the continuance of consultations). It must be recognised that Belarus responded to the ongoing Implementation Committee proceedings and took steps to improve its compliance with the Espoo Convention: changes were made to Belarusian legislation concerning the EIA, and Belarus has taken procedural steps to reach a final decision in regard to the planned activity. The

52 Ibid, paras 13–15.

53 Decision VI/2 (EIA/IC/S/4).

54 UNECE, "Information from other sources" <https://unece.org/environment-policy/environmental-assessment/information-other-sources-0>.

55 UNECE (n. 40).

progress Belarus has made in terms of the EIA procedure was reflected in Decision IS/1d. Despite its best efforts, however, Belarus was not able to comply fully with its obligations under the Espoo Convention. The Implementation Committee also encouraged both parties to conclude a bilateral agreement, to continue bilateral expert consultations, and to continue working on post-project analysis.

Some authors have criticised the proceedings, saying, "It is absurd to discuss the insufficiency of the Belarussian arguments regarding the justification of the choice of the Ostrovets site a year before the start of the NPP".[56] This would not be the case if it were strictly adhered to that a transboundary EIA should be carried out before the decision to authorise or carry out these activities. On the other hand, the nature of the proceedings, which is non-adversarial and assistance-oriented, makes this necessary. The Implementation Committee is assigned more of a mediator's role, which involves helping the parties engage in constructive discussions and reach an agreement. These aspects show that the Implementation Committee's proceedings can significantly contribute to a better implementation of the EIA procedure and the implementation of and compliance with the Espoo Convention.

4.2. It was almost three years after Belarus provided information to the affected parties about its planned activity (15 July 2008) before Lithuania made the submission to the Implementation Committee concerning Belarus's compliance with its obligations under the terms of the Espoo Convention with respect to the planned NPP at Ostrovets (16 June 2011).[57] One of the main circumstances indicated in the submission was that, on 11 February 2011, Lithuania received a final EIA report on the Belarusian NPP that it did not consider to be a final report, and therefore, the EIA procedure remained incomplete. The submission claimed that Belarus had failed to complete the EIA procedures properly with respect to the planned activity even while it proceeded with ground and other preparatory work on site. In its submission, Lithuania relied on the Implementation Committee's letter, which indicates that a submission by the concerned party "should only be made once the final decision has been taken in regard to the activity in question".

Prior to Lithuania's submission, the Implementation Committee had already sought clarification from Belarus in regard to its application of the Espoo Convention, specifically in terms of the proposed NPP, following information being provided by Ecoclub, a Ukrainian NGO, on 1 July 2009 and having considered information provided by Belarus.[58] In its submission, Ecoclub clearly stated that "in addition, Belarus took several important decisions and began preparatory work to construct its NPP. It is clear that Belarus is also violating the requirement to provide notification 'as early as possible'".[59] In addition, the committee had

56 Abashidze et al. (n. 12).

57 UNECE (n. 30).

58 Committee reference No EIA/IC/INFO/5.

59 "Information for the attention of Implementation Committee, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991)" (1 July 2009), 8 <https://unece.org/fileadmin/DAM/env/documents/2019/ece/IC_new_files/EIAICINFO5/EIA.IC.INFO.5_Information_form_on_Belarus_NPP.pdf>.

already written to Latvia, Lithuania, Poland, and Ukraine in October 2009 to ask about their experience in terms of the convention's application in connection with the proposed activity and had considered the responses received from each of them.

Having assessed the circumstances surrounding the proceedings, it has become obvious that construction and digging work was begun prior to the adoption of the final decision of Belarus regarding the NPP project in Ostrovets, even though this was not clearly emphasised in the Implementation Committee's findings. If we consider the EIA to be an important decision-making tool, then the start of any construction work before the EIA's final decision has even been adopted serves to prove that such a tool was used inappropriately and has not achieved its goals. The outcome of such a situation can be assessed in two ways. Firstly, the beginning of construction work should be taken as an independent basis for non-compliance with the Espoo Convention. Secondly, a formal EIA procedure should be carried out (checking whether the same result regarding the location of the proposed activity can be achieved under the terms of the procedure). It looks as though the later formal completion of the EIA procedures could place different countries, as described earlier, in a similar position regardless of the fact that one had begun construction work prior to the EIA's final decision having been issued.

According to Article 6 of the Espoo Convention, the final decision on a proposed activity must take due account of the outcome of an EIA, including any and all EIA documentation in this process, as well as any comments that have been received within a transboundary procedure. Nevertheless, the Implementation Committee's findings show that Belarus was obliged to carry out the EIA procedure, which indicates that priority was given to the execution of the EIA procedure regardless of information received regarding the earlier start of construction work. We should recall the point that if the EIA procedure is a *sine qua non* for granting administrative authorisation, it is nonetheless a procedural requirement, and the submission of a project to the EIA is a purely formal guarantee, one which does not in itself entail any strengthening of ecological controls.[60] This case shows that mere theoretical compliance with the provisions of the convention is not enough. Moreover, the case confirms that stronger measures need to be taken to achieve the objectives of the convention.

4.3. Lithuania used its submission as a tool to ensure compliance with the Espoo Convention, to force the suspension of the entire construction[61] process, and to attempt to force the withdrawal of the NPP from its proposed Ostrovets site. During the proceedings, Lithuania enacted a law that recognised this NPP as being unsafe and that it posed a threat to its national security, the environment, and public health.[62] During the same proceedings, Belarus adjusted its own national

60 N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2020) 131.

61 In its submission of 7 June 2011, Lithuania requested that the Implementation Committee "invite the Belarusian side to suspend all construction processes until the EIA process is fully finished".

62 On 15 June 2017, the Seimas of the Republic of Lithuania enacted Law No XIII-451, which classified the NPP proposed to be constructed in the Ostrovets district as being unsafe and dangerous

laws, although it did not halt the construction of the NPP. The Implementation Committee was involved in ensuring compliance issues in relation to the Espoo Convention but did not take any measures to stop construction work related to the NPP. However, the Espoo Convention did not provide a legal basis for its decision not to suspend the construction of the NPP entirely. The suspension of the NPP construction process at the Ostrovets site as an interim measure was not included in the Implementation Committee's area of competence, which serves to reflect its limited nature when it comes to the Espoo Convention.

These features can be compared to disputes between EU Member States over the implementation of EIAs. The Czech Republic brought a case against Poland under Article 259 TFEU. It argued that Poland had infringed Directive 2011/92 as it had introduced national legislation under which it is possible to extend the development consent for extraction activity without an EIA by a span of six years.[63] The Czech Republic requested the application of interim measures under Article 279 TFEU from the European Court of Justice, requesting the immediate closure of the lignite mine in question. On 21 May 2021, the court's vice-president instructed that interim measures be granted that ordered the cessation of lignite mining activities at the Turów mine.[64] On 20 September 2021, Poland was ordered to pay the European Commission a penalty payment of EUR 500,000 a day from the date notification was received until Poland complied with the order.[65] Thus, in the event of a dispute between two EU Member States over the application of the EIA Directive, there is a possibility of applying interim measures. However, this is not foreseen under the Espoo Convention.

4.4. In addition to procedural matters, the proceedings between Lithuania and Belarus have also caused a number of substantive issues related to NPP safety to arise.[66] By saying that an EIA requires an administrative process that incorporates both scientific analysis and public participation, Elizabeth Fisher raises questions about how to think legally about these processes and, in particular, how courts should scrutinise these processes.[67] Answering scientific and substantive questions raised by Lithuania during the procedure was quite challenging for the Implementation Committee.

(classification carried out under the Law of the Republic of Lithuania on the Recognition of the Nuclear Power Plant under Construction in the Ostrovets District within the Republic of Belarus as being Unsafe and Posing a Threat to the National Security of the Republic of Lithuania, its Environment, and its Public Health).

63 Case C-121/21, *Czech Republic v Republic of Poland*, ECLI:EU:C:2021:420.

64 Ibid.

65 Ibid.

66 For example, in terms of "the scientific assessment of alternative sites, the criteria and reasons for choosing a site near Vilnius, and the alleged violation of Principle 4 of the IAEA's 'Fundamental Safety Principles'" (2006) in regard to "the management of radioactive waste", "emergency situations and the potential impact of any accidents", or "geological data" or other substantive issues.

67 E. Fisher, "Environmental impact assessment: 'Setting the law ablaze'," in D. Fisher (ed.), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar 2022) 427–428.

This situation can be attributed to a number of factors. Firstly, the procedural nature of the EIA is a significant contributing element. A process-oriented technique distinct from substantive environmental standards and requirements, EIA facilitates informed decision-making by thoroughly scrutinising anticipated environmental effects.[68]

Secondly, the specific nuclear regulations that form part of the legislative framework also play a role. It is generally acknowledged that the legal framework for the protection of the environment from the impact of nuclear activities has two distinct bodies of law: nuclear law, which mostly covers aspects related to radioactivity, and environmental law, which covers all types of hazards but may also include requirements for the protection of the environment against the harmful effects of ionising radiation. The fundamentals and general requirements of a legislative and regulatory framework for the safety of NPPs are prescribed in the Convention on Nuclear Safety of 1994 (CNS)[69] and internationally recognised as accepted standards comprising the IAEA's Safety Standards Series.[70] Consequently, there is no internationally binding instrument that sets minimum safety standards for nuclear reactors.[71] The international verification and inspection system to determine compliance with safeguards agreements is the pillar of the entire system and the main expression of the centralisation embodied by the IAEA.[72]

In the context of land-based NPP, the CNS entails a specific consultation obligation on the part of a contracting party and a corresponding right for a potential risk-exposed party to obtain, upon request, information to enable an evaluation and assessment of the likely safety impact on their own territory.[73] However, the need for public participation is limited in the main international nuclear law instrument, with the CNS, for instance, only addressing how to inform the public in the area of emergency preparedness.[74] The obligations of the Espoo Convention also reach much further than those found in specific international nuclear law instruments.[75]

Access to information regarding nuclear matters, concepts of transparency, and stakeholder involvement are relatively recent in the nuclear field and are examples of the effect that the development of international environmental law has had on nuclear law and nuclear activities.[76] In the legal field, it has been noted that "an area where nuclear law still has some ways to go, whereas environmental law excels, is

68 D. A. Wirth and N. M. Sachs, "Hazardous substances and activities," in L. Rajamani and J. Peel (eds.), *The Oxford Handbook of International Environmental Law* (2nd ed., Oxford Academic 2021) 590.

69 Convention on Nuclear Safety (adopted 20 September 1994, entered into force 24 October 1996) 1963 UNTS 293.

70 A. Wetherall, "Environmental considerations in regulating nuclear energy," in *Elgar Encyclopedia of Environmental Law* (Edward Elgar 2021) 366.

71 Wirth and Sachs (n. 68) 587.

72 Viñuales (n. 5) 320.

73 Wetherall (n. 70) 368.

74 Ibid.

75 Emmerechts (n. 4) 97.

76 A. Al Faruque, *Nuclear Energy Regulation, Risk, and the Environment* (Routledge 2019).

in promoting values of transparency and public participation in activities where the decisionmaking process has long been left to the 'experts'".[77] Synergies between nuclear and environmental law, which share the common goal of protecting the environment, are essential for this purpose.[78]

Thirdly, it is important to note that additional resources and specific expertise were not fully available to the Implementation Committee, which, despite being confronted with obstacles, fully answered environmental and scientific questions raised in connection with the planned activity. Fisher also states that EIA is a form of "hot" law addressing "hot" situations – polycentric, scientifically uncertain, and normatively conflicted.[79] The EIA carried out for the construction of the Belarusian NPP serves as an illustrative example.

5. Conclusions

1. Proceedings of the case between Lithuania and Belarus discussed by the Espoo Convention's Implementation Committee resulted in Decision VI/2 (2–5 June 2014) and Decision IS/1d (5–7 February 2019), which found that Belarus had failed to fully comply with its obligations under the Espoo Convention in respect of the planned NPP at Ostrovets. The foregoing analysis of the proceedings has revealed the peculiarities and limitations of an EIA's practical implementation.
2. The course of the proceedings shows that the compliance procedure was conducted, as required, in a non-adversarial and supportive manner. Belarus responded to the committee's ongoing proceedings, taking steps to improve its compliance with the Espoo Convention. The progress made by Belarus in terms of the EIA procedure was reflected in Decision IS/1d. Despite its best efforts, though, Belarus was not able to comply fully with its obligations under the convention. The Implementation Committee is also assigned more of a mediator's role, which involves helping the parties engage in constructive discussions and reach an agreement. This shows that the Implementation Committee can significantly contribute to a better implementation of the EIA procedure and the implementation of and compliance with the Espoo Convention.
3. From the circumstances surrounding these proceedings, it is quite obvious that construction and digging work were started before the final decision could be adopted, even though this was not clearly emphasised in the Implementation Committee's findings. If we consider the EIA to be an important decision-making tool, then the start of any construction work before the EIA's final decision has even been adopted serves to prove that such a tool

77 P. Reyners, "Le droit nucléaire confronté au droit de l'environnement: autonomie ou complémentarité?" [2007] 3 Revue Québécoise de Droit International 149.

78 International Atomic Energy Agency, *Nuclear Law: The Global Debate* (Asser Press 2022) 41.

79 Fisher (n. 67) 422.

was used inappropriately and has not achieved its goals. Nevertheless, the Implementation Committee's findings also show that Belarus was obliged to carry out the EIA procedure, which indicates that priority was given to executing the EIA procedure, regardless of the information received in connection with the early start of construction work.

4. Lithuania used its submission as a tool to ensure compliance with the Espoo Convention, suspend all construction processes, and force the relocation of the NPP in question from the Ostrovets site. Suspension as an interim measure of the NPP's construction process at the Ostrovets site was not included in the Implementation Committee's competence, which reflects the limited nature of the implementation of the Espoo Convention. These features can be compared with the application of the EIA Directive. In the event of a dispute between two EU Member States over the application of the EIA Directive, there is a possibility of applying interim measures. However, this is not foreseen under the Espoo Convention.
5. The proceedings between Lithuania and Belarus have also given rise to substantive questions pertaining to the safety of the NPP. The scientific and substantive questions raised by Lithuania during the procedure presented a considerable challenge for the Implementation Committee. This situation can be attributed to a number of factors. Firstly, the procedural nature of the EIA is a significant contributing element. Secondly, the specific nuclear regulations that form part of the legislative framework also play a role. Thirdly, it is important to note that additional resources and specific expertise were not fully available to the Implementation Committee.

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