

Letter of the Co-Chairs of the ad hoc working group on the applicability of the Espoo Convention to the lifetime extension of nuclear power plants

We hereby provide draft guidance on the applicability of the Espoo Convention to the lifetime extension of nuclear power plants (ECE/MP.EIA/WG.2/2020/INF.12). This draft is the result of three years of intensive discussions in the ad hoc working group and builds on the Terms of Reference adopted by the Working Group at its seventh meeting (Geneva, 28-30 May 2018). More detail on the process leading to the presentation of this draft guidance can be found in the opening chapter of the guidance (paragraphs 8-11) itself.

Although the guidance is not yet ready to be submitted to the Meeting of the Parties, this draft is an important achievement and, given the circumstances, an impressive one. The ad hoc working group's efforts in preparing this draft have been severely impeded by the Covid-19 pandemic and subsequent restrictions on travel. The ad hoc working group was scheduled to meet on three occasions in the first half of 2020, all of which had to be cancelled. This has meant that responsibility for the drafting of the guidance has fallen largely to the Co-Chairs. Nevertheless, we have sought the input of the group in two key ways. Firstly, via formal calls for comments in March 2020 for the first consolidated draft and in April and May 2020 for revised versions of the different chapters. These requests provoked a significant response with a huge number of comments for each chapter received from across the group.

These calls for comments were accompanied by a series of 7 WebEx meetings in May and June 2020, organised by the Secretariat and involving experts from the majority of delegations. In addition to these two key methods of seeking input, the Co-Chairs have also held a number of 1 to 1 discussions with individual delegations regarding specific areas of drafting. The members of the group have also been encouraged to exchange bilaterally.

Attempt to reach consensus

The comments presented by members of the group have reflected opposing views on key issues of the guidance and some members of the group have questioned whether more could have been done to reach a consensus ahead of submission of this draft. The Co-Chairs do not share this view. The ways of working we have had to adopt in recent months may not appear ideal to everybody as compared to traditional forms of exchange and communication but, given the circumstances in which we find ourselves, there is no alternative.

Secondly, and even more importantly, consensus can only be reached if all members are prepared to compromise. In developing the text, the Co-Chairs have always reflected the comments received, doing so in a cautious and balanced way in order to bridge the gap between differing positions represented in the group. Despite our best efforts we regret that we are not able to present this draft to the Working Group as "validated" by the ad-hoc working group. While some delegations support the draft, others believe that the text is not yet ready for validation and requires further discussions. It has therefore been agreed with the group that the entirety of this draft is presented

to the Working Group in square brackets; that is to say that no element of the guidance has been agreed by the whole group. Furthermore, issues of particular disagreement have been placed in additional square brackets within the text and are described in more detail below.

We note that in preparing for the Working Group's next meeting, Parties may submit comments on the draft guidance to the secretariat of the Espoo Convention (by 3 August 2020) and that these comments will be posted on the meeting website for consideration by all the delegations. For Parties which are Member States of the EU possible comments will be subject of the up-coming EU Coordination for the Working Group.

Scope of the guidance

Perhaps the most important issue on which we are yet to reach agreement within the ad hoc group is the question of whether the scope of the guidance is on "lifetime extension" or on "decisions for lifetime extension" (paragraph 18). Chapter 1 of the guidance determines which situations of lifetime extension are covered and thus also determines the extent to which the guidance is relevant for Parties in practice (paragraphs 41-50). Part of the group is of the opinion that the guidance should be on the applicability of the Espoo Convention to the "lifetime extension of nuclear power plants". Other members of the group consider the scope of the Guidance to be "decisions on the lifetime extension of nuclear power plants". If the guidance was limited to "decisions on lifetime extension", it would not apply to Parties which according to their national law have no such decisions. The mandate of the ad hoc group as laid down by Decision IS/2 and the Terms of Reference is ambiguous in this respect and therefore the controversy could not be resolved by the group. It would be helpful if the Working Group could consider this matter and give advice on how it could be resolved.

Interpretation of article 2

A second key issue, which is linked to the question of scope, is the question of whether a decision-making procedure established in national law, is a precondition for the Espoo Convention to be applicable, or whether Parties are required by the Espoo Convention to introduce decision-making procedures for "any activity or any major change to an activity" which is "likely to cause significant adverse transboundary impact".

During a meeting of the ad hoc group in Vienna in December 2019, we discussed the interpretation of article 2 of the Convention, and in particular its paragraphs 2 and 3, and whether it requires Parties to establish a specific decision-making procedure for activities listed in appendix I of the Convention. Some members of the group took the view that there was no such obligation under article 2. They notably highlighted the definition of "proposed activity" in article 1 (v) of the Convention and considered the existence of a decision to be a necessary part of determining whether the Convention applies. Other members of the group argued that this interpretation would undermine the purpose of the Convention as the applicability of the Convention would then depend on the willingness of Parties to provide for a decision-making procedure in their national law for activities or major changes that are likely to cause significant, adverse environmental impacts.

This question has not been resolved either through our calls for written comments or the WebEx meetings described previously. Subsequently, you will find at paragraphs 115-116 of the draft guidance two options which are each supported by different members of the group.

As this issue is of general relevance for the applicability of the Convention, the Implementation Committee was also asked for its opinion. The Committee in its opinion has inter alia highlighted

that “a ‘final decision’ on the proposed activity is one of the core obligations under the Convention, which Parties must implement in accordance with article 6”. (The Committee’s opinion is available for information of the delegates on the meeting website). It has to be noted, that the question of whether a decision is a precondition of the Convention to apply may sooner or later become a matter of debate for any other proposed activity under the Convention. The Working Group may therefore wish to discuss this matter in a broader perspective or to submit it to the Meeting of the Parties for discussion.

Other issues

Some delegations have concerns that the guidance may have impacts on their national legal framework for nuclear safety or implications on other activities that are in scope of the Espoo Convention. The draft guidance addresses these concerns in the opening chapter (paragraphs 18-22 and paragraphs 27-28).

Remaining questions are inter alia whether a “lifetime extension per se” can be classified as a major change (paragraphs 68-71), whether and when multiple minor changes can amount to a major change (paragraphs 72-75), which factors need to be considered in the case-by-case assessment in determining whether a change is major or not (paragraph 66 and annex II), and whether Parties may exclude accidents of an extremely low probability when determining whether a lifetime extension is likely to cause significant adverse transboundary impacts (paragraphs 90-92).

Outstanding work

We had intended to provide a third annex to the draft guidance regarding possible lifetime extension cases and how the guidance would apply to them. For a number of reasons it has not been possible to provide such an annex at this time and subsequently, we would value the opinion of the Working Group as to whether such an annex is considered necessary. In drawing your opinion we would wish to make you aware that although, at the Co-Chair’s request, the Implementation Committee provided descriptive information on the actual cases before it, in drafting such an annex the ad hoc group does not want to refer specifically to individual cases which are before the Committee or to situations arising in different countries as this information is not public.

In closing, the Co-Chairs note that there is still a significant amount of work to be done on the guidance. The particular parts of the draft which are still in square brackets represent points of major conflict which also represent the most important and crucial issues of this guidance. If Parties cannot find a common position on these points there will be no guidance and all of the work done will have been in vain. As Co-Chairs we will continue to work to do all that we can to achieve a consensus and deliver a complete guidance but we can only do so with the full support of the ad hoc group and the Working Group.

We look forward to a fruitful discussion in August.

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