

## The application of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context to nuclear energy-related activities<sup>1</sup>

### Introduction

The Convention on Environmental Impact Assessment in a Transboundary Context sets out the obligations to assess the environmental impact of certain activities at an early stage of decision making. It also lays down the general obligation for parties to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across national borders. The Espoo Convention was adopted in 1991 and entered into force on 10 September 1997. There are currently 45 states party to the Espoo Convention,<sup>2</sup> including 23 countries that are also members of the Organisation for Economic Co-operation and Development (OECD) Nuclear Energy Agency (NEA).<sup>3</sup> It should be noted that the European Union (EU) is also a party to the Espoo Convention<sup>4</sup> and has transposed the provisions related to the environmental impact assessment (EIA) procedure in its legislation,<sup>5</sup> thus imposing the Espoo Convention principles on all EU member states.

1. During its June 2015 meeting, the Nuclear Law Committee welcomed a presentation from the United Nations (UN) Economic Commission for Europe (UNECE) representative on the “Espoo Convention initiative to issue good practice recommendations to support the application of the Convention to nuclear energy-related activities”. To prepare the Nuclear Law Committee delegates for the presentation, the NEA Secretariat prepared a brief background note on the application of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (1991), 1989 UNTS 310, entered into force 10 September 1997 (Espoo Convention), to nuclear energy-related activities. This article is based on the background note and is intended to provide basic information on the relevant provisions of the Espoo Convention, applicable to nuclear energy-related activities.
2. An up-to-date list of the parties to the Espoo Convention can be consulted at: United Nations (2016), “Treaty Collection”, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-4&chapter=27&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&lang=en).
3. These countries are: Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.
4. Espoo Convention, *supra* note 1, Articles 16 and 17(a).
5. Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC), *Official Journal of the European Communities* (OJC) L 175/40 (5 July 1985) (1985 EIA Directive). The EU EIA procedure has been in force since 1985 and applies to a wide range of defined public and private projects. It was amended three times: in 1997, in 2003 and in 2009. Among other changes made by the first amendment, Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJC L 73/5 (14 March 1997), brought the 1985 EIA Directive in line with the Espoo Convention. The initial 1985 EIA Directive and its three amendments have been codified by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011, on the assessment of the effects of certain public and private projects on the environment (codification), *Official Journal of the European Union* (OJ), L 26/1 (28 January 2012), which has been amended in by Directive 2014/52/EU of the European Parliament and of the 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, OJ L 124/1 (25 April 2014).

A first amendment to the Espoo Convention entered into force on 26 August 2014 and a second one has been adopted by the Meeting of Parties to the Espoo Convention (hereafter the “MOP”) on 4 June 2004 but has not yet entered into force.<sup>6</sup>

The purpose of the Espoo Convention is to enhance international co-operation and allow environmentally sound decisions to be made, paying careful attention to minimising significant adverse impacts, particularly in a transboundary context. In order to do so, the Espoo Convention requires that an EIA be carried out for certain types of activities planned by a party (hereafter the “party of origin”), which are likely to have a significant environmental impact within an area under the jurisdiction of another party (hereafter the “affected party”). The Espoo Convention specifies what must be considered at an early stage of the decision making and it lays down the obligation for countries to notify and consult each other and the public. It also requires that all comments received from the public and authorities, as well as the findings from the assessment, are taken into account when the final decision is made for the planned activity.

In addition, the Protocol on Strategic Environmental Assessment<sup>7</sup> was adopted in Kiev in 2003. It entered into force in 2010 and currently has 29 parties (including the EU), 15 of which are NEA member countries.<sup>8</sup> The SEA Protocol requires that a strategic environmental assessment (SEA) be carried out for certain plans, programmes and possibly policies and legislation that are likely to have significant environmental, including health, effects. Hence, parties to the SEA Protocol must integrate environmental assessments into their development of plans and programmes at the earliest stages, irrespective of whether these plans or programmes are likely to have an impact on the territory of another state.

Appendix I to the Espoo Convention lists the proposed activities which, pursuant to Article 2 of the Convention, fall within its scope of application. These proposed activities include the following nuclear energy-related activities:

2. ... nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).
3. Installations solely designed for the production or enrichment of nuclear fuels, for the reprocessing of irradiated nuclear fuels or for the storage, disposal and processing of radioactive waste.

Following the entry into force of the second amendment to the Espoo Convention, the list of proposed nuclear activities falling within the scope of application of the Convention will be the following:

2. ...
  - (b) Nuclear power stations and other nuclear reactors, including the dismantling or decommissioning of such power stations or reactors<sup>9</sup> (except

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6. An up-to-date status of the second amendment to the Espoo Convention can be consulted at: United Nations (2016), “Treaty Collection”, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-4-c&chapter=27&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4-c&chapter=27&lang=en).

7. Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (2003), 2685 UNTS 140, entered into force 11 July 2010 (SEA Protocol).

8. These countries are: Austria, Czech Republic, Denmark, Finland, Germany, Hungary, Luxembourg, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain and Sweden.

9. The second amendment to the Espoo Convention contains the following footnote in the text “For the purposes of this Convention, nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.”

research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).

3. (a) Installation for the reprocessing of irradiated nuclear fuel;
- (b) Installations designed:
  - For the production or enrichment of nuclear fuel;
  - For the processing of irradiated nuclear fuel or high-level radioactive waste;
  - For the final disposal of irradiated nuclear fuel;
  - Solely for the final disposal of radioactive waste; or
  - Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.<sup>10</sup>

Pursuant to Article 1 of the Espoo Convention, any major change to an activity listed under Appendix I of the Convention also falls within its scope of application. Identical provisions are found in Annex I to the SEA Protocol, which lists projects for which each party to the SEA Protocol shall ensure that an SEA is carried out at the plan or programme level.

### **A review mechanism: The Implementation Committee**

In order to review compliance by the parties with their obligations under the Espoo Convention and in view of assisting them fully in meeting their commitments under the Convention, the MOP established the Implementation Committee in February 2001.<sup>11</sup> With the entry into force of the SEA Protocol, the Committee's mandate was extended to review compliance under the Protocol as well.<sup>12</sup>

The Implementation Committee consists of eight members, representing parties both to the Espoo Convention and the SEA Protocol, who are elected by the MOP. In

10. United Nations Economic and Social Council (2004), "Report of the Third Meeting held in Cavtat, Croatia from 1 to 4 June 2004 at the invitation of the Government of Croatia", ECE/MP.EIA/6, Annex VII, Decision III/7: Second Amendment to the Espoo Convention (13 September). This list of activities is identical to that provided in Annex I to the 1985 EIA Directive.

11. United Nations Economic and Social Council (2001), "Report of the Second Meeting held in Sofia from 26 to 27 February 2001 at the invitation of the Government of Bulgaria", ECE/MP.EIA/4, Annex IV (7 August); see also United Nations Economic and Social Council (2004), "Report of the Third Meeting held in Cavtat, Croatia from 1 to 4 June 2004 at the invitation of the Government of Croatia", ECE/MP.EIA/6, Annex II (13 September).

12. United Nations Economic and Social Council (2011), "Report of the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol on its First Session", Geneva, 20-23 June 2011, ECE/MP.EIA/SEA/2, Joint Decision V/6-I/6 (16 August). According to Article 14 of the SEA Protocol, the MOP also serves as the Meeting of the Parties to the Protocol. Since the entry into force of the Protocol, the MOP and Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol (MOP/MOP) have been held in joint sessions, where items relating to Espoo Convention matters only are discussed alongside items relating to SEA Protocol matters only or joint SEA Protocol and Espoo Convention matters. Consequently, the MOP adopts decisions relating to the Espoo Convention only, the MOP/MOP adopts decisions relating to the Protocol only, or the MOP and the MOP/MOP adopt joint decisions relating to the Convention and the Protocol (such as the work plan or the budget). Joint decisions bear double symbols (e.g. Joint Decision V/6-I/6).

case a member represents a party to only one of the two instruments, additional members must be nominated as alternates. In its current composition, the Committee has eleven members, with three members nominated for SEA Protocol matters only. The Committee elects its own Chair and two Vice-Chairs. Members serve for two terms (inter-sessional periods, i.e. the three-year periods between two consecutive sessions of the MOP) and may be re-elected once. The Committee adopts its own procedural rules, which are subject to revision based on practice and experience.

The Implementation Committee reviews parties' compliance: (a) on the basis of submissions (party-to-party submission or self-referrals) or (b) based on Committee initiatives. Committee initiatives are launched in two ways: (i) based on information obtained from other sources (most often from non-governmental organisations (NGOs)) followed by correspondence with the party concerned to gather further information and (ii) as a result of specific compliance issues arising from the periodic reviews of the implementation of the Espoo Convention, followed by correspondence with the party concerned to define whether the Committee should further examine the matter. Until today, the Implementation Committee has considered and concluded its consideration of five submissions by parties and five Committee initiatives. Two out of five submissions by parties concerned nuclear energy-related activities.

In 2012, following a submission by Azerbaijan with respect to the planned construction of a nuclear reactor in Armenia, the Implementation Committee found that the latter had not complied with its obligations under Article 3, paragraph 1, of the Espoo Convention to notify Azerbaijan as early as possible and no later than when informing its own public.<sup>13</sup> In 2014, following a submission by Lithuania with respect to the planned building of a nuclear power plant at Ostrovets, Belarus, the Committee found that Belarus had not complied with its obligations under the Espoo Convention, notably because it had not provided equivalent opportunities for public participation in the affected party and had not furnished the affected party with the final EIA documentation for the purpose of public participation.<sup>14</sup>

The Implementation Committee has over the years received information from different sources alleging non-compliance by parties with their obligations under the Espoo Convention in relation to the carrying out of nuclear energy-related activities. In one instance, the information gathering case was closed, further to the submission by Lithuania, which raised concerns about Belarus' compliance with the Espoo Convention.<sup>15</sup> In two other instances, the Committee decided to open a Committee initiative.

On the basis of information provided in 2011 by a Ukrainian NGO regarding the planned lifetime extension of two nuclear reactors at the Rivne nuclear power plant in Ukraine, the Implementation Committee started to gather information from other parties and stakeholders, which in 2013 led to the opening of a Committee Initiative. Having considered the case, the Implementation Committee found in 2014 that the lifetime extension of reactors 1 and 2 of the Rivne nuclear power plant after the initial licence had expired, even in the absence of any works, was to be considered

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13. United Nations Economic and Social Council (2012), "Report of the Implementation Committee on its twenty-sixth session", Geneva, 26-28 November 2012, ECE/MP.EIA/IC/2012/6, Annex I, "Findings and recommendations further to a submission by Azerbaijan regarding Armenia (EIA/IC/S/3)" (19 December).

14. United Nations Economic and Social Council (2013), "Report of the Implementation Committee on its twenty-seventh session", Geneva, 12-14 March 2013, ECE/MP.EIA/IC/2013/2, Annex, "Findings and recommendations further to a submission by Lithuania regarding Belarus (EIA/IC/S/4)" (15 April).

15. See case EIA/IC/S/4 above.

as a proposed activity under Article 1, paragraph (v) and was consequently subject to the provisions of the Espoo Convention. On that basis, Ukraine had failed to comply with the provisions of the Convention.<sup>16</sup>

On the basis of information provided in 2013 by a German member of the Parliament and the Irish NGO Friends of the Irish Environment regarding the planned construction of the Hinkley Point C nuclear power plant by the United Kingdom, the Implementation Committee started to gather information from other parties and stakeholders, which in 2014 led to the opening of a Committee Initiative. The main issue of this Committee Initiative concerned the likelihood of a significant adverse transboundary environmental impact that might be caused by the activity at Hinkley Point C, more specifically in case of major accidents, beyond design basis accidents or disasters. The Committee held an open discussion with the United Kingdom at its 33<sup>rd</sup> session (17-19 March 2015).<sup>17</sup> At its 35<sup>th</sup> session, the Committee adopted its findings and recommendations, concluding that the United Kingdom had been in non-compliance with its obligations under Articles 2 and 3 of the Espoo Convention. The Committee recalled its previously expressed opinion that even a low likelihood of a significant adverse transboundary impact should trigger the obligation to notify affected parties in accordance with Article 3. The Committee further noted that:

for certain activities, in particular nuclear energy-related activities, while the chance 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. Therefore, ... on the basis of the principle of prevention, when considering the affected Parties for the purpose of notification, the Party of origin should be exceptionally prospective and inclusive ...<sup>18</sup>

On 7 May 2014, the Implementation Committee received information from the NGO Greenpeace Netherlands concerning the lifetime extension of the Borssele nuclear power plant in the Netherlands.<sup>19</sup> The Implementation Committee has since exchanged information with the Netherlands, Belgium and Germany and is still considering the issue; it has not yet decided to open a Committee Initiative.

Lastly, the Committee received information from the German federal states of North Rhine-Westphalia and Rhineland-Palatinate regarding the lifetime extension of the Doel and Tihange nuclear power plants in Belgium. The Committee is expected to consider that information for the first time at its 36<sup>th</sup> session to be held in Geneva, from 5 to 7 September 2016.

After the Committee has concluded consideration of a case, its findings and recommendations are forwarded to the MOP. The MOP then makes a final decision

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16. United Nations Economic and Social Council (2014), "Report of the Implementation Committee on its thirtieth session", Geneva, 25-27 February 2014, ECE/MP.EIA/IC/2014/2, Annex, "Findings and recommendations further to a Committee initiative concerning Ukraine (EIA/IC/CI/4)" (14 August).

17. United Nations Economic and Social Council (2015), "Report of the Implementation Committee on its thirty-third session", Geneva, 17-19 March 2015, ECE/MP.EIA/IC/2015/2 (20 May).

18. United Nations Economic and Social Council (2016), "Report of the Implementation Committee on its thirty-fifth session (Advance copy)", Geneva, 15-17 March 2016, ECE/MP.EIA/IC/2016/2, Annex, "Findings and recommendations further to a Committee initiative concerning the United Kingdom of Great Britain and Ireland (EIA/IC/CI/5)" (April).

19. For more information on this matter (EIA/IC/INFO/15), see *supra* notes 17 and 18.

and mandates the Committee to follow up with its recommendations.<sup>20</sup> The next MOP will be held in June 2017 in Minsk, Belarus.

### Good practice recommendations

For the last five years, the parties have led several initiatives related to nuclear energy to foster implementation of the Espoo Convention. In 2011, at the request of the Working Group on EIA and SEA, the Espoo Convention secretariat prepared a background note on the application of the Espoo Convention to nuclear energy-related activities<sup>21</sup> for consideration by the MOP at its fifth session in June 2011. This note reflected the diverse and sometimes conflicting views expressed by the parties to the Espoo Convention on its application to nuclear energy-related activities and sought to encourage debate on key issues during the panel discussion on nuclear energy-related projects that was held in the framework of the MOP. In 2013, in the context of the third meeting of the Working Group on EIA and SEA, a workshop was organised by Austria, Finland and Sweden on the impacts of nuclear energy-related activities.<sup>22</sup> The workshop participants reached the conclusion, notably, that “nuclear energy activities implied special challenges due to, e.g., the potentially wide scope of severe impacts, great public concern and national interests” and that “there was a major benefit in having an open discussion and sharing experiences, which showed the diversity of different practices in applying the Convention to such activities and facilitated learning from each other”.<sup>23</sup>

At its sixth meeting (2-5 June 2014), the MOP adopted Decision VI/7 on the application of the Espoo Convention to nuclear energy-related activities.<sup>24</sup> This decision proposes the elaboration of good practice recommendations to support the application of the Convention to nuclear energy-related activities. According to the decision, the recommendations are expected to build on the aforementioned background note and to be presented to the next MOP in 2017. This decision invites parties and non-parties, as well as other stakeholders, to provide examples of practical experience for inclusion in these recommendations. An editorial group composed of representatives of Austria, Belarus, Finland, France, Germany, the Netherlands, Poland, the European Commission and the European ECO Forum was established to oversee the development of the draft recommendations, with the support of an external consultant: the Environment Agency Austria. The terms of

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20. For the most recent decisions of the parties, please see United Nations Economic and Social Council (2014), “Report of the Meeting of the Parties to the Convention on its sixth session and of the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol on its second session”, Addendum: Decisions adopted by the Meeting of the Parties to the Convention, Geneva, 2-5 June 2014, ECE/MP.EIA/20/Add.1—EC/MP.EIA/SEA/4/Add.1 (15 July).

21. United Nations Economic and Social Council (2011), “Background note on the application of the Convention to nuclear energy-related activities: Note by the secretariat”, Geneva, 20-23 June 2011, ECE/MP.EIA/2011/5 (2 April).

22. United Nations Economic and Social Council (2013), “Report of the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment on its third meeting”, Geneva, 11-15 November, ECE/MP.EIA/WG.2/2013/7 (20 December).

23. United Nations Economic and Social Council (2014), “Report of the Meeting of the Parties to the Convention on its sixth session and of the Meeting of the Parties to the Convention serving as the Meeting of the Parties to the Protocol on its second session”, Addendum: Decisions adopted by the Meeting of the Parties to the Convention, Geneva, 2-5 June 2014, ECE/MP.EIA/20/Add.1—EC/MP.EIA/SEA/4/Add.1 (15 July).

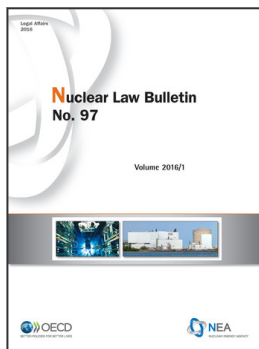
24. See *supra* note 15.

reference for drafting these recommendations<sup>25</sup> have been discussed and revised by the Working Group on EIA and SEA at its fourth meeting held on 26-28 May 2015. On that occasion, the Working Group also agreed that the relevant MOP decisions and the opinions of the Implementation Committee should be considered as the main sources for the preparation of the document, and, as appropriate, existing relevant nuclear safety instruments, such as the International Atomic Energy Agency (IAEA) standards and the standards set in the Treaty establishing the European Atomic Energy Community (Euratom Treaty). Most recently, the Working Group considered progress in the preparation of the good practice recommendations at its fifth meeting held on 11-15 April 2016.<sup>26</sup> Such progress included the gathering of information from the national focal points and other stakeholders on the related practice of their countries as parties of origin and/or affected parties by means of a detailed questionnaire agreed by the editorial group and circulated by the secretariat to the Espoo Convention. The editorial group is continuing its activities with a view to presenting the good practice recommendations to the MOP in June 2017.

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25. United Nations Economic and Social Council (2015), "Working Group on Environmental Impact Assessment and Strategic Environmental Assessment, Good practice recommendations on the application of the Convention to nuclear energy-related activities: Terms of reference drafted by the secretariat, in consultation with the Bureau", Geneva, 26-28 May 2015, ECE/MP.EIA/WG.2/2015/3 (16 March).
  26. United Nations Economic and Social Council (2016), "Report of the Working Group on Environmental Impact Assessment and Strategic Environmental Assessment on its fifth meeting (Advance copy)", Geneva, 11-15 April 2016, ECE/MP.EIA/WG.2/2016/2, pp. 13-14 (18 May).







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