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Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Working Group of the Parties

Twenty-first meeting

Geneva, 4–6 April 2017

Item 3 (c) of the provisional agenda

Substantive issues: access to justice

Report of the Task Force on Access to Justice on its ninth meeting

Summary

At its second session (Almaty, Kazakhstan, 25–27 May 2005), by its decision II/2, the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters established the Task Force on Access to Justice to undertake a number of tasks related to promoting access to justice in environmental matters, including analytical work on the financial and other barriers to access and the sharing of relevant experience and examples of good practice (ECE/MP.PP/2005/2/Add.3, paras. 30–33).¹ By that same decision, the Task Force was requested to present the results of its work for consideration and appropriate action by the Working Group of the Parties. At its fifth session (Maastricht, the Netherlands, 30 June–1 July 2014), the Meeting of the Parties renewed the mandate of the Task Force to carry out further work (see ECE/MP.PP/2014/2/Add.1, decision V/3).²

Pursuant to the above mandates, the present report of the Task Force on its ninth meeting (Geneva, 14–15 June 2016) is being submitted for the consideration of the Working Group of the Parties at its twenty-first session.

¹ Available from <http://www.unece.org/env/pp/mop2/mop2.doc.html>.

² Available from http://www.unece.org/env/pp/aarhus/mop5_docs.html#.

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Introduction

1. The ninth 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 on 14 and 15 June 2016 in Geneva, Switzerland.³
2. The meeting was attended by experts designated by the Governments of Armenia, Austria, Denmark, Estonia, Georgia, Germany, Ireland, Italy, Latvia, Montenegro, the Republic of Moldova, Slovakia, Spain, Sweden, Switzerland, Tajikistan, Turkmenistan, Ukraine and the United Kingdom of Great Britain and Northern Ireland (the latter, by audio link). A representative of the European Commission was present on behalf of the European Union. A representative of the European Investment Bank was also present.
3. Delegates from Guinea-Bissau and Uzbekistan attended the meeting.
4. Also attending the meeting were a number of judges and representatives of judicial institutions and review bodies from Armenia, Azerbaijan, Croatia, Georgia, Iceland, Hungary, Kazakhstan, Kyrgyzstan, the Republic of Moldova, Serbia, Slovakia, Tajikistan, Ukraine and the former Yugoslav Republic of Macedonia. Some of these participants also represented the European Union Forum of Judges for the Environment.
5. The following non-governmental organizations (NGOs) were represented at the meeting: Article 19 (United Kingdom); BLEJAN (Armenia); the Bureau of Environmental Investigation (Ukraine); Center of Economic and Legal Analyses (Armenia); Ecohome (Belarus); Justice and Environment (European Network of Environmental Law Organizations); International Institute for Law and the Environment (Spain); International-Lawyers.org (Switzerland); New Alaverdi (Armenia); OT Watch (Mongolia); the Royal Society for the Protection of Birds (United Kingdom); and the Swedish Society for Nature Conservation (Sweden).
6. Representatives of Aarhus Centres, the Environmental Law Resource Center of the Yerevan State University (Armenia), the University of Rennes (France), Leuphana University (Germany), Kazakh National University (Kazakhstan), the Graduate Institute of International and Development Studies (Switzerland), Osaka University (Japan), the Regional Environmental Centre for Central and Eastern Europe and other experts also attended the meeting.

I. Opening of the meeting and adoption of the agenda

7. The Task Force Chair, Mr. Jan Darpö (Sweden), opened the meeting.
8. The Task Force adopted its agenda as set out in document AC/TF.AJ-9/Inf.1.

³ Documents for the ninth meeting, including a list of participants, statements and presentations, are available online from <http://www.unece.org/index.php?id=41958#/>.

II. Promoting effective access to justice: recent developments

A. Update on legislative, policy and case law developments

9. The Chair opened the discussion on recent legislative, policy and case law developments, drawing the attention to a background document (AC/TF.AJ-9/Inf.2) by the secretariat listing the general compliance issues considered by the Meeting of the Parties at its fifth session (Maastricht, the Netherlands, 30 June–1 July 2014) and the recent findings of a systemic nature adopted by the Compliance Committee since the fifth session on access to justice matters.

10. Written inputs to the session were also provided by the national focal points of Armenia and Serbia, by the coalition of NGOs “Environment Links” and by Justice and Environment.

11. The Chair recalled that the Parties to the Convention had agreed to take actions at the national and international level in accordance with the Strategic Plan for 2015–2020 (ECE/MP.PP/2014/2/Add.1, decision V/5, annex)⁴ in order to ensure timely and effective access to administrative or judicial review procedures for members of the public to challenge acts and omissions that contravened provisions of national environmental law and to reduce and eliminate financial and other barriers that might prevent access to such review procedures, and to establish assistance mechanisms to that end.⁵

12. The Chair discussed the linkages between the Aarhus Convention provisions and the principle of legal protection in European Union law. He examined whether the ban on judicial appeal and the lack of standing of environmental NGOs to challenge wolf hunting licences issued at the regional level in Sweden in the courts would allow the effective implementation of the European Union nature conservation law, and whether it would be in conformity with article 9, paragraphs 3 and 4, of the Convention. He drew attention to the findings of the relevant case before the Swedish Supreme Administrative Court, which had disregarded the ban on appeals in such cases in order to ensure the *effet utile* of the European Union nature conservation law, and had also allowed environmental NGOs standing in such cases.⁶

13. A representative of the European Forum of Judges for the Environment took stock of recent cases related to the standing of environmental NGOs in cases related to protecting the public interest, compensation for environmental damage and challenging insufficient actions of public authorities in reducing greenhouse gas emissions. She reaffirmed the importance of interpreting the criteria laid down in national law for the standing of environmental NGOs in conformity with the objectives of article 9, paragraph 3, of the Aarhus Convention.

14. Representatives of the Ministry of Justice of the United Kingdom informed participants about a proposal to amend the Environmental Costs Protection Regime in England and Wales as a result of recent developments in relevant case law. The proposals included extending the regime to certain statutory reviews, clarifying the types of claimant eligible for cost protection, allowing the courts to tailor the level of costs protection and

⁴ Available from http://www.unece.org/env/pp/aarhus/mop5_docs.html.

⁵ See in particular objectives I.12, I.13 and III.7 of the Strategic Plan.

⁶ See case summary of the Swedish Supreme Administrative Court, case HFD 2015 ref 79 (“Case re Appeal Ban of Hunting Decisions”) available from <http://www.unece.org/env/pp/tfaj/jurisprudenceplatform.html>.

some other clarifications and requirements. The speakers also outlined the next steps and the possible timeline for implementing those proposals.

15. A representative from Leuphana University, Germany, presented a recent case⁷ decided by the Court of Justice of the European Union regarding the failure of Germany to fulfil certain of its obligations related to access to justice under the European Union Environmental Impact Assessment (EIA) Directive⁸ and Industrial Emissions Directive.⁹ He focused on access to justice restrictions in the following areas: (a) the annulment of administrative decisions covered by the EIA and Industrial Emissions Directives; (b) the annulment of decisions regarding activities for which environmental impact assessment or pre-assessment had not been carried out; and (c) standing for members of the public to bring proceedings. Lifting those restrictions might result in decreasing complainants' recourse to administrative procedures and increasing their recourse to judicial review procedures.

16. A representative of the Supreme Court of Kazakhstan provided an overview of measures that had been introduced to further develop the country's judicial system and strengthen the rule of law. Those included, in particular: the simplification of legal proceedings, by reducing the number of instances and the establishment of a specialized judicial board for the resolution of disputes involving large investors; audio and video recording of all proceedings; establishing a council of international experts to advise the Supreme Court; introducing an electronic documents management system; adopting a new Civil Procedure Code; and strengthening the accountability of judges, including by introducing the possibility to challenge a judge's actions before the Judicial Jury at the Supreme Court. International cooperation, continuous dialogue with the public and other stakeholders and judicial training programmes had all played an important role in advancing the implementation of the access to justice pillar of the Convention in Kazakhstan.

17. In the subsequent discussion, the participants:

(a) Highlighted the importance of a clear domestic legal framework for providing effective access to justice in environmental matters to members of the public and advancing the implementation of article 9, paragraph 3, of the Convention, and discussed the preparation of a possible guidance document at the European Union level in that regard, noting that such guidance should be developed through a wide public consultation procedure;

(b) Underlined the important role of effective access to justice in environmental matters for the implementation of multilateral environmental agreements, in particular the Paris Agreement under the United Nations Framework Convention on Climate Change;

(c) Looked at the linkages in different legal systems between the participation of members of the public in environmental decision-making and their further standing in courts to challenge the substantive and procedural legality of the related decisions, acts or omissions of public authorities, and highlighted the possibilities for appeal regardless of the participation of members of the public in decision-making procedures (e.g., in Latvia and the Republic of Moldova);

⁷ Case C-137/14, *Commission v. Germany*, 2015, available from <http://curia.europa.eu/>.

⁸ Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as amended.

⁹ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

(d) Expressed concern about existing financial barriers to access to justice in environmental matters in some countries and the sharp increase of court fees that might preclude members of the public from going to court (e.g., in Ukraine);

(e) Noted recent developments that had widened the standing of members of the public in environmental cases, for example, in Latvia where recent case law granted standing rights to members of the public, without the need to prove their subjective rights had been violated, in cases requesting the public authorities to take effective action to stop violations of environmental law, or requesting a compulsory execution measure to address an omission.

18. Following the discussion, the Task Force:

(a) Took note of the recent developments related to access to justice reported by the speakers;

(b) Highlighted that standing, costs and the scope of review remained important issues for Parties to the Convention;

(c) Called on Parties, partner organizations and other stakeholders to take all necessary measures to implement the relevant objectives of the Convention's Strategic Plan.

B. Update on capacity-building initiatives

19. The participants discussed recent capacity-building initiatives carried out by Parties, partner organizations and other stakeholders.

20. A representative of the Academy of Justice of Azerbaijan presented the Academy's efforts to improve the qualification of judges and other legal specialists with regard to access to justice in environmental matters. She outlined the existing initial and in-service training concepts, highlighted the use of the Task Force outputs and elaborated on potential improvements, such as the development of online resources.

21. A representative of the Center for Economic and Legal Analysis, Armenia, presented the findings of a methodology manual for the effective exercise of rights in the domain of the environment and economic management, which had been prepared with the support of the Organization for Security and Cooperation in Europe Office in Yerevan and in cooperation with the Office of the Coordinator of OSCE Economic and Environmental Activities. In particular, the speaker suggested revising the competences of Ombudsman in Armenia, providing NGOs with standing in environmental cases and providing a legal framework for class actions.

22. A representative of the Regional Environmental Centre for Central and Eastern Europe talked about fundraising for a project to improve access to justice in environmental matters in South-Eastern Europe that would include trainings in local languages and contribute to the analytical work of the Task Force in those countries that had not been studied so far.

23. A representative of Justice and Environment highlighted the outcomes of a seminar held in Croatia on the application of the Convention to spatial planning and nature conservation matters.

24. Some participants presented their experience in the integration of access to justice in environmental matters into the curriculum of different institutions, and highlighted the importance of raising awareness and building the capacities of public interest lawyers and the students of law faculties.

25. Following the discussion, the Task Force:
- (a) Welcomed the capacity-building initiatives reported by speakers;
 - (b) Also welcomed the examples of the integration of access to justice in environmental matters into the curriculum of law faculties, public administrations, judicial training institutions and other relevant institutions, and called for such integration to be further promoted;
 - (c) Suggested giving particular priority within the capacity-building activities under the Convention to removing barriers to access to justice with regard to standing, costs and effective remedies, and facilitating national dialogues aimed at removing such barriers;
 - (d) Called on Parties, partner organizations and other stakeholders to continue addressing the above-mentioned issues through their activities;
 - (e) Encouraged wider use of electronic information tools for capacity-building activities related to access to justice.

III. Thematic session on the scope of review

26. In a discussion on the scope of review, participants shared experiences on what decisions, acts or omissions could be the subject of administrative appeal and judicial review in accordance with the Convention's article 9, what could be the grounds for their review and to what extent both procedural and substantive issues might be reviewed.

27. A representative of Germany presented progress in carrying out a comparative study in France, Italy, Poland, Sweden and the United Kingdom on the implementation of article 9, paragraphs 2–4, of the Convention. The study covered, among others, such issues as the scope and intensity of judicial review and the implementation of article 9, paragraph 3, in the respective legal systems. It was noted that access to justice was restricted under many sectoral laws beyond environmental impact assessment and nature conservation law. Standing of members of the public in all the legal systems examined except for Germany was applied using an interest-based approach to prove sufficient and legitimate interest in the matter; however, the necessary "interest" was nevertheless recognized very generously in most cases. Accordingly, questions of the admissibility of a legal action did not play a great role in practice. The speaker also noticed that the study had not revealed a correlation in the legal frameworks between standing in environmental cases and the intensity of judicial review, in the sense that a broader concept of standing should go along with a limited judicial review on the merits. Preliminary outcomes showed a wide spectrum of levels regarding the intensity of judicial review — from low judicial control in the United Kingdom to high judicial control in Germany and in particular in Sweden.

28. A representative of Switzerland briefed the Task Force about a landmark case brought by BirdLife Switzerland before the Swiss Supreme Court challenging the shooting of some protected birds sanctioned by an internal administrative document, without a formal ruling from the public authorities. Referring to article 9, paragraph 3, of the Aarhus Convention, the Supreme Court had decided that a decision of the public authorities that could impact on nature protection concerns could not be taken in the form of simple internal instructions, but should be issued as a formal ruling. Additionally, the qualification of such a decision as a formal ruling also could not depend on a quantity criterion (i.e., when measures concerned less than 10 per cent of the local species population). Therefore, NGOs promoting environmental protection had standing to appeal those decisions.

29. A representative of the Environmental and Natural Resources Board of Appeal of Iceland presented the review of administrative decisions in Iceland and the Board's role in

implementing the third pillar of the Aarhus Convention. She explained what could be reviewed, who could ask for review, who carried out the review and what its scope was. The Board of Appeal was entitled to review cases within the scope of article 9 of the Aarhus Convention. Some advantages of the proceedings before the Board of Appeal included the possibility of obtaining interim injunctive relief, and the fact that there were no costs involved or legal representation required. Decisions by the Board were binding, but could be appealed in the courts. On appeal a court could either quash or uphold the Board's decisions, but in practice such appeals were rare. Decisions by the Board could also be the subject of complaints to the Ombudsman. There was a need to ensure proper timeliness of the proceedings before the Board of Appeal, and to eliminate the existing backlog, and also to address the findings by the European Free Trade Agreement Surveillance Authority concerning the lack of possibility to challenge omissions of public authorities in accordance with article 11, paragraph 1, of the Environmental Impact Assessment Directive.

30. An expert from the Royal Society for the Protection of Birds and the Wildlife and Countryside Link in the United Kingdom informed the Task Force about the intensity of judicial review in the United Kingdom. There was an inequality between third parties and developers with regard to the scope of their right to appeal decisions (the latter enjoying the right to appeal involving a full merits review). Judicial review in England and Wales for third parties was more focused on procedural rather than substantive impropriety. She explained the challenges in the application of the commonly used *Wednesbury* unreasonableness test to review the substantive legality of contested decisions of public authorities in environmental matters. There had been a gradual move towards the use of the proportionality principle in the review of decisions in other areas of law, especially in cases involving European Union law, and she suggested that protected interests under European Union law could be extended to include environmental protection. It was difficult to find common ground between the various Parties regarding the intensity of review. The concept of substantive legality and its effective review under the Aarhus Convention needed further elaboration.

31. A representative of the Bureau of Environmental Investigation presented the preliminary findings of an analytical study carried out under the auspices of the Task Force in Albania, Armenia, Belarus, Kazakhstan, Serbia and Ukraine with regard to the scope of administrative and judicial review to challenge the substantive and procedural legality of decisions, acts and omissions by public authorities. In particular, in cases of judicial review members of the public would have standing before a court to protect their impaired rights, freedoms or legitimate interests regardless of their participation in the decision-making procedures in question. Some decisions could not be challenged in judicial review owing to its form (e.g., law) or to the level of the decision-making authority (e.g., President or parliament). Further consideration and clarification in the selected countries might be required to challenge an expert's conclusions or reports relating to environmental matters that had provided a basis for the adoption of a decision by public authority in a complex decision-making procedure to permit specific activities.

32. The representative of the Bureau of Environmental Investigation also described court powers and the criteria to review a contested decision, act or omission by public authorities. In most of the countries studied (e.g., Albania, Armenia, Serbia and Ukraine) a court could impose an obligation on public authorities to issue a certain decision if such an obligation was clearly set out by law. In most of the countries, courts could also partly quash a contested decision or certain of its provisions or recognize them as void, which in some cases might lead to changing the substance of the decision (e.g., in access to information cases). In Serbia, if an administrative court adopted a judgment ordering a public authority to adopt a new decision, the legal opinion and the remarks of the court regarding the decision-making procedure should be considered in the further decision-making procedure. In Ukraine, the decisions of the public authorities were reviewed by

administrative courts on the basis of 10 criteria clearly defined in the Code of Administrative Legal Proceedings, including, among others, proportionality, reasonableness and timeliness.

33. In the subsequent discussion, some participants noted the possibilities to challenge normative legislative acts of the president and parliaments in certain countries, and possible undesirable impacts of judicial reform on the administrative justice system in Ukraine.

34. Following the discussion, the Task Force:

(a) Welcomed the progress in carrying out the study on the scope of review in France, Germany, Italy, Poland, Sweden and the United Kingdom, led by Germany, and the study on the same matter in Albania, Armenia, Belarus, Kazakhstan, Serbia and Ukraine launched under the auspices of the Task Force;

(b) Requested the secretariat, in consultation with the Chair, to revise the study launched under the auspices of the Task Force, as discussed at the meeting. The revised study would be circulated by 20 July 2016. National focal points and stakeholders were invited to provide their comments to the secretariat on the second draft by 19 August 2016;

(c) Recognized the pivotal role of constitutional justice in ensuring the effective implementation of the Convention;

(d) Highlighted various approaches used by the Parties to the Convention in defining the scope and intensity of the review procedure to challenge decisions, acts and omissions by public authorities, in accordance with article 9 of the Convention, and called for Parties to consider the linkages between the scope and intensity of review with standing, adequate and effective remedies and costs in order to ensure effective access to justice in environmental matters;

(e) Welcomed the expansion of the study on the scope of review to other interested Parties that had not been covered so far.

IV. The way forward

35. Participants then discussed any emerging issues or issues of a systemic nature related to effective access to justice that the Task Force could address in the next intersessional period, and how to address them.

36. Opening the discussion, the Chair recalled that the work on access to justice was implemented in accordance with decision V/3, but was also guided by the Convention's Strategic Plan and Sustainable Development Goal 16, especially target 16.3 on access to justice for all. Delegates were invited to discuss suggestions outlined in his note on possible future directions for the work (AC/WGP-20/Inf.3).

37. Some participants highlighted the need to strengthen the collection and accessibility of data on adjudication of environmental cases and environmental NGOs activism, with a view to effectively monitoring progress in the implementation of the Convention.

38. Participants generally supported the focus of the Task Force work on overcoming barriers to access to justice and sharing good practices on identified issues. Among others, that could include sharing information on the intensity of the review and its connection with the effectiveness of access to justice; providing effective remedies; and removing financial barriers through, for example, establishing public interest litigation funds, improving legal aid schemes or using other means.

39. Some participants drew attention to cases that had given rise to concerns of persecution and harassment of environmental activists and whistle-blowers, and the need to exchange information and experiences on the work to protect such persons.

40. The participants also discussed how to make the best use of the findings of the analytical studies carried out under the Task Force, through identifying good practices and consolidating possible suggestions for advancing the implementation of access to justice pillar of the Convention.

41. Following the discussion, the Task Force:

(a) Welcomed the note by the Chair on possible future directions for the work of the Task Force on Access to Justice;

(b) Suggested that the following issues be given particular priority:

(i) Effective access to justice in information cases (art. 9, para. 1, in conjunction with art. 9, para. 4, of the Convention);

(ii) The scope of review and other issues related to effective access to review of acts or omissions that contravened permit requirements or laws relating to the environment, including with regard to spatial planning (art. 9, paras. 2–3, in conjunction with art. 9, para. 4, of the Convention);

(iii) Removing financial barriers to access to justice (art. 9, paras. 4–5);

(c) Reiterated its continuous support for the promotion of multi-stakeholder dialogues, e-justice initiatives, capacity-building at all levels, dissemination of information on access to review procedures and relevant case law and the collection of relevant statistics;

(d) Welcomed the analytical studies on access to justice prepared under the auspices of the Task Force and those led by several Parties to the Convention, and suggested the elaboration of a synthesis report highlighting the main findings and good practices of the studies;

(e) Called for the promotion of networking of members of the judiciary, judicial institutions and other review bodies across the pan-European region under the auspices of the Task Force, and for the further strengthening of cooperation with existing networks of judges, public interest lawyers, other legal professionals and other international forums, in order to exchange information, especially with a view to achieving Sustainable Development Goal 16 and meeting its target 16.3;

(f) Reiterated the importance of the Task Force as a multi-stakeholder platform and welcomed the proposal to organize a possible workshop under the auspices of the Task Force on the topics outlined in its mandate with the participation of representatives of the Parties, members of the judiciary and other review bodies, international organizations, non-governmental organizations, public interest lawyers, academia and other stakeholders.

V. Approval of key outcomes and closing of the meeting

42. The Task Force agreed the key outcomes of the meeting (AC/TF.AJ-9/Inf.3) and requested the secretariat, in consultation with the Chair, to finalize the report and to incorporate those outcomes in the meeting report. The Chair thanked the speakers, the participants, the secretariat and the interpreters and closed the meeting.
