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Meeting of the Parties to the Convention on
the Protection and Use of Transboundary
Watercourses and International Lakes

Working Group on Integrated Water Resources Management

Seventh meeting*
Geneva, 3 and 4 July 2012

Working Group on Monitoring and Assessment

Thirteenth meeting*
Geneva, 3 and 4 July 2012

Item 13 of the provisional agenda
Opening of the Convention

Draft decision on accession by non-United Nations Economic Commission for Europe countries

**Prepared by the Bureau with the support of the Chair and the
Vice-Chair of the Legal Board**

Summary

At its third session in November 2003, the Meeting of the Parties adopted decision III/1 amending articles 25 and 26 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention), opening the Convention for accession to countries outside the United Nations Economic Commission for Europe (ECE) region. The amendments are expected to enter into force by the end of 2012 or the beginning of 2013.

However, the amendments stipulate that any request for accession by Members of the United Nations shall not be considered for approval by the Meeting of the Parties until the amendments have entered into force for all the States and organizations that were

*Joint meeting of the two Working Groups.

Parties to the Convention on 28 November 2003.

This document proposes options for a draft decision by the Meeting of the Parties to expedite and facilitate accession by non-ECE countries to the Water Convention, addressing two aspects: (a) the need for simplification/clarification of the approval process by the Meeting of the Parties; and (b) the timeline for the procedure for accession by non-ECE Parties.

The document has been prepared by the Bureau of the Meeting of the Parties to the Convention, with the support of the Chair and the Vice-Chair of the Legal Board.

The Working Group on Integrated Water Resources Management and the Working Group on Monitoring and Assessment are invited to:

(a) Discuss and decide on the proposals contained in this document, as well as agree on future steps for finalizing the draft decision and submitting it for possible adoption to the Meeting of the Parties at its sixth session (Rome 28–30 November 2012);

(b) Urge Parties that have not yet done so to ratify the amendments to articles 25 and 26 of the Convention as soon as possible, in order to make sure that they are in force by the sixth session of the Meeting of the Parties;

(c) Prompt non-Parties that are in the process of ratifying, accepting or approving the Convention to simultaneously ratify, accept or approve the above amendments.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Background and rationale.....	1–10	3
II. Explanation and analysis of the alternative options	11–29	4
Option A	13–17	5
Option B	18–23	5
Option C	24–29	6
III. Proposals for a draft decision	30	7

I. Background and rationale

1. The amendments to articles 25 and 26 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention), adopted through decision III/1 of the Meeting of the Parties of 28 November 2003, provides for the insertion into article 25 of a new paragraph, after paragraph 2, which reads as follows:

3. Any other State, not referred to in paragraph 2, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties. In its instrument of accession, such a State shall make a declaration stating that approval for its accession to the Convention had been obtained from the Meeting of the Parties and shall specify the date on which approval was received. Any such request for accession by Members of the United Nations shall not be considered for approval by the Meeting of the Parties until this paragraph has entered into force for all the States and organizations that were Parties to the Convention on 28 November 2003.

2. In November 2009, the Meeting of the Parties called for an acceleration of the ratification process and urged Parties to ratify the amendments as soon as possible. Since 2009, seven more Parties have ratified the amendments and many others are at an advanced stage in the ratification process.

3. In recent years, considerable interest in the Convention has been observed outside the ECE region and several non-ECE countries have expressed interest in acceding to the Convention. For example, the International Conference on “Europe-Asia Transboundary Cooperation”, held in Geneva on 15 and 16 December 2011, attracted significant participation and interest from all but one of the countries bordering the ECE region. This interest was also shown by the participation of an increasing number of representatives from 22 different non-ECE countries in meetings under the Convention during the period 2009–2012, mainly in the workshops on water and climate change adaptation in transboundary basins in April 2011 and 2012, the Workshop on Water and Forests in Low-Forest Cover Countries (Geneva, 7–8 July 2011) and the above-mentioned International Conference on Europe-Asia Transboundary Cooperation. Moreover, neighbouring non-ECE countries actively contributed to the *Second Assessment of Transboundary Rivers, Lakes and Groundwaters*.¹ The opening of the Convention to accession by non-ECE countries within a reasonably short time frame is thus demanded and urgent.

4. This need has also been underlined at several events, such as the Sixth World Water Forum (Marseille, France, 12–17 March 2012), and in particular in its ministerial declaration, as well as by United Nations Secretary General Ban Ki-moon in his remarks to the ECE Executive Committee on 18 October 2011, where he expressed the hope that the Convention would soon be open to accession by non-ECE Member States.

5. A rapid opening of the Convention is especially important for those countries sharing transboundary waters with non-ECE countries. If all riparian countries were Parties to the Convention, it would help facilitate transboundary cooperation, reduce uncertainty and improve sustainability in the shared basins.

6. A rapid opening of the Convention would also contribute to the goals of the United Nations Conference on Sustainable Development (Rio de Janeiro, 20–22 June 2012), in the preparatory process for which water has been recognized as a key issue for sustainability, poverty reduction and greening the economy. In addition, the opening of the Convention

¹ United Nations publication, Sales No. 11.II.E.15.

would promote the achievements of several international commitments, such as the Millennium Development Goals and the Johannesburg Plan of Implementation, in particular the objective to develop integrated water resources management plans at the basin level. The institutional set-up required of Parties by the Convention, such as concluding bilateral or multilateral agreements, can promote permanent and effective transboundary cooperation worldwide.

7. The opening of the Convention will provide a global legal framework for transboundary water cooperation that is based on a model which has proven its effectiveness in different economic, social and environmental conditions. In the past 16 years since its entry into force, a wealth of experience has been accumulated under the Convention on technical and strategic aspects of transboundary water cooperation, including on emerging aspects, such as adaptation to climate change in a transboundary context. The Convention has served as a model for transboundary cooperation arrangements throughout the region and beyond. Most importantly, through its institutional structure — its Meeting of the Parties and subsidiary bodies — it provides a platform for sharing such experience. Non-ECE countries can greatly benefit from this wealth of experience. Moreover, such experience can also represent a great asset in implementing the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which is also expected to enter into force soon.

8. With only a few ratifications lacking for the entry into force according to article 21, paragraph 4 of the Convention, the amendments to the Water Convention are expected to enter into force by the end of 2012 or the beginning of 2013. However, according to the text of the amendments, non-ECE countries might still have to wait many more years before they can become Parties to the Convention — until all the countries and organizations which were Parties to the Convention in 2003 have ratified the amendments.

9. In addition, the requirement for approval by the Meeting of the Parties greatly complicates the accession by non-ECE countries, creating an unfair and unjustified differentiation between ECE member States, which can accede to the Convention without any approval, and non-ECE countries, which need approval.

10. The present document therefore includes proposals for a draft decision to be adopted by the Meeting of the Parties at its sixth session with a view to facilitating and expediting accession by non-ECE countries. From a political and communication point of view, the adoption of such a decision, next to the completion of the process leading to the entry into force of the amendments to articles 25 and 26, would send an important message outside the ECE region that could significantly enhance the promotion of the accession to and implementation of the Convention outside the ECE region.

II. Explanation and analysis of the alternative options

11. Three options for a decision by the Meeting of the Parties are put forward to address, in a different way and with a varying degree of action, two major concerns: (a) the need for simplification/clarification of the process for approval by the Meeting of the Parties, (b) the timeline for the procedure for accession by non-ECE Parties.

12. In all proposed options, the Meeting of the Parties urges all Parties that have not yet done so to ratify the amendments to articles 25 and 26 as soon as possible, among others to ensure the consistency of the Convention's legal regime.

Option A

Enhancing voluntary cooperation with non-ECE States while abiding by the requirement that all Parties ratify the amendments before accession of non-ECE countries

13. With this option, by the proposed decision, the Meeting of the Parties calls for a close collaboration with non-ECE States wishing to accede.

14. In addition, the Meeting of the Parties clarifies the accession procedure for non-ECE States by taking a decision to consider any future requests for accession as approved after the amendments have entered into force for all States and organizations that were Parties to the Convention at the time of adoption of the amendments.

15. Deciding to consider any future requests for accession as approved is consistent with the fundamental cooperative character of the Convention, which speaks against a differentiation of the accession procedure for ECE and non-ECE member States. It also takes into account the due-diligence nature of its substantive obligations. The latter normative feature of the Convention, in combination with the widespread practice by Parties, militates in favour of such an approach in a twofold manner. On the one hand, the flexibly progressive nature of the substantive obligations of the Convention, together with its institutional mechanisms of support and assistance, have proven to act as an incentive and to be an effective catalyst for rapid increases in the compliance capacity of States which, at the time of their ratification, or accession, would seem to leave to be desired. On the other hand, practice has also shown that that same normative flexibility inherent in the due-diligence nature of the substantive obligations of the Convention renders it extremely difficult to set absolute and, especially, objective parameters against which the Meeting of the Parties could undertake a procedure of approval of requests for accession in each specific case.

16. This option does not raise concerns from the legal point of view. It is an additional demonstration of the commitment of the Meeting of the Parties to open the Convention for membership from outside the ECE region. In addition, voluntary and close cooperation with non-ECE States wishing to become Parties serves the object and purpose of the Convention.

17. However, with option A, the accession of non-ECE States would be delayed until the amendments are ratified by all States and organizations that were Parties on 28 November 2003, although several non-ECE States have already expressed their interest in acceding to the Convention as soon as possible. Moreover, this option does not address the uncertainty about the time that will be needed for the completion of the ratification process by all States and organizations that were Parties to the Convention at the time of adoption of the amendments. This could deter non-ECE countries from considering accession and thereby delay the effective opening of the Convention.

Option B

Assignment of [Provisional] [Preliminary] Party status to non-ECE countries which complete the accession procedure until the entry into force of the amendments for all States and organizations that were Parties on 28 November 2003

18. Also in this option, the Meeting of the Parties clarifies the accession procedure for non-ECE States by taking a decision to consider any future requests for accession as approved after the amendments have entered into force for all States and organizations that

were Parties to the Convention at the time of adoption of the amendments, based on the same reasoning as in option A (see paragraph 15 above).

19. Until the amendments have entered into force for all States and organizations that were Parties in 2003, this option proposes the assignment of [Preliminary] [Provisional] Party status to States outside the ECE region which complete the national process of accession to the Convention and deposit their instrument of accession with the Secretary-General of the United Nations in accordance with article 24 of the Convention. These non-ECE States will automatically become full Parties once the amendments have entered into force for all States and organizations which were Parties to the Convention on 28 November 2003.

20. The [Preliminary] [Provisional] Party status will entail most but not all Parties' rights and obligations. It will include all rights and obligations of parts I and II of the Convention. As for part III of the Convention, [Preliminary] [Provisional] Parties will have all rights and obligations with the exception of the rights related to article 21 "Amendments to the Convention". The Rules of Procedure of the Meeting of the Parties will apply, *mutatis mutandis*, to [Preliminary] [Provisional] Parties.

21. Such decision to grant [Preliminary] [Provisional] Party status is in accordance with article 17, paragraph 2 (f), of the Convention, which entrusts the Meeting of the Parties to undertake any action that may be required for the achievement of the purposes of the Convention.

22. The advantage of this option is that it respects the requirements of the 2003 amendments, but at the same time encourages interested non-ECE States to proceed with the process of accession to the Convention. Moreover the [Preliminary] [Provisional] Party status will guarantee most of the Parties' rights and obligations to non-ECE States and, hence, allow those States to take actively part in the work of the Convention. The proposed procedure will not entail additional requirements for non-ECE States that have completed the national accession process and deposited their instruments of accession as they will automatically become full Parties to the Convention once the requirements of the 2003 amendments are met.

23. However, while [Preliminary] [Provisional] Parties will enjoy most of the rights of Parties, they will not enjoy all of them. Moreover, the uncertainty will remain on how much time will be needed for the completion of the ratification process by all States and organizations that were Parties to the Convention at the time of adoption of the amendments so that [Preliminary] [Provisional] Parties can become full Parties.

Option C

Immediate opening through unanimous consent of the Meeting of the Parties

24. In this option, by the proposed decision, the Meeting of the Parties, being fully aware of the procedural requirements of the amendments, unanimously decides to open the Convention for accession by non-ECE States upon the entry into force of the amendments, without having to wait until all the Parties and organizations that adopted the amendments ratify them.

25. In addition, the Meeting of the Parties clarifies the accession procedure for non-ECE States by taking a decision to consider any future requests for accession as approved from the date of the entry into force of the amendments, based on the same reasoning as in options A and B above.

26. The main motive for option C is that, from a non-ECE standpoint, the procedure set out in article 25 of the Water Convention as amended may be taken to run contrary to the

very rationale of the amendments — i.e., the intention to open the Convention rapidly and to the maximum extent — and could undermine the fulfilment of the object and purpose of the amendments by discouraging non-ECE member States from acceding, or sapping their political will to do so.

27. In this option, the unanimity of the Parties in their desire to open the Convention for accession by non-ECE States upon the entry into force of the amendments serves as a firm expression of the will of all Parties, including those which have not yet ratified the amendments, to rapidly open the Convention. Furthermore, the unanimous consent is ensured through a safeguard clause present in paragraph 4 of the proposed decision, which guarantees that the will of all the Parties, including those not present at the sixth session of the Meeting of the Parties, is fully respected.

28. The major advantage of the proposed option is that it allows States outside the ECE region to become Parties immediately after the entry into force of the amendments, without having to wait until the amendments enter into force for all States and organizations that were Parties at the time of adoption of decision III/1.

29. However, this approach might raise concerns as to the legitimacy of the decision. While the proposed decision is guided by the rationale of the amendments and the principle of good faith, it is debatable whether a subsequent decision by the Meeting of the Parties can override the text of the amendments. Although precedents exist (e.g., in the practice of the United Nations Convention on the Law of the Sea or the ECE Convention on Transboundary Effects of Industrial Accidents), none of them is identical to the situation at issue.

III. Proposals for a draft decision

30. Set out below are the proposals for a draft decision, which include option A, B and C variants.

The Meeting of the Parties,

Expressing the firm belief that cooperation among riparian States on transboundary watercourses and international lakes contributes to peace and security and to sustainable water management, and is to everyone's benefit,

Reconfirming the conviction that the Convention on the Protection and Use of Transboundary Watercourses and International Lakes is an effective instrument to support cooperation also beyond the region of the United Nations Economic Commission for Europe (ECE),

Wishing to share the knowledge, practices and experience collected in the 20 years since the adoption of the Convention, and, at the same time, to benefit from the knowledge, practices and experience in other regions of the world,

Also wishing to collectively promote river basin cooperation throughout the world, including by offering a global intergovernmental platform for exchange and debate on transboundary water issues and for supporting the implementation of international water law,

Recalling its decision III/1 of 28 November 2003 to amend the Convention's articles 25 and 26,

Recognizing the increased interest in the Convention and its activities by many non-ECE countries and their wish to accede to the Convention,

Acknowledging the need for a procedure for accession by non-ECE countries not differing from the procedure for accession by ECE-countries,

Expressing the unanimous resolve to enable the accession by non-ECE countries as soon as possible,

1. *Urges* all Parties that have not yet done so to ratify the amendments to articles 25 and 26 as soon as possible;

Option A

2. *Decides* that, upon entry into force of the amendments to articles 25 and 26 of the Convention for all the Parties that adopted them, any future request for accession to the Convention by any Member of the United Nations is welcome and, therefore, hereby approved. Such approval will take effect once the amendments enter into force for all the States and organizations that were Parties to the Convention on 28 November 2003. Accordingly, reference to the present decision will have to be made by any such State in submitting its instrument for accession;

3. *Calls* for the strengthening of cooperation between Parties to the Convention and non-ECE States interested in acceding to the Convention, with a view to promote exchange of experience as well as the application of the Convention beyond the ECE region.

Option B

2. *Decides* that, for the purposes of article 25 of the Convention, as amended by decision III/1, any future request for accession to the Convention by any Member of the United Nations is welcome and, therefore, hereby approved. Such approval will take effect once the amendments enter into force for all the States and organizations that were Parties to the Convention on 28 November 2003. Accordingly, reference to the present decision will have to be made by any such State in submitting its instrument for accession;

3. *Invites* interested Members of the United Nations to start and finalize all national steps necessary for the accession to the Convention according to national legal provisions and to deposit their instruments of accession in accordance with article 24 of the Convention, accompanied by a declaration to undertake all obligations of the Convention, making reference to the present decision, and at the same time to inform the ECE secretariat of the Convention;

4. *Decides* to assign, by the present decision, a [Preliminary Party] [Provisional Party] status to any Member of the United Nations, which has submitted or will in future submit an instrument of accession in accordance with paragraph 3 above, pending the entry into force of the amendments for all the States and organizations that were Parties to the Convention on 28 November 2003;

5. *Resolves* that the [Preliminary Party] [Provisional Party] status will entail all rights and obligations of the Convention, with the exception of the rights related to article 18 "Right to vote" and article 21 "Amendments to the Convention". The Rules of Procedure of the Meeting of the Parties will apply, *mutatis mutandis*, to [Preliminary] [Provisional] Parties, with the exception of rules 34 to 43 on voting;

6. *Requests* the secretariat to inform the United Nations Treaty Section about this procedure so that appropriate arrangements can be made, and to disseminate information on the procedure to interested Members of the United Nations which are not members of the Economic Commission for Europe.

Option C

2. *Decides* that, for the purposes of article 25 of the Convention, as amended by decision III/1, any future request for accession to the Convention by any Member of the United Nations is welcome and, therefore, hereby approved. Accordingly, reference to the present decision will have to be made by any such State in submitting its instrument for accession;

3. *Also decides* that the present approval of future requests for accession to the Convention will take effect upon entry into force of the amendment to article 25 of the Convention, without having to wait until all the Parties that adopted the amendments ratify them;

4. *Decides* that the present decision will take effect [if no Party submits a formal objection to it to the Executive Secretary of the ECE within two months from the adoption of the present decision] [once all Parties not present at the sixth session of the Meeting of the Parties have expressed their consent to the Executive Secretary of the ECE];

5. *Requests* that the secretariat disseminate the above information to Parties.
