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Economic Commission for Europe**Meeting of the Parties to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters****Working Group of the Parties****Twelfth meeting**

Geneva, 30 June–2 July 2010

Item 4 (d) of the provisional agenda**Report of the Task Force on Access to Justice
on its Third Meeting¹***Summary*

The third meeting of the Task Force on Access to Justice under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was held at the Palais des Nations in Geneva from 14–15 October 2009. The meeting, which brought together national experts, as well as judges and academics from the region, was organized pursuant to the Meeting of the Parties' work programme for 2009–2011 (ECE/MP.PP/2008/2/Add.17). It started with a half-day mini-conference, "Hot Topics and Case Law Related to the Implementation of the Aarhus Convention: National and Regional Experiences".

¹ This report was prepared pursuant to a decision of the Working Group of the Parties at its eleventh meeting (ECE/MP.PP/WG.1/2009/2, para. 89).

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Introduction

1. The third meeting of the Task Force on Access to Justice, established by the Meeting of the Parties to the Convention at its second session (decision II/2), was held in Geneva on 14 and 15 October 2009.
2. The meeting was attended by experts designated by the Governments of France, Germany, Italy, Kyrgyzstan, Latvia, Norway, Slovakia, Sweden, Tajikistan and Ukraine.
3. The European Commission was present on behalf of the European Community.²
4. A representative of the Regional Environmental Center for Central and Eastern Europe attended the meeting.
5. The following regional and international non-governmental organizations (NGOs) were represented: GLOBE Europe, European Environment Bureau/European ECO-Forum and International Center for Environmental Research (Georgia).
6. The following national NGOs were represented: Ecopravo (Belarus), Bureau of Environmental Investigation (Ukraine), Coastwatch (Ireland), Environmental Law Service/Justice and Environment (Czech Republic), Environment-People-Law (Ukraine), Friends of the Irish Environment (Ireland), Independent Ecological Expertise (Kyrgyzstan), Resource and Analysis Center – Society and Environment (Ukraine), St James’s Research (United Kingdom) and WWF-UK.
7. A number of international experts, high-level judges and representatives of judicial training institutions from Azerbaijan, Georgia, Republic of Moldova and the United Nations Interim Administration Mission in Kosovo and academic institutions attended the meeting. A representative from CropLife International was also present.
8. The former Chair of the Task Force, Mr. Håkan Bengtsson (Sweden), having had to resign owing to a change in his responsibilities, was replaced by Mr. Jan Darpö (Sweden), designated by Sweden. The new Chair opened the meeting.

Part A: Mini-conference – Hot Topics and Case Law Related to the Implementation of the Aarhus Convention: National and Regional Experiences

9. The first half day of the meeting took the form of a mini-conference called “Hot Topics and Case Law Related to the Implementation of the Aarhus Convention: National and Regional Experiences”, with presentations by three leading experts in the field, speaking in their personal capacity. The aim of the mini-conference was to give the experts an opportunity to benefit from and discuss the presentations on how courts interpreted and implemented the Convention and/or the laws transposing the Convention at the domestic level.
10. Mr. Richard Macrory, Professor of Environmental Law, Centre for Law and the Environment at University College London, gave a presentation on judicial politicization and the Convention. The effect of article 9, paragraph 4, of the Convention in the United Kingdom of Great Britain and Northern Ireland was analysed with a focus on the costs of

² The European Union replaced and succeeded the European Community as of 1 December 2009. However, since the meeting took place before that date, references to the European Community have been maintained throughout the document.

environmental litigation. In addressing the loser pays rule, it was noted that although the general rule required the losing party to pay litigation costs for itself and the winning party, judges maintained discretion at the end of the process to refuse costs to the winning party on the grounds that it was in the public interest to bring the case. However, that was rarely exercised and the expense of litigation and risk of exposure to costs became problematic. This system created a disincentive to bringing litigation since plaintiffs considered that the costs could be prohibitively expensive.

11. Next, the United Kingdom's system of protective costs orders (PCOs) was addressed: They allowed the courts to set a maximum limit to the costs of litigation before the case began. In the view of the speaker, that system helped the United Kingdom achieve some level of access to justice as sought by the Convention. However, PCOs were only narrowly allowed for public interest cases, in the sense that if the court found that any private interest was involved, a PCO could not be awarded. A number of senior judges in the United Kingdom were becoming increasingly aware of the potential implications of the Convention. Participants discussed the findings of the Working Group on Access to Environmental Justice, chaired by Mr. Justice Sullivan, which were reflected in *Ensuring Access to Environmental Justice in England and Wales* (May 2008), commonly known as the Sullivan Report. The Report found that protective cost measures could fix the problem of prohibitive expense in the British judicial system, but argued that such measures should be available in every case relating to the Convention.

12. *Review of Civil Litigation Costs: Preliminary Report* (May 2009), commonly known as the Jackson report, by Mr. Justice Jackson on the review of civil litigation costs in England and Wales was also discussed. The speaker speculated on whether tribunals, rather than highly expensive courts, might be a preferable way of meeting the aspirations of the Convention on access to justice in many cases.

13. Responding to queries from the participants, Professor Macrory highlighted the importance of timeliness of the process in environmental cases. Because of their organizational nature, NGOs might not be able to receive legal aid; in some cases, where a group of people suffered environmental harm, it might be difficult to identify one person from the group that qualified to receive legal aid. In addition, a regulatory tribunal had been set up in the United Kingdom to deal with a wide range of regulations, including environmental regulations, where citizens would be able to bring cases against polluters.

14. Ms. Vera Macinskaia, Judge of the Supreme Court in the Republic of Moldova, gave a presentation on the role of the judiciary in implementing the third pillar of the Convention – access to justice. The most effective form of safeguarding the rights of access to justice could be found in the court system, given the independence and transparency of the system. Studies had been conducted by the National Institute of Justice in the Republic of Moldova regarding the Moldovan judicial system, which demonstrated that although the legislature had adopted a legislative framework implementing the Convention and thus providing for the protection of the rights of the public for access to justice in environmental matters, and while there were many violations of an environmental character in the Republic of Moldova, the courts had been unable to address these violations, mainly because those cases had not been brought before the courts. There were presently over 80 NGOs in Moldova with a focus on environmental rights, but they did not use the court system. Indeed, a study of approximately 295 cases regarding environmental law – excluding criminal cases – in the Republic of Moldova showed that almost all cases were brought by individual citizens, not by NGOs. The latter should be encouraged to bring more environmental cases to the courts. In addition, parties to litigation were not charged with court expenses, which could at times hinder the pursuit of litigation.

15. During a brief discussion that followed the presentation, the fact that the actual implementation of judicial orders in the Republic of Moldova heavily depended on the

executive and not on the judiciary was evaluated. Participants said that costs associated with the hiring of experts for the evaluation of environmental damage might be considered a serious impediment for NGOs to bring environmental cases before the courts, not only in the Republic of Moldova, but in other countries as well. They also raised concerns about the fact that procedural laws in general might limit the possibility of locus standi for NGOs.

16. Mr. Jan Jans, Professor at the University of Groningen, Netherlands, gave a presentation on jurisdictional competition examining the existing and evolving relationship between the Convention and its implementation within the European Union (EU). The presentation covered access to justice with respect to institutions of the European Community, the implementation of the principles of Convention by member States through European Community law and the possible direct effect of the Convention.

17. On the first aspect of access to justice in EU affairs, the limitations of article 230 of the European Community Treaty and of the criterion of individual concern were acknowledged, and a number of cases ruled on by the European Court of Justice were mentioned in that regard; to a certain extent, it was expected that the situation of the locus standi for NGOs would be moderately favoured by the amendments introduced to article 230 of the European Community Treaty after the entry into force of the Treaty of Lisbon.

18. On the second aspect of implementation of the principles of the Convention in the member States through European Community law, it was pointed out that the objective of Directive 2003/35³ was to contribute to the implementation of the Convention, which might lead to jurisdictional competition between the European Court of Justice and the Convention Compliance Committee. Also, the possible spillover effect of Directive 2003/35 on national legislation was discussed. The said Directive would require only that the European directives relating to integrated pollution prevention and control and environmental impact assessment be implemented in conformity with the Aarhus principles.⁴ However, it was expected that the Aarhus principles would also spill over into other areas of environmental law or even into public law in general.

19. Finally, with regard to the possible direct effect of the Convention, it was explained that since it was a mixed treaty under European Community law and that since upon ratification, there had been a declaration of competence on the part of the European Community, the question of direct effect was essentially limited to the scope of Directive 2003/35 and other EU measures implementing article 9, paragraph 3, of the Convention. Beyond that Directive, the self-executing nature of the Convention was primarily an issue for EU member States.

20. In response to queries from the participants, Professor Jans said that the Convention Compliance Committee fulfilled a different function from the European Court of Justice and lacked redress character. Further, the European Court of Justice did not have jurisdiction over matters that were not regulated by primary or secondary European Community legislation, such as matters falling within the scope of article 9, paragraph 3, of the Convention, and it was for the member States to decide on the direct effect of the Convention, depending on their rules and constitutional traditions.

3 Directive 2003/35/EC of the European Parliament and the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC with regard to public participation and access to justice.

4 Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment of 27 June 1985, as amended by Council Directive 97/11/EC of 3 March 1997; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 and Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009.

Part B: Regular business of the Task Force

I. Adoption of the agenda

21. The Task Force adopted the agenda.

II. Sharing experiences: inclusion of jurisprudence in the Aarhus Clearinghouse

22. By means of paragraph 16 (a) (ii) of decision III/3, the Meeting of the Parties requested the Task Force to develop a portal for the exchange of jurisprudence concerning the Convention for use by judges, legal professionals, academics and other stakeholders. The Chair of the Task Force noted that more than 10 years after the adoption of the Convention, a substantial body of case law had been developed in relation to the Convention. The Chair recalled his letter of 3 September 2009 to experts and national focal points calling for the submission of jurisprudence materials to set up the database. It was important to have from each country an indicative list of the judicial and quasi-judicial bodies, whose decisions formed an authoritative source of law or interpretation of law. Finally, the decisions of judicial bodies at the supra-national level such as the European Court of Justice of the EU and the European Court of Human Rights of the Council of Europe would be useful material for the portal.

23. The secretariat gave a short presentation. First, it explained the process for the submission of materials through the use of a template developed by the Chair of the Task Force; the jurisprudence material could either explicitly refer to the Convention or the domestic legislation implementing the Convention, or merely to its principles. Case summaries and related information should be submitted in English and the link or the actual text of the ruling in the original language should be provided. The secretariat had collected 60 summaries on findings of the Convention Compliance Committee and on rulings of judicial and quasi-judicial bodies not only from the jurisdictions of Parties to the Convention but also from those of signatory and other countries. In that regard, it thanked France, Latvia and the Republic of Moldova for having submitted some cases. Finally, it gave a demonstration of how the information would be displayed in the Aarhus Clearinghouse and shared information with the Task Force on the functions and technical details of the Clearinghouse.

24. Several participants welcomed the development of the database. A number of collections with cases were available and that in carrying out that exercise, the Task Force should coordinate with other organizations and benefit from their work in that area, such as work conducted by the Environmental Management and Law Association and the database of the European Commission on access to justice due to be launched in December 2009.

25. The Task Force decided that an effort should be made to carry on the development of the database, that the current list of key words for the database should be flexible and that at the first stage, focus should be placed on judgments and decisions that created precedents, without excluding other decisions. Also, while the focus of the database would be on decisions relating to the Convention, cases predating the entry into force of the Convention that referred to the principles endorsed by the Convention should not be excluded. The development and maintenance of the jurisprudence portal should be a continuously evolving task. The Task Force also asked the secretariat to explore whether the portal could at a future stage be available in French and Russian as well as in English and whether and how the author or source of the submitted cases could be acknowledged.

III. Analytical studies

26. The Chair of the Task Force introduced the agenda item on analytical studies and emphasized that the Task Force should use the existing material and build upon it.⁵ He also made proposals on the methodology and the process to be used, stressing that existing material should be studied first. He invited participants to put forward proposals for the topics of the analytical studies.

27. Participants welcomed the initiative. References were made to relevant existing material, such as the analytical study conducted by Justice and Environment on access to justice, including the issues of costs and financial barriers, legal aid and injunctive relief in some member States of the European Community, the Sullivan report, the Jackson report, the reports on the inventory of EU Members States' measures on access to justice in environmental matters (commonly known as the Milieu study) of September 2007 and various reports, studies and projects conducted by national institutions, judicial centres and other organizations. Experts agreed that such material should be considered and supplemented by updated studies on related topics. The analytical material should make the necessary links to specific cases and examples (case study approach). They further noted the different legal cultures and traditions of the Parties to the Convention and expressed the view that as far as possible the Task Force should identify issues that were common to all UNECE member States.

28. The following issues were also discussed: financial assistance to NGOs and public interest lawyers, possibly through the setting up of an Aarhus fund; effective justice, in the sense that a strong implementing mechanism was a prerequisite for successful legislation; and the role of the courts in the implementation of the Convention with a focus on its article 3, paragraph 8, on the protection of whistleblowers from harassment, such as in the form of strategic lawsuits against public participation, sometimes known as SLAPPs. Finally, participants were reminded that the Implementation Guide of the Convention was being updated to include good practice examples.

29. After consideration of the topics presented, namely costs and financial arrangements, remedies, standing, SLAPP suits and enforcement of court decisions, the Task Force decided to prioritize analytical studies on the issue of costs and financial arrangements (including litigation costs, legal aid and support for public interest lawyers) and the issue of remedies (including injunctive relief and the issue of timing). The studies would provide a good source of comparison and improvement on the Aarhus principles. A third issue that should be further analysed at some point would be that of standing, with the details to be discussed at the next meeting. Participants were invited to submit any further information on relevant studies by the end of November 2009.

30. The Task Force briefly considered options for carrying out the analytical work, recognizing that the extent of such work would depend upon the availability of resources. The work could be carried out by secretariat staff, interns or consultants, or a combination thereof, preferably with the involvement of the Chair. Norway indicated that it would be willing to see part of a financial contribution that it had made in December 2008, some of which had been earmarked for work on access to justice, used for the purpose of developing the analytical studies. It stressed the value of the Chair being able to devote time to overseeing the work, and that if necessary, part of its contribution could be used to make it possible. The Task Force mandated the Chair and the secretariat, in consultation with the lead country and Norway, to find the most practical way to proceed. A draft outline of the

⁵ See the note prepared by the secretariat, Analysis of Information, Training and Analytical Material on Access to Justice, Second Meeting on Access to Justice (agenda item 4(c)), 10–12 September 2007.

studies to be undertaken, and eventually drafts of the studies themselves, would be circulated to Task Force members for their comments and in the latter case could be discussed at the next meeting of the Task Force.

IV. Workshops

31. The Chair introduced the agenda item on workshops and put forward a proposal for a regional workshop for senior members of the judiciary in Central Asia, if possible with the cooperation of other organizations active in the field and judicial training centres. He emphasized that a workshop for public interest lawyers, held in conjunction with the existing networks of such lawyers, would also be valuable.

32. The participants reported on a number of past and future training activities and discussed the options for the organization of workshops, taking into account the limited resources and the parallel training activities carried out by other organizations. In that regard, the training programme for judges coordinated by the European Community together with judges' associations was mentioned; the programme aimed to raise awareness of environmental law among judges. The role of public interest lawyers' networks was also extensively discussed.

33. Participants pointed to the advantages and disadvantages of workshops with a wide range of participants and stakeholders, such as judges, officials of public authorities and NGOs, including those with environmental expertise. Some participants argued that a workshop involving stakeholders from different backgrounds could stimulate discussion, whereas others felt that an approach targeting a particular group of stakeholders would be more effective. It was further suggested that the use of a common language for the workshops could increase interaction among participants.

34. Moreover, a number of experts noted that the effectiveness and actual impact of a workshop could be enhanced if participants were encouraged to share the knowledge acquired through the workshops with, and disseminate the material as much as possible to, their colleagues and other stakeholders in their countries; in that regard, the organization of workshops providing for training for trainers was assessed and experts reported on examples of dissemination of workshop materials in their countries.

35. Participants acknowledged that many critical issues concerning the interpretation and implementation of the Convention arose from real examples in member States and were subject to scrutiny and analysis by the Convention Compliance Committee. It would therefore be useful to involve members of the Committee in workshops.

36. The Task Force agreed that it would be useful to organize a subregional workshop in Central Asia during the next year, following the successful example of the Kiev and Tirana workshops in 2007 and 2008, respectively. It asked the Chair and the secretariat to contact national focal points in the region and agencies active in this field, such as the Organization for Security and Co-operation in Europe and the Council of Europe, to explore the idea further and find the most practical way to proceed. The Task Force also asked the secretariat to explore the possibility of coordinating with judicial training centres, and to make contact with the Council of Europe that was active in that area. Finally, it requested the secretariat to contact public interest lawyers' networks and, subject to the availability of resources, investigate the possibility of a seminar for public interest lawyers.

V. Capacity-building, training materials, outreach and cooperation

37. Introducing the item, the Chair noted that while these activities would intensify at a later phase of the work of the Task Force, some thought should be given already at the present meeting.

38. Experts exchanged views and experiences on the issues, pointing out different examples. They discussed the importance of national-level training for members of the judiciary, the cooperation between judicial training centres, and the organization of roundtables on topics related to the barriers to access to justice and involving different stakeholders, such as judges, lawyers – including public interest lawyers – and NGOs.

39. With respect to the development of training materials, the Task Force asked the secretariat to develop training modules on the basis of the workshops carried out in Kiev and Tirana and upload them on the Convention website. Participants mentioned the need to raise awareness, especially for residents' groups and small NGOs, and that the Task Force, through the secretariat, should promote the inclusion of the Convention in the curricula of statutory judicial training.

40. On outreach, the secretariat drew attention to an initiative undertaken in Spain by the Spanish bar associations in 2007; brochures with key information on the Convention prepared in Spanish had been disseminated to most lawyers in the country using existing professional networks. It informed the Task Force that the update of the implementation guide was under way and that the Task Force would receive communications of the progress of this activity and its members would be provided with an opportunity to comment on the new draft.

41. The Task Force directed the secretariat to coordinate with the Chair and proceed with the development of training materials and to upload material from previous meetings to the website.

VI. Other business

42. It was agreed that the next meeting of the Task Force would take place in October 2010.

43. Further to the Chair's invitation, participants gave their feedback on the meeting. The format of the programme starting with a mini-conference was considered, as it had triggered reflection and discussions. It was suggested that future meetings follow this approach and link the topic of the mini-conference to the agenda items of the Task Force. Some participants noted with regret that there were only a few representatives of Parties at the meeting of the Task Force.

44. The Task Force expressed its gratitude to Norway for its contribution of US\$ 70,000 for the activities of the Task Force.

VII. Adoption of the report

45. The Task Force reviewed and provided comments on a draft of the meeting report. The Chair and the secretariat were mandated to finalize the report for submission to the Working Group of the Parties.

VIII. Closing of the meeting

46. The Chair thanked the participants, the secretariat and the interpreters, and closed the meeting.
