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Ref. ECE/ENV/2015/581

ОБЪЕДИНЕННЫЕ НАЦИИ

ЕВРОПЕЙСКАЯ ЭКОНОМИЧЕСКАЯ
КОМИССИЯ

UNITED NATIONS

ECONOMIC COMMISSION
FOR EUROPE

Palais des Nations
CH-1211 GENEVE 10

15 October 2015

Dear Mr. Dusik,

Thank you for your letter of 25 September 2015 and the appreciation you expressed for the assistance provided by the UNECE secretariat to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) for the development of a protocol on environmental impact assessment in a transboundary context to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention). I am pleased that the negotiation of the protocol has now reached its final stages, and is pending only an agreement on proposals by one Government on its annex I. Moreover, I was honoured to learn that at the June 2015 preparatory meeting for the upcoming sixth Meeting of the Conference of the Parties to the Tehran Convention (Baku, November 2015), the Parties agreed to request advisory assistance from the Espoo Convention secretariat on the matter.

We are most willing to continue cooperating with the secretariat of the Tehran Convention and to assist the Convention's Parties on this matter to the best of our capacity and within the limits of our mandate. I understand that we are consulted because two Parties to the Tehran Convention that are also Parties to the Espoo Convention have expressed concerns about the potential incompatibility of the provisions of annex I to the draft protocol with the similar provisions under the Espoo Convention, if amended as proposed. In this regard, the UNECE secretariat considers that it is in a position to provide the requested advice by referring to the relevant provisions of the Espoo Convention and also by clarifying them to a certain extent. However, kindly note that the Implementation Committee under the Espoo Convention alone has the mandate to formally interpret the legal obligations of the Espoo Convention or to analyse the compatibility of other legal instruments with it.

Mr. Jan Dusik
Director, Regional Office for Europe
United Nations Environment Programme
International Environment House
9-15 Chemin des Anémones
CH-1219 Châtelaine
Geneva, Switzerland

Please find enclosed the requested advisory opinion prepared by the Espoo Convention secretariat in consultation with a legal expert to the secretariat. The opinion is limited to the issues raised in the request.

I hope that the opinion will be useful in clarifying the relevant provisions of the Espoo Convention, and in this way contribute to moving the negotiations forward. The adoption and the subsequent ratification of the protocol by the Parties to the Tehran Convention would enable the Parties to implement the well-tested and efficient "Espoo procedures" for fostering sustainable development of the Caspian Sea marine environment and supporting closer intergovernmental cooperation among the Caspian littoral States.

I wish the Conference of Parties fruitful deliberations and successful outcomes at its upcoming meeting. I would also welcome receiving information about the decisions of the Parties

I very much look forward to our continued cooperation.

Yours sincerely,



Tea Aulavuo
Secretary to the Espoo Convention and
its Protocol on Strategic Environmental Assessment
United Nations Economic Commission for Europe

Enclosure

Advisory opinion from the United Nations Economic Commission for Europe (UNECE) secretariat to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)

Requested by the Parties to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention) through the (interim) secretariat of the Tehran Convention for presentation at the sixth Meeting of the Conference of the Parties to the Tehran Convention (Baku, November 2015).

I. Background

1. Parties to the Tehran Convention are in the final stages of negotiation on a protocol on environmental impact assessment in a transboundary context, which is meant to follow the provisions of the Espoo Convention.
2. During the negotiations one of the negotiating Parties proposed to modify, as compared with the respective provisions of the appendix I to the Espoo Convention¹, the paragraphs 3, 9 and 16 of the annex I of the Protocol containing the list of activities (see TC/COP5/4.Rev.1 for the proposed modifications).
3. Two negotiating Parties, which are also Parties to the Espoo Convention, expressed concerns about whether the proposed modifications would make the provisions of the Protocol incompatible with the relevant provisions of the Espoo Convention and thus put at risk their respective obligations as the Parties to that Convention.
4. The negotiating Parties decided to seek - through the (interim) Tehran Convention secretariat - an objective advisory opinion through the Espoo Convention secretariat.

II. Scope of the opinion

5. The current opinion has been prepared by the Espoo Convention secretariat in response to the request from the Parties to the Tehran Convention, in consultation with a legal expert. Its objective is to clarify the relevant provisions of the Espoo Convention.
6. The opinion is limited to the issues raised in the request and it does not purport to provide a comprehensive legal analysis of the compatibility of the draft Protocol with the provisions of the Espoo Convention. Moreover, the opinion should not be considered as reflecting the views of the Implementation Committee under the Espoo Convention and its Protocol on Strategic Environmental Assessment, which is alone mandated to formally interpret the legal obligations of these treaties and to issue other legal opinions.

III. Respective obligations under the Espoo Convention

7. The list of activities in the appendix I to the Espoo Convention specifies activities which are subject to the obligations arising from the Convention by referring

¹ As amended by the second (2003) amendment to the Espoo Convention, (through decision III/7) (http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/2nd_amendment_en.pdf)

predominantly to the type or category of activity, combined sometimes with some thresholds and exceptions.

8. While the appendix I provides a mandatory list of activities, this list is not exclusive, as the Convention envisages also the application of its provisions to other activities where the Parties so agree under article 2 paragraph 5 of the Convention.

9. Furthermore, the Convention grants the Parties the right to implement more stringent measures, by clearly stipulating, in article 2 paragraph 9, that it "shall not affect the right of particular Parties to implement, by bilateral or multilateral agreement where appropriate, more stringent measures".

10. The reference to "more stringent measures" covers the possibility to apply the provisions of the Convention to activities that are not listed in appendix I, including activities of other types than the types listed, and activities that are listed but below the thresholds envisaged in the appendix I. Furthermore, it covers also the possibility not to apply the exceptions allowed under the Convention.

IV. Nature of the proposed modifications to the list of activities in annex I of the draft Protocol to the Tehran Convention

11. The proposed modification to para 3 is to delete the wording allowing for an exception to the general rule. Thus, it will not result in limiting the scope of application of the Protocol but in extending it to certain activities, which the Espoo Convention allows not to be subject to its provisions. Applying this exception cannot be treated as an obligation. Thus, the proposed modification to para. 3 of the annex I to the Protocol may not be treated as being incompatible with the Espoo Convention.

12. The proposed modification to para 9 is to delete the threshold in relation to one of the activities. Adoption of this modification will not result in limiting the scope of application of the Protocol but in extending it. Thus, the proposed modification to para 9 of the annex I to the Protocol may not be treated as being incompatible with the Espoo Convention.

13. The proposed modification to para 16 is to add a new type of activity (exploration) to one of the categories of activities. While one may wonder how the proposed modification will be interpreted in practice in combination with the existing threshold, there is no doubt, however, that the adoption of this modification will not result in limiting the scope of application of the Protocol but in extending the scope of its application. Thus, the proposed modification to para 16 of the annex I to the Protocol may not be treated as being incompatible with the Espoo Convention.

V. Conclusion

14. In conclusion, none of the proposed three modifications to the annex I to the Protocol on environmental impact assessment in a transboundary context negotiated under the Tehran Convention may be treated as being incompatible with the Espoo Convention. Consequently, adopting the Protocol with these modifications will not result in Parties to the Protocol being in non-compliance with their respective obligations as the Parties to the Espoo Convention.