UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

CEP/WG.5/2001/5
3 October 2001

ORIGINAL: ENGLISH

ECONOMIC COMMISSION FOR EUROPE

COMMITTEE ON ENVIRONMENTAL POLICY

Working Group for the Preparation of the
First Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters
(First meeting, Geneva, 28-30 November 2001)

WORKSHOP ON ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS UNDER THE AARHUS CONVENTION

Introduction

1. At their second meeting, the Signatories to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters established a Task Force on Access to Justice, to be led by Estonia, to support the implementation of the third pillar of the Convention (CEP/WG.5/2000/2, para. 47). Following the suggestion of the Signatories, the Task Force held a workshop in Tallinn, Estonia on 17-19 September 2001. The Governments of Finland and the Netherlands provided financial assistance for the workshop to match the Estonian funds.

2. The workshop was attended by 52 participants, acting in their personal capacity, from governmental and non-governmental organizations from the following countries and organizations: Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Former Yugoslav Republic of Macedonia, Georgia, Germany, Kazakhstan, Latvia, Lithuania, Netherlands, Romania, Slovakia, Sweden, Ukraine, United Kingdom, Uzbekistan, Yugoslavia, European Commission, American Bar Association Central and Eastern European Law Initiative (ABA/CEELI), Regional Environmental Center for Central and Eastern Europe (REC), the European ECO Forum and the Environmental Law Association of Central and Eastern Europe and Newly Independent States (GUTA Association), the American Embassy in Estonia, Estonian Green Movement and Coalition Clean Baltic.

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3. Mr Allan Gromov, Deputy Secretary General, Ministry of the Environment, Estonia, welcomed the participants to the workshop. Estonia had been working for over two years to prepare the ratification of the Convention in August 2001 with the assistance of the Government of Denmark to whom Mr Gromov expressed his gratitude. He also thanked the Governments of Finland, the Netherlands and the United Kingdom and ABA/CEELI who had contributed to the workshop and the preparation of the handbook and expressed his best wishes for a successful workshop.

4. Ms Sofie H. Flensborg, from the secretariat, gave a brief update on the status of the Convention and the current developments under its auspices. Seventeen countries had ratified the Convention which would enter into force on 30 October 2001. The first meeting of the Parties would be likely to take place during autumn 2002, although no decision had been taken so far. A preparatory meeting for the first meeting of the Parties had been scheduled for 28-30 November 2001 to which the results of the workshop would be reported.

5. The representative of the lead country for the Task Force, Ms Rita Annus, Estonia, reminded the workshop of the mandate given to the Task Force by the second meeting of the Signatories. The Task Force should focus on good practice and should provide a forum for exchange of practical experience – it should not engage in refining the legal framework of the Convention. The aim of the workshop would be to provide an opportunity for sharing practical experience and to refine the concepts in the draft handbook. In addition, there would be a possibility to discuss possible further activities of the Task Force. She also introduced the agenda for the workshop and some questions that had been prepared in advance of the workshop.

6. As a representative of the main donor for the project on the draft handbook on access to justice, Ms Jayne Boys, United Kingdom, raised some points of importance to the UK. She emphasized the support of the UK to the Aarhus Convention and to the handbook project. Sharing practical experience on what works best had proven to be a good method in the case of the Newcastle Handbook on public participation and Ms Boys expressed the hope that the actual cases in the draft handbook could be a useful basis for discussions at the workshop and that these discussions would help in shaping the handbook. She thanked the people who had contributed to the drafting process and invited other people to submit comments and additional material for the finalization of the handbook.

7. Mr Hannes Veinla, Chair of the Environmental Law Department, Faculty of Law, Tartu University, Estonia, gave a presentation outlining the issue of access to justice in the Aarhus Convention. He focused on the characteristic features of article 9 and the purpose of access to justice both in general and in the context of the Aarhus Convention. He then raised some of the key issues of implementation, such as institutions, standing, remedies and costs. He concluded by emphasizing that every person should have access to a simple, brief and effective procedure for obtaining protection by a court or an alternative body against acts and omissions that affect any of the rights established under the Convention and national law.

8. Mr Stephen Stec, REC, coordinator of the project of the handbook, gave an introduction to the process of the development of the draft handbook, underlining the fact that the time

available to prepare the draft had been very limited and that a lot of editing and reviewing was still necessary. The draft handbook was in two parts, an analytical part and an appendix of case studies. He explained the process for the collection of case studies – 43 cases in total had been submitted – but also emphasized that more countries needed to submit cases and that the cases also needed more work. He expressed his gratitude to the partner organizations in the project, namely ABA/CEELI, the Environmental Law Alliance Worldwide (E-LAW), GUTA Association and European ECO Forum, and to others involved in the work of the Task Force.

9. Ms Cairo Robb, United Kingdom, reiterated the mandate of the Task Force which emphasized that it should focus on practical implementation and should provide models, concrete solutions and problem-solving approaches in the implementation of article 9. She highlighted some parts of the handbook such as the chapter on access to justice in public participation cases, the section on injunctive relief and the part on SLAPP suits. As to the case studies collected for the purposes of the draft handbook, article 9, paragraph 3, seemed quite lightly covered whereas many cases illustrated issues in relation to article 9, paragraph 2. She emphasized that the workshop should focus on the lessons that could be learned, both from the case studies and from exchanges of experience, which could then be reflected in the conclusions of the workshop.

10. The workshop organized its discussion in three smaller groups each facilitated by one of the participants. The smaller groups based their discussions on the draft handbook and on the questions which had been circulated in advance of the workshop. After each session, the smaller groups reported their conclusions back to the plenary.

I. GOOD PRACTICES IDENTIFIED

11. The main conclusions of the workshop are reflected below. In the discussions of the different topics, it became clear, taking into account the broad geographical scope of the UNECE countries, that different countries had different legal systems and that the contexts in which access to justice under the Aarhus Convention needed to operate were diverse in terms of legal and democratic traditions, as well as social, cultural and economic conditions. Therefore any conclusions on what can be learned from examples raised in the discussion in the workshop need to take this into account. Furthermore, even though the workshop had a wide representation of UNECE countries, it is likely that given the short time available, the need to simplify the examples and problems of language and terminology, not all existing examples of good practices were actually discussed and presented at the workshop itself. The following conclusions should be considered in the light of these limitations.

12. These conclusions are therefore a list of good examples that countries can use as a starting point when looking for examples of experiences in a particular field. They can then investigate in more depth how the example works, for instance by taking up bilateral contact with the workshop participant from that particular country. Furthermore, where concrete examples exist to illustrate the good practices suggested, or other good practices, these should be provided for the final version of the handbook, if they are not already there. Efforts should be made to ensure that all good practices listed below are adequately described in the final version of the Access to Justice Handbook.

A. Procedures - Article 9, paragraph 1

Review bodies

13. The question of the body to which a member of the public can appeal a refusal of access to information was considered in several sessions of the workshop. In the United Kingdom (England and Wales) a Freedom of Information Commissioner had been appointed to consider cases of denial of full access to information. The Commissioner was open to any person and his or her decisions were binding on the public authorities in question. In Estonia, there was a Data Protection Inspectorate which was an independent body providing a procedure which was quick, low cost and easily accessible. In Slovakia, a new Commission for Environmental Information had been established under the Ministry of Environment to consider these types of cases; it had independent members of both the judiciary and NGOs. In Ukraine, there were expeditious appeals procedures for these cases coupled with the possibility of claiming disciplinary penalties. (See also paras. 33 to 39 below on Review Bodies.)

Time frames

14. Concerning good practices for preliminary reconsideration and administrative review procedures with respect to cases concerning refusal of access to information, the question of time frames was considered. The obligation of the European Parliament, Council and Commission to internally reconsider an application for access to information within 15 days of the submission of the complaint (confirmative application) was considered to be good practice. Furthermore, a number of countries had one month in general for administrative (non-judicial) reviews; this was the case in the Czech Republic, Estonia, the former Yugoslav Republic of Macedonia and also other countries.

15. Concerning judicial review, six months from the appeal to the judicial system and until the final decision by the court, as is the target in England and Wales, seemed to be a good example of a timely judicial procedure. Another suggested good practice would be to reduce deadlines for refusal of information to allow the applicant to go forward with the complaint or appeal as soon as possible.

General

16. From the discussions, it seemed that the non-judicial review mechanisms were more efficient, timely and cheaper than court procedures, but that the court proceedings should be kept in place.

B. Procedures - Article 9, paragraph 2

Standing

17. There was a variety of ways in which the countries had dealt with the question of standing in relation to cases falling under article 9, paragraph 2, consistent with the Convention's objective of providing wide and effective access to justice. In Ukraine, every citizen could complain about

alleged violations of rights under article 9, paragraph 2, which seemed to be good practice. In the United Kingdom (England and Wales), the determination of 'sufficient interest' is left to the discretion of the court, which can interpret this flexibly enough to include not only NGOs, but also other citizens' organizations and residents and community groups as well as individual citizens.

Review bodies

18. In Denmark, the Environmental Appeals Boards were established by law. These Boards were independent from the Ministry, delivered what were considered to be high quality binding decisions and were therefore considered to be an example of good practice. (See also paras 33 to 39 below on Review Bodies.)

C. Procedures - Article 9, paragraph 3

Standing

19. For an NGO to have standing in cases under article 9, paragraph 3, in certain countries such as Belgium, certain criteria should be fulfilled, but once an NGO had proven to fulfil these - for instance that protection of the environment should be the objective stated in the charter or the bylaw of the NGO - it would have standing in all environmental cases.

20. *Actio popularis* existed in some countries, such as the Netherlands and Spain. The practical experiences with *actio popularis* were that it was rarely used in Spain but used quite often in the Netherlands.

Constitutional rights

21. In many countries, for instance Hungary, Belgium, Czech Republic, Kazakhstan, the former Yugoslav Republic of Macedonia, Slovakia, Spain, Yugoslavia and Ukraine, the public had a constitutional right to a healthy environment and in some countries also an obligation to protect the environment. Following from this constitutional right and, where applicable, obligation, there was a right of standing in the constitutional court in cases of alleged violation of the constitutional right.

Criminal proceedings

22. In a few countries, like Spain and the United States, it was possible for NGOs to challenge companies for violation of the environmental legislation directly in criminal proceedings. In the case of Spain, the NGO might have to join the public prosecutor in the case but further investigation was required to clarify this point.

Citizen enforcement

23. In the UK, while the main responsibility for enforcement lay with the authorities, in cases of nuisance, legislation provided that where the local enforcement authority had not acted, any person may ask the local court to make an order requiring a polluter who was causing a statutory nuisance to abate the pollution. If the polluter failed to comply with the notice, this was a criminal offence.

D. Remedies

Injunctive/interim relief

24. Rules and practices on injunctive relief seemed to be very different in different countries. Examples of good practice were identified in the Czech Republic and Germany, where a complaint in relation to a license or permit automatically suspends the decision taken by the public authority. In other countries, such as Hungary, the United Kingdom and the United States, injunctive relief is possible in certain circumstances. In some countries, the criteria are specified in the legislation, whereas in others the criteria were developed in court practice.

25. In Germany, no bond was required to obtain an interim injunction and the defendant was not entitled to sue for damages even if they won the case. In other countries, such as the United States and the United Kingdom, in environmental cases in the wider public interest, the court had discretion to require only a nominal bond (for example 1 USD) or no bond at all.

Timely procedures

26. To prevent lengthy court proceedings, case management techniques and timetables to be followed in court cases had been developed in some countries, like the United Kingdom (England and Wales), the United States and the Netherlands.

Mechanisms to avoid abuse of the legal system

27. In some countries, such as the United Kingdom (England and Wales), there were generally very strict time limits for bringing a case to the court where the case involved a challenge to a decision of a public authority. A court claim would have to be brought within three months after the final decision of the public authority.

Damages

28. The question of damages was considered to be relevant in some cases. In Ukraine, there was a regulation on how to calculate damages, whereas in most countries, it was left to the discretion of the judges/courts.

29. The practice in Ukraine and Russia to provide for moral damages in environmental cases was considered to be a good example of an effective remedy of redress.

Enforcement

30. Mechanisms to enforce court decisions were considered to be essential. In Belgium (Flanders), there was a possibility to issue instant penalties for non-compliance with court decisions and in United States, each day of violation of the court decision was considered to be a separate criminal offence of contempt of the court.

31. Imposing criminal responsibility on government officials who concealed environmental information, as for example in Russia and Kazakhstan, was considered to be an effective remedy as regards access to information.

32. Strict liability of entities carrying out hazardous activities was felt to be important because it shifted the burden of causation and was an appropriate allocation of the burden of risk. In some cases, strict liability was combined with requirements on operators to establish insurance funds or other financial guarantees to ensure that judgments against them could be enforced.

E. Review bodies and other bodies

Main review bodies

33. In most countries, the main review bodies under article 9, paragraphs 1 and 2, were the courts. However, some good examples of other independent and impartial bodies were mentioned in relation to article 9, paragraphs 1 and 2 (see paras. 13 and 18 above). In Sweden a specific Environmental Court had been established, which had jurisdiction in environmental law cases.

Independence and impartiality of the main review bodies

34. The independence of review bodies other than courts of law was in most cases secured by the statute or the law by which the body had been established, e.g. the Danish Appeal Boards. Financial independence was secured by separate budgets for the bodies.

35. The independence of the courts was secured through the appointments procedures, providing job security for judges, (e.g. higher judges are appointed for life or until retirement, and may only be removed in exceptional circumstances), providing adequate remuneration of judges, ensuring independence of funding for the judiciary and the independence of the judicial hierarchy from the main decision-making government departments.

36. It was considered important that courts and other independent bodies operated transparently. This could include providing annual reports on their activities, including statistics on numbers and types of cases, and publication of their decisions, for example on the Internet.

Reconsideration by a public authority

37. The existence of a reconsideration procedure was considered an important means to avoid or solve disputes at an early stage. Where a procedure for reconsideration by a public authority existed in the context of article 9, paragraphs 1 and 2, it seemed to be good practice that the administrative review would be performed by a different person than the one who made the decision in the first instance.

Ombudsman

38. In most countries, and in the European Union, there was an ombudsman institution, which seemed to be good practice, even if during the discussions it became clear that the institution would be quite different in different countries. Usually, ombudsmen would be independent, appointed by the Parliament and only responsible to the Parliament. In most countries, everybody had the right to complain to the ombudsman. In some countries, like Hungary, there were more ombudsmen dealing with different issues. Some ombudsmen dealt specifically with issues such as human rights and freedom of information. Other ombudsmen dealt only with cases of mal-administration. In some

countries, e.g. Spain, the ombudsman would have to deal with all complaints whereas in others, they had the discretion to decide whether they wanted to address a specific case or not, e.g. in Denmark. While decisions of most ombudsmen were non-binding, the publicity given to ombudsman cases and reports could help to ensure that decisions of the ombudsman were taken seriously. However, the ombudsman in Moldova was able to issue legally binding decisions.

Mediation

39. In some countries, mediation existed as an alternative to more formal action. While this was not suitable for all types of dispute, it could provide an accessible no or low cost option in some cases. Availability of mediation services could reduce the need for the use of more formal mechanisms for access to justice, such as litigation in the courts. This could be especially useful in local and neighbour disputes.

F. Overcoming financial barriers

Legal aid schemes

40. Most countries had legal aid schemes to assist individuals when they seek access to justice before the courts, which were considered to be a good means for overcoming financial barriers. These schemes could cover some or all of the following: initial investigation costs, court fees, attorney fees for advice and for representation in court, and expert fees. The assistance could be financial or could be in the form of direct provision of services. In most countries, the assistance was only available to individuals, and usually would depend on the financial situation of the applicant. In some cases, the assistance would also depend on the chances of a successful outcome for the plaintiff in the court case. However, a good example of extended access to legal aid seemed to be the German system, where NGOs could also apply for financial assistance in higher courts and the supreme court without having to show chances of a successful outcome.

41. Even where legal aid schemes were available, it was considered important to provide other mechanisms to overcome financial barriers which still existed for those not eligible for legal aid.

Initial investigation prior to court action

42. A robust state-run environmental regulatory and enforcement system could play a significant role in investigation and information gathering prior to court actions. It was considered to be good practice that the implementation of the access to environmental information provisions of the convention enabled citizens to obtain such information at no or low cost.

Court fees

43. In some countries, such as Spain, free access to courts was available in some cases, whereas in others, like the United States and Hungary, only a low nominal fee was necessary to start a case in front of the court, and in yet others, like the United Kingdom and Bulgaria, the court fee could be waived or reduced, inter alia, depending on the income of the plaintiff, even if the lawsuit was unsuccessful.

Attorney fees

44. A practice of pro bono lawyers was quite developed in the US but less available in Europe.

In Hungary and the Ukraine certain NGOs specialized in providing free legal advice in environmental cases. In some countries, certain NGOs always had the right to a free lawyer. In other countries, groups of lawyers existed to promote special types of cases, such as environmental cases. In some proceedings there was no requirement to be represented by a lawyer, and so attorney's fees could be avoided altogether. This was the case with the Danish Environmental Appeals Boards and the Netherlands Administrative Courts.

Expert fees

45. Some good examples of how to overcome barriers posed by expert fees were identified. In Spain, a judge could decide that the court itself should cover expert fees. In one of the Spanish courts, a toxicologist had been employed directly by the court to help in technical matters. In some countries, it was left to the discretion of judges who should pay expert fees. The creation of new public interest networks and support for existing ones could help to reduce the need for and the cost of experts.

General support to public interest NGOs

46. The provision of tax deduction incentives for private donations, as in Germany and the UK, was regarded as a good example of helping NGOs to overcome financial barriers in general, which in turn could have benefits on access to justice. In Spain, Hungary and the United States, there was a possibility of more favourable tax rules for public interest NGOs themselves. Some governments, for example Germany and the Netherlands, annually gave funds to NGOs, including environmental NGOs whose projects could lead to court actions. In some countries, the court could order that the fine of a polluting company be paid directly to NGOs with the objective of environmental protection; that was the case in Germany and Uzbekistan. Some participants in the workshop felt that under the Aarhus Convention, it should be the general objective to reduce fees or give free access to court to public interest NGOs.

Financial certainty and cost shifting

47. In certain cases it was not just the absolute costs of bringing an environmental action that created a financial barrier, but also the uncertainty in relation to the costs – especially the risk of having to pay the other side's costs where fee-shifting was practiced. It was considered good practice to be able to provide more certainty from the outset to those bringing actions in the public interest. In Germany, for example, there were fixed maximums for the costs of certain types of actions. In the United Kingdom, it was possible for a judge to make a pre-emptive costs ruling at the outset of a case that the applicant bringing a case in the public interest would not be held liable for the other side's costs, even if the applicant were to lose.

48. At the end of a case, in some countries such as the United Kingdom and the Netherlands, the judge had a discretion to limit the amount of the other side's costs that a losing applicant would have to pay in the light of the nature of the case and the conduct of the defendant.

General

49. A good practice to overcome financial barriers to access to justice in general was considered

to be the use of non-judicial mechanisms as they were generally cheaper and less time-consuming. Good quality of administrative decision-making reduced the needs to go court and thus the number of court cases, which was likely to save costs for all parties.

G. Overcoming other barriers and other issues not addressed in other sessions

Capacity building

50. Capacity building was identified in both smaller working group sessions and in plenary as key to good practice in implementing the access to justice provisions under the Convention. This could take the form both of capacity building at home, and in partnership projects with other states. Partnership projects could be particularly important where states shared a reliance on a specific common natural resource. It was felt important that the needs of different target groups, such as judges and lawyers, government officials, NGOs and the general public were all addressed. Strengthening capacity in relation to access to justice under the Aarhus Convention would have a positive effect on other areas of law. It was noted that a lot of the elements necessary to increase the capacities were already available – what was needed was political priority and adequate resources.

Capacity building of government officials

51. The handbook was considered to be addressed to government officials, whom it was intended to assist in identifying possible elements of good practice.

Capacity building of judges and lawyers

52. It was felt that the knowledge of the judiciary and members of other review bodies should be improved through training and workshops on the issues liable to arise in environmental cases. One way of ensuring this was identified in Sweden, which had a specific Environmental Court whose judges specialized in environmental cases. What was important was that training and, where necessary, technical assistance were available to those judges likely to come across relevant cases. The UK system of justices clerks, who assist and provide advice to Magistrates, was presented as an example of a way of channeling environmental expertise into the judiciary. Training for lawyers was also considered to be good practice. This could be done in conjunction with university courses, and could involve students' participation in university environmental law clinics as in the Ukraine. It was also regarded as important that all lawyers had access to court decisions, and it was considered good practice for courts to publicise their decisions, and especially for Supreme Courts to publish all their decisions, for example on the internet as is done in Estonia, Russia and the United Kingdom.

Public awareness

53. It was felt useful to share experience on public awareness campaigns, even if they concerned another topic. The use of electronic tools was emphasized as a good solution to reach the public. The public seemed not to be aware of their environmental rights in many countries. State-funded public advice centres, such as the Citizens' Advice Bureaux in the United Kingdom and university law clinics existing in Estonia and the Ukraine, could be used to educate and assist the

public in relation to their environmental rights. Good practice included strategies which took a long term approach to awareness-raising, to ensure that the effect of the awareness-raising campaign would be carried forward. For this reason it was important to take awareness raising seriously, to plan it carefully, and to involve NGOs and other community groups in spreading the message.

54. Fostering constructive relationships between the different actors was regarded as good practice. For example, in Kazakhstan, the Ministry of Natural Resources, the Parliament and NGOs had entered into a special agreement on the implementation of the Aarhus Convention and through this were able to disseminate information quickly through these outlets. Similar agreements had also been signed at the local level. In Georgia, the Environment Ministry held regular national and regional Saturday morning meetings with NGOs.

II. NEXT STEPS – FUTURE ACTIVITIES OF THE TASK FORCE

55. The participants at the workshop felt that it was important that the work of the Task Force continue, and discussed what the possible next activities should be in terms of finalization of the handbook and other activities.

Handbook

56. Concerning the handbook, it was agreed that the draft handbook should be finalized taking into consideration the findings of the workshop. The lead country, Estonia, would take the lead in the process of finalization. Participants would be invited to submit written comments on the handbook to Estonia and would also be invited to submit more details on specific identified good solutions to certain problems. The deadline for submission of comments would be communicated to the participants as well as to the Focal Points to the Aarhus Convention.

Questionnaire

57. One of the findings of the workshop was that the legal systems throughout the UNECE region were very different and that it was therefore quite difficult to assess the usefulness of the models and examples identified at the workshop and in the draft handbook. Taking this into consideration, the lead country informed the participants of its intention to circulate a questionnaire to all countries which would help to gather general information on the legal systems of access to justice in the different countries. The questionnaire would be simple, easy to complete and not designed with the intention of conducting an in-depth analysis of the legal systems. The survey would provide background material which would help in the understanding of the differences in legal systems in the region.

Other proposed activities

58. On the basis of the understanding that the handbook would be mainly addressed to government officials and others involved and responsible for the implementation of the Convention, it was considered to be important for the Task Force to also assess and address the needs of other target groups such as the public, lawyers and judges.

59. Some participants felt that a next step could be for each country to do an analysis of its legal and practical systems in place on access to justice. Such an analysis could use the findings of the workshop and the handbook to identify priorities for improvements.

60. The lead country invited all participants to consider further financial and other contributions to the future work of the Task Force. Some participants indicated that they would look into the possibility of providing such support.

III. CLOSURE OF THE WORKSHOP

61. The participants expressed their gratitude to the lead country for the organization of the workshop, and the lead country thanked all participants, facilitators, rapporteurs, the interpreters and the secretariat for their efforts.