UNITED NATIONS

E

Economic and Social Council

Distr.
RESTRICTED

CEP/AC.3/16
17 December 1997

ORIGINAL : ENGLISH

ECONOMIC COMMISSION FOR EUROPE

COMMITTEE ON ENVIRONMENTAL POLICY

Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making

REPORT OF THE EIGHTH SESSION

1. The eighth session of the Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making took place in Rome from 1 to 5 December 1997.

2. It was attended by the delegations of: Albania; Armenia; Austria; Belarus; Belgium; Croatia; Czech Republic; Denmark; Estonia; Finland; France; Georgia; Germany; Hungary; Italy; Kazakhstan; Kyrgyzstan; Latvia; Lithuania; Malta; Netherlands; Norway; Poland; Portugal; Republic of Moldova; Romania; Russian Federation; Slovenia; Spain; Sweden; Switzerland; Turkey; Ukraine; United Kingdom; and Uzbekistan.

3. The Commission of the European Communities was also represented.

4. The following non-governmental organizations (NGOs) were represented: Environmental NGOs Coalition; Regional Environmental Center for Central and Eastern Europe (REC); and World Conservation Union (IUCN).

5. Mr. Valerio Astraldi, Minister Plenipotentiary, delivered a statement on behalf of the Italian Minister of the Environment. He welcomed the delegates to the meeting and expressed his gratitude for the work undertaken so far by the Working Group. He also indicated, inter alia, that his Government was in favour of a continuously active role for the non-governmental organizations, not only during the drafting of the convention, but also after its signing at the Århus Ministerial Conference. Mr. Kaj Bärlund, Director of the ECE Environment and Human Settlements Division, thanked the Government of Italy for organizing and hosting the meeting.

6. The Working Group adopted the agenda as contained in document CEP/AC.3/15.

7. The representative of the Commission of the European Communities indicated that its mandate would be formally approved by the Council of Ministers of the European Union very soon.

8. The Environmental NGOs Coalition informed the Working Group of its relevant activities and, in particular, made reference to the Bled Declaration, which had been adopted at the NGO Strategy meeting on public participation held in Slovenia from 7 to 11 November 1997. The Declaration was made available to the Meeting. The Regional Environmental Center informed the Meeting of round tables which had been organized in central and east European countries and in newly independent States to promote dialogue between governmental officials and non-governmental organizations on the draft convention.

9. The Meeting was informed that a working group under the Congress of Local and Regional Authorities of the Council of Europe would prepare a paper expressing its views on the present consolidated draft of the convention. The Working Group requested the secretariat to circulate this paper before its next session. The Working Group expressed its gratitude to the Government of Austria for its contribution to Trust Fund for Assistance to Countries in Transition (TFACT) to support the participation of experts from countries in transition. The Working Group was also informed of relevant activities undertaken by INFOTERRA, a UNEP programme, in relation to the dissemination of environmental information, and its interest in cooperating in the implementation of the Convention.

10. The Working Group considered articles 1, 1 bis, 2, 3, 7, 8 and 9 as set out in document CEP/AC.3/R.5 and made some amendments to them (see annex I below). Delegations made the following specific comments.

11. The delegation of the Republic of Moldova expressed concern regarding the wording of article 1 and considered the approach taken too anthropocentric. It proposed to insert the word “healthy” before the word “environment” in the first line of the article, and to delete the words “adequate to his health and well-being” following this word, and to delete the word “ohanri” in the third line of the Russian version. The Environmental NGOs Coalition welcomed article 1 as a historic step forward, despite its shortcomings, and supported express reference to future generations.

12. The delegations of Belgium, Denmark and Norway informed the Working Group that they understood the words “under the control of” in article 1 bis (b)(iii) to mean inter alia that policy and major issues were subject to approval or decision by public authorities. The Environmental NGOs Coalition objected to the deletion of article 1 bis (v). The delegation of Germany indicated that it would prefer to add to article 1 bis (b)(i): “with responsibilities relating to the environment”. The delegations of the Russian Federation and Germany expressed reservations regarding the insertion of “including genetically modified organisms” in article 1 bis (c)(i). In relation to article 1 bis (e), the delegation of Germany was in favour of replacing the words “shall be deemed to have a sufficient interest” by the formulation “may be deemed to have a sufficient interest”. The delegation of Turkey insisted that the word “sufficient” in article 1 bis, subparagraph (e) should be kept. A number of delegations, including that of Norway, suggested inserting in article 1 bis (e) before “requirements”, the word “reasonable”.

13. The delegation of the Russian Federation expressed reservations about the insertion of the new paragraph at the end of article 2. The Environmental NGOs Coalition, supported by the delegation of Norway, objected to the deletion of article 2, paragraph 1A.

14. The delegations of Hungary and the Netherlands proposed to add the following new paragraph to article 2: “The public shall have access to environmental information, and have the possibility to participate in environmental decision-making and access to justice without distinction as to citizenship, nationality or domicile.” Consequently article 3, subparagraph 1 (a), and article 9, paragraph 5, would be deleted.

15. The Environmental NGOs Coalition supported the deletion of “[where appropriate]” in the opening words of article 3, subparagraph 1. However, it objected to the deletion of the brackets in subparagraph 1 (c), and to the inclusion of the words “or customary practice” in subparagraph 3 (c). The delegation of Norway and the Environmental NGOs Coalition were opposed to the deletion of subparagraph 1 (d) of article 3. These two delegations also objected to what they considered to be the absence of an effective qualifier for the commercial confidentiality exemption in subparagraph 4 (d). The Environmental NGOs Coalition objected to the inclusion of any exemption for intellectual property in subparagraph 4 (e), and to the wording of the proposed exemption. The delegation of Norway and the Environmental NGOs Coalition objected to the inclusion of any exemption for voluntary supplied information in subparagraph 4 (g), and to the wording of the proposed provision. The Coalition and the delegation of Norway objected to the removal of article 3, paragraph 6, and the Coalition also objected to the dilution proposed by Poland. The Environmental NGOs Coalition objected to adding words at the end of article 3, paragraph 8, allowing for a longer time limit for refusals of requests. In this respect it proposed to add: “The applicant shall be informed of any extension and of the reasons justifying it.” The Environmental NGOs Coalition expressed its dismay at the lack of transparency of the positions of Member States of the European Union during the discussions of article 3.

16. The delegation of Ukraine indicated that article 3, subparagraph 3 (b) in its current wording was too vague and required further reformulation. The delegation of Germany was in favour of replacing article 3, subparagraph 4 (c), by “matters which are, or have been, sub judice or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings.” The delegation of Italy reserved its position regarding article 3, subparagraph 4 (c), and noted that the actual text was a step backwards compared to the Sofia Guidelines.

17. The delegation of Poland proposed to revise article 3, paragraph 6, as follows: “Where a public authority does not hold the information requested but is empowered to request such information, it should make practical arrangements to obtain such information in order to make it available in accordance with the provisions of this article.” This proposal received support from some delegations, including that of Norway.

18. The delegation of Norway suggested adding the following proposal to article 5, paragraph 2: “(e) Whether the activity is subject to a national or transboundary environmental impact assessment procedure.” In relation to Article 5, paragraph 9 as set out in CEP/AC.3/14, Annex I, the delegation of Germany indicated that it preferred the insertion of the word “concerned” after the words “the public” in the third line of the provision.

19. The delegation of the United Kingdom proposed the following wording for article 7: “Each Party shall strive to promote effective public participation at an appropriate stage, and whilst options are still open, during the preparation of binding rules of general application that may have a significant effect on the environment, except where those rules are being adopted by the legislature. To this end the following steps should be taken where appropriate:

(a) Time frames sufficient for effective public participation should be fixed;

(b) Draft rules should be published; and

(c) The public should be given the opportunity to comment, either directly or through representative consultative bodies.

The result of the public participation shall be taken into account so far as possible.”

20. The Environmental NGOs Coalition expressed concern at the recommendatory nature of article 7 and its non-applicability to legislative bodies. The delegations of the Russian Federation and Belarus reserved their positions with regard to this article. The delegation of Denmark reserved its position with regard to the use of the words “strive to”. The delegation of Turkey suggested discussing the article at a later stage. The delegation of Germany reserved its position concerning the wording of article 7, lines 1 and 3, in the version submitted by the United Kingdom.

21. Concerning article 9, the Environmental NGOs Coalition objected to the following words in paragraph 1: “at least where access to information is refused under this paragraph.” Furthermore, it objected to the insertion of “within the framework of national legislation” in paragraphs 1 and 2. It

proposed to add “Final decisions shall be binding.” and “Reasons shall be stated in writing.” to paragraphs 2 and 3. The Environmental NGOs Coalition also objected to what it saw as a weakening of paragraph 3, and to the deletion of the words: “open” and “transparent” from paragraph 4. It also objected to what it saw as the weak nature of paragraph 5.

22. The delegation of Romania expressed reservations about article 9 and promised to submit its opinion on this article in writing, after consultation with the relevant authorities in the country, before the next meeting of the Working Group. The delegation of the Russian Federation expressed a general reservation concerning article 9. The delegation of Germany expressed its reservation concerning the wording of article 9, paragraph 2, second subparagraph, sentences 1 and 3. The delegation of Italy reserved its position with regard to article 9, paragraph 2. It also noted that the present text was a step backwards compared to the Sofia Guidelines and that the convention had to ensure access to justice for the public concerned.

23. The delegation of Turkey expressed reservations concerning the use of the words “members of the public” in article 9. The delegations of Denmark and Belgium and the Environmental NGOs Coalition informed the Meeting that they understood the words “members of the public” to include individuals and organizations. The Working Group decided to come back to this issue at a later stage. The Environmental NGOs Coalition expressed the opinion that article 9, paragraph 2, should be applicable also to other provisions of the convention. In this respect, the Working Group also decided to come back to the issue at a later stage.

24. The delegations of Germany, the Netherlands and Turkey expressed their preference for the insertion of “subject to national and international law” in paragraph 4 of article 9. The delegation of the United Kingdom indicated that it could not accept article 9, paragraph 5, because of its mandatory nature and reference to “other barriers”.

25. The Turkish delegation declared that article 9, paragraph 6, was contradictory to the content of paragraphs 1 and 2, where it was said that each Party would act within the framework of its national legislation concerning the application of these articles, and asked for clarification. Following the discussions, the Turkish delegation informed the delegations present that the Turkish administrative and judicial authorities would apply the conditions set out in the Turkish legislation concerning paragraphs 1 and 2 of article 9. The Working Group decided to discuss at a later stage the possible addition to article 9, paragraph 6, of the following words: “, including place of registration or incorporation.” In this respect the delegation of Finland proposed to consider the following words:”, where an organization has its registered seat or the effective centre of its activities in the territory of a Party.”

26. The Working Group thanked the Government of Italy, and especially Mr. Francesco La Camera, for the smooth organization of the meeting and for the generous hospitality provided.

27. The Working Group adopted its report on Friday, 5 December 1997.

Annex I

AMENDMENTS TO THE TEXT OF THE FOLLOWING ARTICLES AS INCLUDED IN DOCUMENT CEP/AC.3/R.5

Article 1

Delete the square brackets and renumber the articles accordingly

For protect read contribute to the protection of

After person insert of present and future generations

For his read his or her

Before public participation insert access to environmental information and and delete this text further on.

Article 1 bis

In subparagraph (b), delete the text of (v)

In subparagraph (c) (i), after components, insert including genetically modified organisms,

In subparagraph (e), delete twice square brackets around n and delete [sufficient]

Article 2

Delete paragraph 1 A

Delete paragraph 3 and renumber the remaining paragraphs accordingly

In paragraph 6 delete [more stringent]

Add a new paragraph as follows: Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

Article 3

In paragraph 1, after including insert where requested and subject to subparagraph (c) and delete [where appropriate]

In paragraph 1 (c) delete the square brackets

Delete paragraph 1 (d)

In paragraph 3 (c) delete the square brackets

In paragraph 3 (c) for unless the harm likely to result from disclosure is outweighed by the public interest in making the information available] read taking into account the public interest served by disclosure.

For paragraph 4 substitute:

4. A request for environmental information may be refused if the disclosure would [adversely affect][prejudice]:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, [if disclosure of the information would cause significant financial damage to an economic interest and] where such confidentiality is protected by law;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where provided for in national law;

(g) The interests of a third party which has supplied information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way taking into account [whenever possible][where possible] the public interest served by disclosure.

Delete paragraph 6 and renumber the remaining paragraphs accordingly

In paragraph 8 for one [two] month[s] read one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

Article 7

For article 7 substitute:

Article 7

PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND GENERALLY APPLICABLE LEGALLY BINDING RULES

Each Party shall strive to promote effective public participation at an appropriate stage, and whilst options are still open, during the preparation of executive regulations and other generally applicable legally binding rules of public authorities that may have a significant effect on the environment. To this end, the following steps should be taken:

(a) Time frames sufficient for effective participation should be fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account so far as possible.

Article 8
Delete this article

Article 9
For article 9 substitute:

Article 9

ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his/her request for information under article 3 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law to challenge the substantive and procedural legality of any decision, act or omission subject

to the provisions of article 5 [and other relevant provisions of this Convention].

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 1 bis, subparagraph (e,) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

This provision shall not exclude the possibility of a review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1, the procedures referred to in paragraphs 1, 2 and 3 shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

6. A member of the public shall have access to administrative and judicial procedures within the scope of this article without distinction as to citizenship, nationality or domicile.

Annex II

PROPOSAL BY THE DELEGATION OF BELGIUM FOR A NEW ARTICLE 14 BIS

Article 14 bis

IMPLEMENTATION

1. The Conference of the Parties shall establish a subsidiary body for implementation.

2. This subsidiary body shall receive and consider communications from members of the public subject to the jurisdiction of a Party who claim to be victims of a violation of any of the rights guaranteed by articles ___ of this Convention.

3. Subject to the provisions of paragraph 2, members of the public who claim that any of their rights referred to in paragraph 2 have been violated and who have exhausted all available domestic remedies may submit a written communication to the subsidiary body referred to in paragraph 1 for its consideration.

4. The subsidiary body shall consider communications received under this article in the light of all written information made available to it by the member of the public and by the Party concerned and shall, where appropriate, formulate recommendations, which it shall forward to that Party and to the member of the public who submitted the communication.