Economic Commission for Europe
Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context

Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context serving as the Meeting of the Parties to the Protocol on Strategic Environmental Assessment

Working Group on Environmental Impact Assessment and Strategic Environmental Assessment
Fifth meeting
Item 2 of the provisional agenda
Status of ratification

Accelerating the entry into effect of the first amendment to the Convention

Proposals by the Bureau

Summary

The Working Group on Environmental Impact Assessment and Strategic Environmental Assessment under the Convention on Environmental Impact Assessment in a Transboundary Context and its Protocol on Strategic Environmental Assessment is mandated to assist in the implementation of the Convention and the Protocol and the management of their joint workplan (ECE/MP.EIA/SEA/2, decision I/5-V/5, para. 2).

In accordance with that mandate, the Working Group decided at its fourth meeting (Geneva, 26–28 May 2015) that at its next meeting, depending on the number of ratifications still needed for the first amendment to the Convention to have effect, it would consider avenues for the acceleration of the entry into effect of that amendment. These avenues included “the adoption of a separate agreement modifying article 17, paragraph 3, and entering into force through a no-objection procedure once a deadline specified in the...
agreement had lapsed” (ECE/MP.EIA/WG.2/2015/2, para. 9).

The present document, which examines the various options for accelerating the entry into effect of the first amendment, has been prepared at the request of the Bureau, in consultation with the Bureau and the Treaty Section of the United Nations Office of Legal Affairs. A proposal for an agreement modifying article 17, paragraph 3, of the Convention is set out in an annex. It builds on the informal document in English considered by the Working Group at its fourth meeting (ECE/MP.EIA/WG.2/2015/INF.3).

The Working Group is invited to discuss the options provided in the document, taking due account of the fact that, at the time of writing (i.e., late January 2016), the number of remaining ratifications of the first amendment has not increased since the fourth meeting of the Working Group. The Working Group is invited to consider the document and to recommend actions to be taken by the Meeting of the Parties to the Convention at its seventh session, scheduled to be held in Minsk in June 2017, to accelerate the entry into effect of the amendment.
I. Introduction

1. The first amendment to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), adopted by decision II/14 of the Meeting of the Parties (ECE/MP.EIA/4, annex XIV), entered into force in August 2014. However, while the main goal of decision II/14 is to turn the Convention into a global instrument, the amendment establishes a precondition for it to take effect (art. 17, para. 3): the 31 Parties that were Parties to the Convention at the time of the adoption of the amendment (i.e., 27 February 2001) must all ratify the amendment for it to enter into effect.

2. At its sixth session, in June 2014, the Meeting of the Parties to the Convention urged all the States and organizations that were Parties to the Convention on 27 February 2001 that had not yet done so to ratify the amendment to article 17 as soon as possible (see ECE/MP.EIA/20/Add.3-ECE/MP.EIA/SEA/4/Add.3, decision VI/5–II/5, para. 2, and Geneva Declaration, para. B1). The Meeting of the Parties also noted the increased interest shown by States not members of the Economic Commission for Europe (ECE) in becoming Parties, as well as their attendance at meetings under the Convention.

3. At its meeting in February 2015, the Bureau under the Convention and its Protocol on Strategic Environmental Assessment considered the status of ratification of the amendment and the need to accelerate its entry into effect so that all countries members of the United Nations could join the Convention. It decided that the issue should be discussed at the fourth meeting of the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment (Geneva, 26–28 May 2015).

4. To facilitate discussions at the Working Group meeting, the Bureau asked the secretariat to prepare an informal note, in consultation with the Treaty Section of the United Nations Office of Legal Affairs, about the implications of the entry into force of the first amendment to the Convention for countries (or economic integration organizations), whether or not they are ECE members, pending ratification by the remaining Parties (art. 17, paras. 3 and 7). As requested by the Bureau, the note was to also present possible avenues to promote the global application of the Convention as soon as possible, including the adoption of a separate agreement modifying article 17, paragraph 3, and entering into force through a no-protest procedure when a deadline specified in the agreement lapses.

5. At its fourth meeting, the Working Group considered the informal note prepared by the secretariat as requested by the Bureau (ECE/MP.EIA/WG.2/2015/INF.3). However, it decided to postpone the discussion on the possible avenues for the acceleration of the entry into effect of the first amendment to its next meeting, depending on the number of ratifications still needed (ECE/MP.EIA/WG.2/2015/2, para. 9).

6. At its meeting on 19 and 20 January 2016, taking stock of the situation, the Bureau noted that no further ratification had taken place since the fourth meeting of the Working Group and that, consequently, 13 further ratifications were still missing for the amendment to take effect. It also recognized that it had taken 13 years for the amendment to enter into force and that it was likely to still take several years to reach the required number of

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1 The informal notes of this Bureau meeting are available online from http://www.unece.org/index.php?id=38121#/

2 Official and informal documentation on the Working Group’s fourth meeting is available online from http://www.unece.org/index.php?id=38654#/.
ratifications for the entry into effect of the amendment. Consequently, it invited the secretariat to prepare an official pre-session document for submission to the fifth meeting of the Working Group to inform the deliberations at that meeting on the means for accelerating the entry into effect of the first amendment.\(^3\)

7. The present document has been prepared by the secretariat to respond to the Bureau’s request and to the decision by the Working Group to formally discuss the matter at its fifth meeting. The document builds on informal document ECE/MP.EIA/WG.2/2015/INF.3 considered at its fourth meeting. Aside from incorporating the comments from the Bureau, it reflects the views of the Office of Legal Affairs and is based on the treaty text, including the amendment, and the applicable rules of treaty law and practice.

8. The Working Group is expected to consider the document and agree on actions it will recommend that Parties take at in this regard at the seventh session of the Meeting of the Parties in June 2017.

II. The terms for the entry into effect of the amendment

9. The Convention was negotiated and adopted in 1991 as a regional instrument, thus limiting its membership to States members of ECE and regional economic integration organizations constituted by ECE States (see arts. 16 and 17 of the Convention). The Convention entered into force on 10 September 1997.

10. Soon after its entry into force, recognizing the added value and benefits of the Convention, Parties agreed to open it for accession also by non-ECE States. Decision II/14 on the amendment to the Convention was adopted by the Meeting of the Parties at its second session, on 27 February 2001. According to article 14, paragraph 4, of the Convention, the amendment entered into force on 26 August 2014, i.e., the ninetieth day after the receipt by the depositary of notification of the accession of Malta on 28 May 2014.

11. The objective of the amended text is to enable United Nations Member States that are not members of the ECE to accede to the Convention. The text of the amendment includes, however, two requirements for accession by non-ECE States: (a) approval by the Meeting of the Parties; and (b) the entry into force of the amendment for all the States and organizations that were Parties to the Convention on 27 February 2001.

A. Approval by the Meeting of the Parties

12. Article 17, paragraph 3, of the Convention provides for the possibility of non-ECE States to accede to the Convention upon approval by the Meeting of the Parties.

13. At their fifth and first sessions, respectively, in 2011, the Meeting of the Parties to the Convention and the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol adopted decision V/8-I/8 on accession by Member States of the United Nations (ECE/MP.EIA/SEA/2) not members of ECE, setting out a procedure for approval by the Meetings of the Parties.

\(^3\) The informal notes of this Bureau meeting will soon be available online from http://www.unece.org/index.php?id=40421#/. 
14. At their sixth and second sessions, respectively, in 2014, the two Meetings of the Parties adopted decision VI/5–II/5 on accession by United Nations Member States not members of ECE, superseding decision V/8–I/8 and giving blanket approval to any future request for accession by non-ECE members.

B. Ratification by all States Parties on 27 February 2001

15. According to the text of the amendment, the Meeting of the Parties to the Convention “shall not consider or approve any request for accession by such a State until this paragraph has entered into force for all the States and organizations that were Parties to the Convention on 27 February 2001” (art. 17, para. 3), i.e., the date the amendment was adopted. Although the Meeting of the Parties has given a blanket approval for any future request for accession, such approval cannot operate until this term has been fulfilled.

16. As of today, 25 January 2016 — 15 years after the adoption of the amendment — of the 31 States and organizations that were Parties to the Convention on 27 February 2001, the following 13 Parties still need to ratify the amendment to make it effective: Armenia, Azerbaijan, Belgium, Canada, Cyprus, Denmark, Greece, Italy, Latvia, Republic of Moldova, the former Yugoslav Republic of Macedonia, Ukraine and the United Kingdom of Great Britain and Northern Ireland.

III. The period between the entry into force and the entry into effect of the amendment

17. Despite the fact that the amendment has entered into force, the blanket approval granted by the Meeting of the Parties through its decision VI/5–II/5 is not effective pending ratification of the amendment by the 13 remaining States. As a result, any applicant non-ECE State still cannot accede to the Convention. This means that, in this interim period between the entry into force of the amendment and its eventual ratification by the remaining 13 States, an instrument of accession by any interested non-ECE State will not be accepted by the depositary. The applicant State will have to deposit a new instrument of accession after the condition of ratification has been fulfilled, namely after the amendment has entered into force for all States that were Parties at the time the amendment was adopted.

18. In the interim period until the amendment becomes operational, any ECE State may still ratify or accede to the Convention, without any restriction. It should be noted that by ratifying or acceding to the Convention, that State will be deemed to simultaneously ratify, accept or approve the amendment to the Convention (art. 17, para. 7).

IV. Ways to accelerate global accession

19. It took 13 years for the amendment to enter into force. In the meantime Parties agreed to interpret article 14 on amendments to the Convention in a way that would accelerate its entry into force, taking as the basis for the calculation of the “three-fourths requirement” the number of Parties to the Convention at the time of the adoption of the amendment, as opposed to the actual number of States Parties. That was in line with the intention of the Parties expressed in decision V/2 on the interpretation of article 14 of the
Convention (amendments) (ECE/MP.EIA/SEA/2), to bring about the early entry into force of the amendments adopted by decisions II/14 and III/7 (ECE/MP.EIA/6, annex VII).

20. Taking into account the long time it took to reach the necessary number of Parties for the amendment to enter into force, there is a risk that the additional requirement for ratification by the 13 additional States will take several years to fulfil. This, however, seems to run counter the intention of the Parties to render the Convention a global instrument as soon as possible, as evidenced by the objective of the amendment in decision II/14, as well as decisions V/2, VI/5–II/5 and the 2014 Geneva Declaration.

21. The amendment to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (ECE/MP.WAT/14) includes a similar clause for the accession of non-ECE States. The amendment entered into force on 6 February 2013, and the amendment will enter into effect on 29 February 2016, i.e., the ninetieth day after Ukraine deposited its instrument of acceptance of the amendment, on 1 December 2015.

22. Apart from prompting the 13 States to ratify the amendment, the Meeting of the Parties may decide: (a) to amend article 17, paragraph 3, through the adoption of a new amendment; or (b) to proceed with the adoption of a new, separate agreement modifying article 17, paragraph 3, and entering into force through a no-objection procedure when a deadline specified in the agreement has lapsed.

A. Amendment to the Convention

23. Parties may decide to proceed with a new amendment to the Convention, waiving the condition of article 17, paragraph 3. If such an amendment is adopted by a decision of the next Meeting of the Parties to the Convention in 2017, and assuming that the number of the Parties to the Convention will still be 45, the three-fourths requirement under article 17 will be met when 33 Parties — regardless of whether they are Parties to the Convention at the time of the adoption of the amendment in 2017 or became Parties after the adoption of such amendment — out of the 44 that are Parties at the time of the amendment’s adoption, excluding the European Union, have ratified the new amendment.

24. However, the fulfilment of the three-fourths requirement for the entry into force of the first amendment necessitated 23 ratifications and, as mentioned above, took 13 years to be met. The entry into force of a new possible amendment in 2017 which will require at least 33 ratifications for its entry into force may therefore take much longer to become effective, longer than the ratification of the amendment by the 13 Parties. Therefore, while this option appears to be the most straightforward, it is not practical as it does not respond to the intention of the Parties to turn the Convention into a global instrument as soon as possible.

B. Agreement superseding the Convention

25. A possibility to expedite accession by countries outside the ECE region to the Convention is the adoption of an agreement modifying article 17, paragraph 3, and entering into force at a certain time after its adoption, as agreed by the Parties to the agreement, through a simplified no-objection procedure.

26. The adoption of a separate agreement to amend the Convention and a no-objection procedure or the entry into force of such an agreement are in conformity with the law of treaties and the principle of consent of the Parties. By adopting the new agreement, the
Parties would agree to its entry into force by the mechanism of non-objection. Any Party would also have the possibility to object to the entry into force of the agreement during the period established for that purpose. Application of successive treaties on the same matter is foreseen under article 30 of the Vienna Convention on the Law of Treaties (lex posterior derogat legi priori). The bottom line is that this is done in good faith and within the spirit of international cooperation.

27. The no-objection procedure ensures that the principle of the consent of the Parties, which is fundamental in treaty law, is respected. Even one single objection within the proposed period is sufficient to defeat the entry into force of the agreement as a whole. For this reason, should Parties to the Convention opt for the adoption of the agreement at the next session of the Meeting of the Parties in 2017, there should be clear and unanimous consent by all Parties from the start to pursue this avenue for accelerating the globalization of the Convention.

28. Examples of multilateral treaties deposited with the Secretary-General which provide for amendments to enter into force for the Parties through a no-objection procedure include:

(a) The Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 1982. A State that has already deposited its instrument of ratification or accession to the Convention may express its consent to be bound by the Agreement on Part XI either through signature, ratification or accession, or through a simplified procedure (see art. 4), i.e., upon expiry of 12 months after the date the Agreement was adopted without an objection from the State to the Agreement (art. 5). The Agreement entered into force on 16 November 1996, i.e., 30 days after the date on which the 40 States that had established their consent to be bound — through signature, ratification or accession or the simplified procedure of article 5 of the Agreement;

(b) The ECE Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be Used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these Prescriptions provides that amendments to the Agreement and its appendices enter into force if no Party expresses an objection within a period of six months following the date of circulation of the proposed amendment by the depositary (art. 13). If an objection to the proposed amendment has been expressed, the amendment does not enter into force. The last amendment entered into force in 1995.

29. There are further examples of multilateral treaties deposited with the Secretary-General that provide for the entry into force of amendments through a simplified procedure and also include an opt-out procedure. Such an opt-out procedure is not included in the treaties mentioned in paragraph 28 above, where amendments do not enter into force if there is an objection. Examples of agreements that provide for an opt-out procedure include:

(a) The Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention). article 22 of the Stockholm Convention provides that an additional annex or an amendment to an annex adopted by the Parties will enter into force “on the expiry of one
year from the date of the communication by the depositary of the adoption of [the] additional annex" (see art. 22, paras. 3 (b) and 4). The annex does not enter into force for Parties that have notified the depositary that they were unable to accept an additional annex. For example, the amendments to annexes A, B and C to the Stockholm Convention entered into force on 26 August 2010, i.e., at the expiry of one year after the communication (dated 26 August 2009) by the depositary of the adoption of the amendments. However, the amendments did not enter into force on that date for those Parties that had submitted a notification pursuant to the provisions of paragraph 3 (b) of article 22 of the Stockholm Convention;

(b) The ECE Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be Used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these Prescriptions (see para. 28 (b) above) also provides for a no-objection and opt-out procedure for the adoption of numerous regulations or addenda to the Agreement (art. 12). The last amendment (Addendum 134 — Regulation No. 135) entered into force as an annex to the 1958 Agreement on 15 June 2015;

(c) The ECE Convention on the Transboundary Effects of Industrial Accidents:8 article 26 provides for a special procedure for the entry into force of amendments to annex I to the Convention, i.e., on the expiry of 12 months from the date of communication by the ECE Executive Secretary (90 days before the meeting at which it is proposed for adoption), the amendment becomes effective for those Parties that have not submitted a notification within the 12 months that they are unable to approve the amendment. An amendment to annex I to the Convention was adopted according to this procedure in 20149 and no Party opted out;

(d) The ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)10 provides that amendments to annexes to the Convention become effective 12 months after the depositary’s communication of the adoption of the amendment for those Parties that have not notified the depositary within the 12-month deadline that they are unable to approve an amendment to an annex (art. 14, paras. 5 and 6). To date, no amendments to the Aarhus Convention annexes have been adopted.

30. To ensure that time frames under national procedures for the conclusion of international treaties are respected, Parties can agree on a period longer than six months or one year for the entry into force of the agreement after its adoption, following the no-objection procedure.

31. The agreement can be annexed to a decision by the Meeting of the Parties or be a separate instrument to be (signed and) adopted during the next session of the Meeting of the Parties. A draft of proposed text is annexed to the present document.

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9 See ECE/CP.TEIA/30, paras. 36–38.
Annex

Agreement relating to article 17, paragraph 3, of the Convention on Environmental Impact Assessment in a Transboundary Context as amended by decision II/14 of the Meeting of the Parties.

The Parties to the Agreement,

Recognizing the important contribution of the Convention on Environmental Impact Assessment in a Transboundary Context to environmentally sound and sustainable development, and to cooperation also beyond the Economic Commission for Europe (ECE) region,

Noting that the amendment to the Convention introduced by decision II/14 entered into force on 26 August 2014,

Also noting that [13] more ratifications are necessary to fulfil the condition set by article 17, paragraph 3, of the Convention, i.e., that the Meeting of the Parties shall not consider or approve any request for accession by such a non-ECE State until that paragraph has entered into force for all the States and organizations that were Parties to the Convention on 27 February 2001,

Mindful of the increased interest in the Convention and the involvement of many countries from outside the ECE region in activities within its framework,

Prompted by the desire to facilitate and achieve global participation in the Convention,

Having considered that article 17, paragraph 3, of the Convention, as amended by decision II/14, would run counter this objective,

Considering that the agreement of all Parties is necessary to amend article 17, paragraph 3, of the Convention, as amended by decision II/14,

Have agreed as follows:

Article 1

Implementation of article 17, paragraph 3, as amended through II/14

The Parties to this Agreement agree to implement article 17, paragraph 3, of the Convention, as amended by decision II/14 of the Meeting of the Parties, in a way that allows the immediate global and unconditional participation in the Convention of any Member State of the United Nations [or regional economic integration organization] without having to wait for its entry into force for all States and organizations that were Parties to the Convention on 27 February 2001.

Article 2

Relationship between this Agreement and the Convention

This Agreement shall be interpreted and applied in parallel to the Convention. In the event of any inconsistency between this Agreement and article 17, paragraph 3, of the Convention, as amended by decision II/14, the provisions of this Agreement shall prevail.
Article 3
Consent to be bound

1. A State or regional economic integration organization referred to in article 16 of the Convention, which has deposited before the date of the adoption of this Agreement an instrument of ratification, acceptance, approval or accession to the Convention, irrespective of whether it has signed this Agreement, shall be considered to have established its consent to be bound by this Agreement on the date of entry into force of this Agreement, unless that State or organization objects to the entry into force of this Agreement.

2. Any State or regional economic integration organization referred to in article 16 of the Convention that deposits an instrument of ratification, acceptance, approval or accession to the Convention after the adoption of this Agreement but before the entry into force of this Agreement, according to article 4, paragraph 1, shall be considered to have established its consent to be bound by this Agreement on the date of the entry into force of the Convention, according to article 18, paragraph 1, if that date is after the entry into force of this Agreement, or on the date of the entry into force of this Agreement, if that date is after the entry into force of the Convention for that State or organization, according to article 18, paragraph 1, unless that State or organization notifies the depositary in writing before the date of entry into force of the Agreement that it objects to the entry into force of this Agreement.

Article 4
Entry into force

1. This Agreement shall enter into force the day following the expiry of the period of [.. months] [.. year[s]] after the date of its adoption, provided that no State or organization has objected in accordance with the procedure stipulated in article 3.

2. After the adoption of this Agreement, any instrument of ratification, acceptance, approval or accession to the Convention shall also represent consent to be bound by this Agreement.

3. If any objection is made in accordance with the procedure stipulated in article 3, this Agreement shall have no effect.

Article 5
Depositary

The Secretary-General of the United Nations shall be the depositary of this Agreement

Article 6
Authentic texts

The [Arabic, Chinese,] English, French [and] Russian [and Spanish] texts of this Agreement shall be equally authentic.

In witness thereof the undersigned, being duly authorized thereto, have signed this Agreement.

Done at [Minsk], this […] day of … two thousand [seventeen].

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