UNITED NATIONS **E**

Economic and Social Council

Distr.
LIMITED

ECE/MP.PP/WG.1/2007/L.10
10 October 2007

Original: ENGLISH

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 to the Convention

Eighth meeting
Geneva, 31 October–2 November 2007
Item 6 of the provisional agenda

ACCESS TO JUSTICE

REPORT OF THE TASK FORCE ON ACCESS TO JUSTICE ON ITS SECOND MEETING[1]

Summary

The second 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 10 to 12 September 2007. The meeting, which brought together national experts, as well as judges and academics from the region, was organized pursuant to the Working Group of the Parties' work plan for 2006-2008 (ECE/MP.PP/WG.1/2006/2) started with a one-day mini-conference on Opening the Doors to Justice: the Challenge of Strengthening Public Access.

[1] This document could not be submitted by the usual deadline for meeting documentation because the Task Force meeting took place some weeks after that deadline.

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INTRODUCTION

1. The second meeting of the Task Force on Access to Justice, established by the Parties to the Convention at their second meeting (decision II/2), was held in Geneva from 10 to 12 September 2007.

2. The meeting was attended by experts designated by the Governments of Armenia, Azerbaijan, Belarus, Belgium, the Czech Republic, Denmark, Estonia, France, Germany, Latvia, Moldova, Slovenia, Sweden, Switzerland, Ukraine and the United Kingdom of Great Britain and Northern Ireland.

3. The European Commission (EC) was present on behalf of the European Community.

4. Representatives of the United Nations Institute for Training and Research (UNITAR) and the Regional Environmental Center for Central and Eastern Europe (REC) attended the meeting.

5. The following regional and international non-governmental organizations (NGOs) were represented: the Access Initiative (TAI), Earthjustice (Switzerland), the European ECO-Forum, the European Union Forum of Judges for the Environment (EUFJE) and the Institute for European Environmental Policy (Belgium).

6. The following national NGOs were represented: Friends of the Irish Environment (Ireland), Citizen and Democracy Association (Slovakia), Environmental Justice Association (AJA) (Spain), Ecological Society Green Salvation (Kazakhstan), the Union of Advocates of Ukraine and the WorldWide Fund for Nature (WWF-UK).

7. A number of international experts, high-level judges and representatives of national judicial training institutions (JTIs) also attended the meeting.

8. The Chairperson of the Task Force, Mr. Håkan Bengtsson (Sweden), opened the meeting.

Part One

MINI-CONFERENCE ON OPENING THE DOORS TO JUSTICE: THE CHALLENGE OF STRENGTHENING PUBLIC ACCESS

9. The first day of the meeting took the form of a “mini-conference” on the theme of “Opening the Doors to Justice: The Challenge of Strengthening Public Access”, with presentations by a number of leading experts in the field. The aim of the conference was to allow for the free exchange of opinions on the “burning issues” in the implementation of the third pillar of the Convention between a wider range of stakeholders than normally participates in Task Force meetings. They included representatives of ministries of justice, high-level judges and representatives of national JTIs.

10. The morning session, chaired by Professor Vasyl Kostytsky, Academic Director of the Institute of Legislative Initiative and Legal Assessment and incoming judge at the Constitutional Court of Ukraine, addressed the main issues in implementing article 9 of the Convention, including standing and remedies.

11. Professor Ludwig Kraemer of the Universities of Bremen and Copenhagen, former judge at the Landgericht Kiel, Germany, presented an overview of the key challenges in implementing access to justice. He argued that there was a strong need to have a check on the acts and omissions of the administrative authorities to balance their power to protect and preserve the environment against the interests of the "voiceless environment". However, broad access to justice could not be reached by maintaining the status quo but required a change in the legislative and/or judicial practices of all Parties. In this regard, injunctive relief, length of procedures and determination of costs, in particular, had been identified as often presenting obstacles to effective environmental protection. The courts could play an important role in interpreting relevant legal rules in line with the objectives of the Convention and thus objectively balance the interests of applicants acting altruistically to protect the general interest "environment" against the interests of operators, polluters or administrations. In summary, two key questions need to be asked: (a) Who shall protect the environment: the administration or (also) civil society? (b) How can the environment be protected against administrative acts or omissions, inertia or negligence? In suggesting wide access to the courts for citizens and environmental organisations, the Convention gives a clear answer to both questions.

12. Ms. Carol Hatton, WWF-UK, gave a presentation on "Access for whom? – The issue of legal standing". After a brief summary of the provisions for standing under article 9 of the Convention, she examined the four broad categories of standing in article 9, paragraph 4, including issues such as *actio popularis*, legislated standing for recognized NGOs, sufficient interest standing, and restrictive subjective requirements for standing. Taking the European Court of Justice as an example of the fourth model, the speaker illustrated with case law the narrow interpretation of direct and individual concern taken by the Court. Reference was made to a study by De Sadeleer et al. (2002), which had concluded that the standing criteria imposed by the Parties represented a significant hurdle to access to environmental justice for NGOs. She concluded by stressing the need to finalize the draft EC Directive on access to justice in environmental matters, the important contribution the judiciary could make in adopting a broad interpretation of standing criteria, and the need for regular monitoring and review in order to highlight good practice and maintain pressure on the Parties to promote wide access to justice.

13. In his presentation, Professor Jan Darpö, University of Uppsala, Sweden, addressed the issue of "Effective remedies – Do they exist?" He stated that the concept of "effective remedies" was closely related to each nation's legal system and traditions. However, there was no universal understanding among different legal systems in relation to the notion of "environmental procedure". There were substantive differences in terms of procedural obstacles to access to justice between appeal systems in which courts acted in the ordinary course of appeal and had the authority to review the decision in its entirety and systems in which courts could only scrutinise a particular case on issues of legality. Comparative studies in the area could contribute to promoting understanding of access to justice, but the systemic differences made it necessary to be very specific when discussing matters concerning "effective remedies", including time differentiation before and after activities have been started and terminated. Citing case examples, he stressed that the need for effective remedies could differ from one system to another, depending upon some key issues such as the time of action.

14. The plenary that followed discussed the idea of courts as arbiters between the administration and civil society. Questions were raised as to who protected the general interest and how to ensure the independence and discretion of the judiciary. The importance of

immediate publication of relevant studies, as well as of open and transparent procedures and judgements given in writing, was particularly stressed. It was agreed that the experiences of and with courts varied in different countries, and that examples of best practice could be useful. The participants in particular discussed the issue of costs and the insecurity related to them, which remained a major obstacle to effective access to justice. Some participants also pointed out that fears that opening the doors to justice would result in floods of cases had proven to be groundless.

15. Ms. Olya Melen of the International Foundation Environment-People-Law, Ukraine, spoke on "Public interest advocacy: a key to better implementation?" In order to understand the role of public interest advocacy in the implementation of the Convention, several factors preventing individuals and NGOs from filing court cases had to be considered, such as; personal threats; the risk of strategic lawsuits against public participation (SLAPPs); psychological barriers; fear of the courts; financial implications; lack of professional experience and knowledge; low environmental awareness; conflicts between economic, social and environmental interests for individuals; and the lack of financial support, availability of lawyers and support from the local population for NGOs. Nevertheless, at present nearly 90 per cent of all court suits were initiated by NGOs. Furthermore, strategic lawsuits tended to be initiated by NGOs rather than individuals, underlining the key role of public interest advocates in the implementation of article 9 of the Convention.

16. Professor John Bonine of the University of Oregon, United States of America, addressed the issues of costs and "Getting SLAPPed". He cited three recent cases which represented important developments relevant to financial barriers:

(a) In 2004, the Privy Council in London, the highest court in the Commonwealth of Nations, had ruled in a case where environmental NGOs had lost an appeal against a decision by the Court of Appeal of Belize "because this was a public interest case there should be no order as to costs of the appeal"[2],

(b) In 2005, Corner House Research[3], the Court of Appeal in the United Kingdom, had set the parameters for appropriate issuance of "protective costs orders" that ensured that if the NGO lost, it would not have to pay the lawyers' costs of the other side: "The overriding purpose … is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance …. "

(c) Also in 2005, the European Court of Human Rights ruled that two citizens who had been sued by a corporation for defamation had been denied the right to a fair trial and freedom of expression under Articles 6 and 10 of the European Convention on Human Rights because

[2] http://www.elaw.org/assets/pdf/be.FinalOrderNoCosts.pdf.

[3] *R (Corner House Research) v Secretary of State for Trade & Industry* [2005], EWCA Civ 192.

the Government of the United Kingdom had refused to provide funding for their lawyers to defend them.[4]

17. The afternoon session of the mini-conference was chaired by Professor Marc Pallemaerts of the Free University of Brussels, Belgium, Senior Fellow at the Institute for European Environmental Policy.

18. In his presentation on access to justice in transboundary cases, Professor Jonas Ebbesson of the University of Stockholm stressed the applicability of the Convention in transboundary contexts. He described the potential legal consequences of the non-discrimination principle embedded in article 3, paragraph 9, of the Convention, and demonstrated how this principle had developed in international environmental law and how it had been applied in practice. He then clarified the legal consequences of non-discrimination in cases concerning access to justice in light of the minimum requirements set out in article 9, e.g. with regard to standing, remedies and due process. Mr. Ebbesson ended by emphasizing that while the Convention required a clear and transparent legal framework also for transboundary cases, even in the absence of such legislation the courts had an important role in ensuring due application in transboundary disputes. It was important to realize the broader scope of concerns for courts in a global society, not least with respect to environmental matters.

19. The plenary discussed some of the issues raised in these presentations. While NGOs often lacked the funds to file a claim, usually business corporations could easily afford litigation. This inequality, whereby access to justice remained often a question of financial ability to sue, had to be addressed to ensure fair and equal proceedings.

20. The importance of persisting with litigation, even if the success rate remained very low, was noted by some participants, since bringing cases before courts was one of the ways of raising the issue of accountability and public awareness, increasing experience, and developing good practice useful for future cases.

21. Some participants noted that whereas in transboundary civil law cases the claimant might have the choice of going to the court of the country where the damage had taken place, administrative cases could only be brought before the courts of the country in which the administrative act or omission in question had occurred. The concept of the European Union (EU), however, was seen by some as a reason to reassess this territorial approach to court jurisdiction within the EU even in administrative cases.

22. It was emphasized that the numerous obstacles identified could not be eliminated by only one group of stakeholders but required the combined efforts of the judiciary and other legal professions as well as the relevant ministries and the parliament.

23. It was also stressed that when assessing obstacles arising in respect of access to justice, such as standing for NGOs, the Convention itself should be used as a basis of the judicial

[4] European Court of Human Rights, *Steel and Morris v. United Kingdom*, App No 6841601, Judgment of 15 February 2005 (summarized in www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/133/133.pdf at page 13).

assessment alongside the national legislation. In this regard, the importance of clear definitions of legal terms to be transposed into national laws was particularly stressed.

24. Professor Svitlana Kravchenko of the University of Oregon reported on the main challenges identified by experts in the Eastern Europe, Cacasus and Central Asia (EECCA) region in response to a questionnaire she had developed, which included lack of judicial independence, lack of judges' awareness, the limited number of licensed public interest lawyers, low numbers of court cases, the chilling effect of SLAPP suits, financial barriers, and narrow standing for NGOs. She put forward several suggestions on how to overcome these obstacles, including reform of the judicial system; fighting corruption in the judiciary; providing financial support to public interest environmental law NGOs as key triggers of cases in domestic courts and the Convention Compliance Committee; raising awareness of environmental law among judges through continuous judicial training, including within the Task Force; and development of training materials focusing on the judiciary and the access to justice pillar of the Convention.

25. Dr. Csaba Kiss of the Environmental Management and Law Association from Hungary presented three independent multi-country assessments on access to justice focusing on the EU and Eastern Europe, undertaken respectively by the Access Initiative (TAI), Justice and Environment (J&E), and the European Environmental Bureau (EEB). The studies demonstrated that while in most countries the implementing legislation was largely in place, issues such as narrow standing, problems with injunctive relief, difficulty with appeals against screening decisions in environmental impact assessment (EIA) procedures, lack of legal requirements to build judicial capacity, and weak enforcement of court decisions continued to pose problems and limit access to justice. Recommendations included the promotion of judicial independence and awareness of environmental law among the judiciary, specialized environmental courts, State subsidies to address financial barriers to access to justice, clarification with regard to direct applicability of the Convention in the national courts, broad interpretation of standing for the public concerned, effective appeal, and screening procedures and guidance from the EC regarding access to justice problems in the EU Member States. The study carried out by EEB also concluded that adoption of an access to justice Directive in the EU would be beneficial overall.

26. The discussion in plenary noted that there had been overall progress with regard to access to justice, albeit slow. However, several NGO participants reported on measures taken in their own countries which had recently narrowed access to justice for NGOs. The plenary addressed the issue of judicial independence and particular difficulties that judges in some countries faced in this regard when reviewing decisions of the executive branch. The idea of an international environmental court was mentioned in this connection. The participants also mentioned that while an independent judiciary was a main step towards effective access to justice, this process would take time and thus had to be accompanied by a parallel process of solving access obstacles with the involvement of other stakeholders. The key role of ministries of justice as well as other legal professionals was also noted.

27. Many participants considered judicial training on international law, including on the Convention (and in EU Member States, the relevant EC directives), as a precondition for effective access to justice. In non-EU countries, clear and consistent transposition of the Convention's requirements through implementing legislation was necessary.

28. The Honourable Luc Lavrysen, Justice of the Constitutional Court of Belgium, and the Honourable Vera Macinskaia, Justice of the Supreme Court of Moldova, then spoke on the issue of how the judiciary could further the implementation of the third pillar from EU and EECCA regional perspectives respectively.

29. Justice Lavrysen emphasized that the dissemination of adequate information to all relevant legal stakeholders should be a top priority. This could be done through national environmental handbooks and journals which formed the basic reference material for most of the legal profession. Second, the Convention should be an important item in training activities for judges and other judicial officers. Constitutional courts in particular could play an important role in the enforcement of the Convention. They were generally in a position to combine provisions of their national constitution with relevant provisions of international treaties and check not only the constitutionality of federal or regional acts of parliament, but also their conformity with international provisions, such as those of the Convention. He also underlined that administrative courts could easily reinterpret the existing national provisions on standing in conformity with article 9, paragraphs 2, 3 and 4, of the Convention.

30. Justice Macinskaia presented recent developments in the legislation of Moldova, in particular with regard to legislation on access to information, which had generated considerable jurisprudence on the matter. She also pointed out the special role that the judiciary played in applying the law as such, in particular in the light of its independent status. High-level courts, such as Supreme Courts, played a special role in the EECCA region by analysing jurisprudence and providing guidance to the lower courts on specific issues. She noted that specialization of judges in particular fields of law, e.g. environmental law, through, inter alia, creation of specialized courts or court chambers could go a long way towards solving the problem of "overload", and in turn the matter of timing. Justice Macinskaia highlighted the importance of capacity-building for the judiciary, in particular through exchange of experience among judges, and pointed to the recent regional judicial workshop on access to justice as a positive example of such efforts.

31. Ms. Iryna Voytyuk, President of the Academy of Justice of Ukraine, described the role which JTIs could play in promoting effective access to justice. Most JTIs operate as independent public or private law bodies, with only a few being part of the ministries of justice or the Supreme Court. Speaking on behalf of the JTIs from Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, she pointed out that the JTIs were in a unique position to reach not only judges at all levels but also court officials and other legal professionals. The JTIs relied on high-level judges, academics and international experts to deliver trainings at the national as well as local levels. In this regard, Ms. Voytyuk mentioned the Lisbon Network, a European information exchange network between persons and bodies in charge of the training of judges and public prosecutors. She concluded by stating that training on the Convention would raise awareness, promote the connection between the judges and environmental protection, and also promote the use of the Convention in jurisprudence.

32. Judge William Birtles, Resident Judge at the Mayor's and City of London Court, United Kingdom, presented a paper on the work of the European Union Forum of Judges for the Environment (EUFJE) whose purposes are to: (a) share experiences of judicial training in environmental law; (b) foster knowledge of environmental law among judges; (c) share experiences of environmental law; and (d) contribute to a better implementation and enforcement

of international, European and national environmental law. EUFJE has held several conferences on various issues of international environmental law[5] and has made a number of recommendations on EU environmental law to the European Parliament and the European Commission, which have been accepted. Finally, EUFJE members participated in the Access to Justice Regional Workshop for High Level Judiciary (Eastern Europe and South Caucasus Region) in June 2007 (Kiev). Judge Birtles concluded by suggesting the establishment of one or more similar judicial associations outside the EU region.

33. In the ensuing plenary discussion, it was noted that the establishment of judicial networks and associations in other regions would require funding which might have to come from outside sources, at least initially. In this regard, governmental sources, EU funding and funding from private foundations could be explored.

34. The issue of judicial discretion in deciding on matters such as costs, including bonds, was discussed. However, the level of such discretion differed from one national system to another.

35. With regard to the use of trainers and presenters for capacity-building activities for the judiciary and legal professionals, the possibility of relying on specialised bar associations, such as the British bar associations specializing in planning and environmental law, was mentioned.

36. Based on discussions in the mini-conference, its Chairpersons presented some general conclusions and recommendations in their personal capacities. Noting the overall importance of the Convention in the development of both national and international environmental law, they emphasized the immediate importance of the tasks undertaken by the Task Force on Access to Justice. In this regard, they noted that involvement of high-level judges in the work of the Task Force, including through capacity-building activities, had proven particularly useful. They also suggested that involvement of professional associations of judges, attorneys and other legal professionals be considered for future activities.

37. The Chairpersons also put forward several suggestions concerning future work, including the establishment of a working group on access to justice. They noted that the upcoming tenth anniversary of the Convention was not only an important occasion for celebrations, but also provided a unique opportunity to assess successes, achievements and difficulties in the implementation process, using the information in the national implementation reports to be submitted to the third meeting of the Parties. They suggested that within the framework of the Convention, an overall harmonization of norms and practices was advisable across the region to tackle common obstacles to access to justice such as costs, standing and timing. They also noted that judicial training programmes on environmental law in general and access to justice in particular could be developed in a harmonized way across the region. They pointed out that the implementation process could not be expected to change over night and that the Convention differed from other environmental conventions because it went to the heart of the relationship between the administration and citizens, touching touched upon legal systems, administrative

[5] Such as “The Prevention and Remedying of Environmental Damage”, “EU Waste Law” and “The Impact of Natura 2000 on Environmental Licensing”, with the next annual conference being held in December 2007 on the Enforcement of Environmental Criminal Law.

practice and the structures of power and bureaucracy, which would necessarily take time to change.

Part Two

REGULAR BUSINESS OF THE TASK FORCE

I. ADOPTION OF THE AGENDA

38. The Task Force adopted the agenda for the meeting.

II. ELECTION OF OFFICERS

39. The Task Force elected Ms. Maryna Yanush (Belarus) as Vice-Chairperson.

III. RELEVANT DEVELOPMENTS

40. TAI presented the 42 new "Access to Justice Indicators" as part of the TAI analysis tool which is used to assess national implementation of Principle 10 and is available as a Web based tool at www.accessinitiative.org. An analysis of 65 access to justice case studies in 16 countries was compared with a similar analysis of 9 studies in Ireland.[6]

41. The REC informed the Task Force of the outcomes of the project "Improving the Practices of Public Participation: Next Steps in Implementing the Aarhus Convention in South-Eastern Europe (SEE)" funded by the Netherlands, resulting among other things in assessments of access to justice in Albania and Montenegro, the translation of the *Handbook on Access to Justice*, and a regional capacity-building workshop with a day on access to justice for the judiciary, legal professionals, ministry officials and NGOs. In an ongoing project funded by Swedish International Development Cooperation Agency, assessments had been prepared on the development of civil society including the use of access to justice opportunities, including under the Convention, and relevant trainings for NGOs.[7]

42. A representative of France reported on an environmental initiative launched by the President of the Republic in which six groups consisting of various stakeholders (representatives of the State, local bodies, employers, employees and environmental NGOs) were working on specifically defined and identified environmental subjects. The results of the initiative would be published online and were expected to lead to a new environmental development plan in France at the end of October, aiming at carrying out about 15 concrete and assessed measures. Second, consideration would be given to specializing the judicial system with regard to environmental issues as part of a national reform. Third, a conference on the Convention, focusing in particular on its third pillar, would be held in May 2008 by the National Judiciary School. It was planned to invite a number of European and non-European judges. Further details would be available soon.

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[6] See http://www.environmentaldemocracy.ie.

[7] See project web-link for the previous capacity building activities: www.rec.org/REC/Programs/PublicParticipation/Improving_practices/default.html

43. The representative of UNITAR reported on a series of pilot projects on national profiles undertaken in three countries (Kyrgyzstan, Serbia and Tajikistan) together with UNECE, a part of which covered the third pillar of the Convention. She concluded that there was a lack of effective enforcement mechanisms as well as insufficient deterring fines for polluters in the pilot countries.

44. A representative of Germany reported that in that country, the implementation process for the Convention had been finalized since the previous meeting, paving the way for ratification. In December 2006, two new Acts, one on participation in administrative decision-making on environmental matters and the other on access to justice, both implementing the Convention and Directive 2003/35/EC, had come into force.

45. The Citizen and Democracy Association (Slovakia) reported that recent developments regarding access to justice in Slovakia had been negative. An act on promotion of highway construction that abolished the right of environmental NGOs to have access to court had come into effect. The government, at the same time as proposing the ratification of the Genetically Modified Organisms (GMO) amendment to the Convention, had also proposed an amendment to the GMO Act abolishing the right of NGOs to have access to court regarding GMO decision-making procedures and weakening existing participation rights. Other laws abolishing a right of access to court for NGOs with respect to decision-making procedures subject to EIA and other procedures having an important impact on the environment had been passed in September 2007.

46. The Environmental Justice Association had prepared two publications, “Nest of Justice” (www.participate.org) and “Access to justice in Spain under the Aarhus Convention” (www.elaw.org/assets/pdf/es.a2j.spain.2007.pdf). A “Guide on Access to Environmental Justice” and an executive summary of the guide would be published in September 2007 at the General Council of Spanish Advocates magazine “Abogados”, with 140,000 copies distributed among Spanish lawyers, legal institutions and administration departments. Another publication under preparation with the support of the Biodoversity Foundation, “Environmental Democracy and Access to Justice: the application of the Aarhus Convention in Spain”, would attempt to assess the application of article 9 of the Convention in Spain.

47. WWF UK referred to a report published by Liberty and the Civil Liberties Trust in 2006 entitled Litigating the Public Interest (www.liberty-human-rights.org.uk), which discussed the contribution that Protective Costs Orders can make to public interest law, with specific reference to article 9 of the Convention and possible negative compliance effects caused by the United Kingdom costs rules. Arising from that, a separate Working Group under the chairmanship of Sir Jeremy Sullivan was presently looking at the issue of prohibitive costs and the costs rules in the context of the Convention. The WWF-UK representative pointed out that the group comprised the Environment Agency, Legal Services Commission, academics, practising lawyers and NGOs, with both the Department for Environment, Food and Rural Affairs and the Ministry of Justice declining an invitation to join the group. A report covering issues such as protective costs orders, public funding and remedies was expected to be published in 2008.

48. The representative from Armenia reported that since the last Task Force meeting there had been increased activities by NGOs and the Ministries of Justice and Environment in Armenia. A number of judicial trainings had been conducted, with further training activities and

the improvement of legislation and lobbying being planned. However, issues such as standing and costs continued to present obstacles to effective access to justice, in particular for NGOs.

49. The representative from Belarus reported that the country's system had proven to be fairly effective in ensuring the rights of citizens. A directive adopted in December 2006 set out principles for the functioning of the administration. A range of other activities to ensure effective access to justice, including a new draft law and judicial training courses, had been undertaken. However, she also acknowledged the issue of costs being a key obstacle to access to justice.

50. The representative of the Czech Republic informed the Task Force that in that country 63 cases of petitions had been lodged in courts against decisions made in environmental matters in 2005, 123 in 2006, and 96 in first half of 2007. This was a sign of effective access to justice. She also mentioned the decisions of the supreme administrative court, which were published in Czech only, as well as environmental law trainings for judges conducted by the national judicial training centre.

51. The Chairperson reported on an initiative from the United Nations Environment Programme (UNEP) to develop guidelines on access to information, public participation and access to justice in environmental matters. The initiative was in the initial stage.

52. The Ecological Society Green Salvation (Kazakhstan) stated that there was a stagnation of access to justice in Kazakhstan and pointed out that assistance from the Task Force members could be useful in addressing the failure to act by the public authorities and the courts with regard to a number of polluting projects.

IV. INFORMATION, TRAINING OR ANALYTICAL MATERIALS AND ACTIVITIES

A. Report on the workshop for the high-level judiciary

53. The Chairperson of the Task Force reported on the workshop for the high-level judiciary held in Kiev, on 4 and 5 June 2007, drawing particular attention to the recommendations that had been agreed upon by the participants (see ECE/MP.PP/WG.1/2007/L.11).

54. The participants in the Task Force meeting, in particular those who had participated in the Kiev workshop, congratulated the Chairperson, the secretariat and the Organization for Security and Cooperation in Europe (OSCE) on the successful outcome of the workshop. They expressed their full satisfaction with the concept and organization of the workshop, which they felt to be very useful and informative. It was recommended to apply the approach in the future and organize further workshops in other subregions as well as on national level. A number of Task Force members suggested using the hypothetical cases used in the workshop as well as additional real cases in future training organized by the Task Force and other organizations, while stressing the need for training and workshops in their countries.

55. It was also noted that while judicial training had to be seen as an important part of the implementation process, other ways of furthering access to justice had to be kept in mind to ensure that cases could be brought to courts. In this regard, some participants stressed that future

training should also include other legal professions, such as public prosecutors and court administrative staff, as well as further activities to raise the awareness of the public.

B. Other capacity-building activities, in particular workshops in Central Asia and South-Eastern Europe

56. The Chairperson presented an overview of efforts he had undertaken with the secretariat with regard to two possible workshops to be held in SEE and Central Asia respectively.

57. Talks had been held with UNEP regarding the possibility of incorporating an extensive Convention capacity-building training component in a workshop that UNEP was planning to hold in the SEE region. However, due to considerations of dates and the limited time available for the access to justice component in the UNEP workshop, which would cover international environmental law in general, the Chairperson and the secretariat suggested organizing a similar workshop in the SEE region to the one held in Kiev, subject to sufficient funding being obtained.

58. With regard to the Central Asia region, the Chairperson and secretariat had talked with the EC regarding a workshop planned by the EC within the framework of a project funded under the TACIS programme. The EC representative reported that the consultant for the project had been chosen and had started work the previous week. No further information was available. However, it was agreed that the secretariat and the Chairperson should make contact with the consultant as soon as possible, in the hope that the workshop would take place during 2008.

59. The representative of WWF-UK asked if there were any plans for similar training activities in Western Europe. The Chairperson referred this question to the discussion on future work, but mentioned that the mandate given to the Task Force required prioritization of countries with economies in transition.

60. REC reported on a two-day national training event on access to justice for judges and prosecutors held in Albania in November 2006 that it had organized in cooperation with the Judicial Training Center, with funding from the Spanish Development Cooperation Agency. Spanish and Hungarian lawyers had been involved in the interactive trainings, using case examples from their countries as well as a simulation game. The training would be repeated in November 2007. In Azerbaijan, REC had prepared an assessment of capacity-building needs for the implementation of the Convention and proposed a programme of capacity building/training, including access to the justice pillar, with funding from the OCSE Office in Baku.

C. Comprehensive analysis in order to identify gaps in materials related to the various elements contained in article 9

61. At their second meeting, the Parties mandated the Task Force to develop information, analytical and training material in relation to the Convention in accordance with the specific needs identified (ECE/MP.PP/2005/2/Add.3, para. 33(b)). In order to assess the need for any new material, the Task Force, at its first meeting in February 2006, had requested the Chairperson and the secretariat to prepare a comprehensive analysis of information, analytical and training material on access to justice in order to identify gaps in relation to the various elements contained in article 9.

62. The secretariat presented the analysis which it had developed in cooperation with the Chairperson of the Task Force. The research upon which the paper was based drew on information collected within the framework of the earlier Task Force on Access to Justice, information provided by the Task Force members in the current intersessional period in response to a request from the secretariat, and Internet resources, including materials published by various stakeholders in the clearinghouse.

63. The analysis had shown that while a large number of information and analytical materials related to access to justice was available, most contained general information on the Convention, whereas only a limited number of materials specifically addressed access to justice in environmental matters and issues related to the implementation of article 9 of the Convention. Furthermore, little or no materials could be identified with regard to guidance and training, in particular where specific aspects of implementation such as standing, costs and remedies were concerned. The analysis therefore concluded that there were gaps with regard to guidance and/or training materials, in particular with regard to the specific aspects of article 9, the implementation of which had proven to pose the biggest challenges to effective access to justice.

64. In the following discussion concerning options for future work on this topic, the representative of Germany stated that though they acknowledged the large amount of materials identified by the secretariat, Germany did not consider the analysis to be a sufficient basis for the conclusions drawn in it. The analysis could not be considered to be comprehensive, as for example it was missing most of the materials available in Germany. At the same time, Germany acknowledged that the reason that such materials were not included was due to the fact that they and most of the other Task Force members had failed to respond to the request of the secretariat to provide such information. The German representative added that the national implementation reports to be submitted by the Parties by the end of the year would contain comprehensive and updated information regarding the status of implementation of the third pillar of the Convention.

65. Some other Task Force members agreed with the position of Germany, stating however that they would support the development of best practice materials focusing on specific issues. Identifying such issues might require some further analysis. The notion of developing guidance materials was supported by some participants. Others made it clear that any such guidance should not extend to an interpretation of article 9. Still others expressed their surprise at the scarcity of responses to the requests by the secretariat and invited the Task Force to recall the mandate given to it by the Parties when considering further steps.

66. It was also suggested to explore ways to publish available data and materials on the Internet, for example in the Clearinghouse, to ensure easier access for the public.

67. The Task Force thanked the secretariat for the substantial amount of work that had gone into the preparation of the comprehensive analysis. Furthermore, the Task Force took note that many of its members had not provided input to the analysis in response to the secretariat’s request for such input, but that they would be in a position to do so shortly after the Task Force meeting. The Task Force therefore requested the secretariat to send a new invitation to the Task Force members, giving them a limited period of time to provide information on additional materials to be incorporated in the analysis document.

68. Considering the preliminary results from the analysis and the needs articulated by members of the Task Force as well as by the representatives of the high-level judiciary and the JTIs, the Task Force preliminarily identified that the development of the following materials would be a priority, subject to review in light of the additional materials that would be sent to the secretariat pursuant to the invitation in the above paragraph:

(a) A compilation of examples of good practices adopted and/or undertaken with a view to furthering effective access to justice, taking full account of existing materials and building on the work done in the current and previous Task Forces on Access to Justice.[8]

(b) Training material targeting members of judiciaries and other relevant legal professionals, aiming at increasing their awareness of the Convention and, where existing, relevant provisions implementing the Convention in national law, and enabling them to adequately take the Convention/such provisions into consideration in a way that promotes the effective implementation of article 9 of the Convention, taking full account of existing relevant training material such as the Judicial Training Modules on Environmental Law developed by UNEP.

69. The Task Force, subject to the review mentioned above, consequently invited the Chairperson, the Vice-Chairperson and the secretariat to develop a proposal outlining the possible contents of the above materials, as well as the procedure/modality for producing them, in consultation with interested members of the Task Force, and to circulate the proposals electronically to the full Task Force for consultation. Some participants felt that the Working Group should also be consulted over the proposal.

V. MECHANISMS FOR INFORMATION EXCHANGE AND DISSEMINATION

70. The secretariat drew the attention of the Task Force to two existing mechanisms for exchange and dissemination of information. The Web pages of the Task Force (www.unece.org./env/pp/a.to.j.htm) contained information on the work of the Task Force and all the relevant materials, including expert presentations, meeting documents and materials produced for the judicial workshops. The Aarhus Clearinghouse for Environmental Democracy (http://aarhusclearinghouse.unece.org/) showcased information on laws and practices relevant to implementation of principle 10 of the Rio Declaration, including information sources relevant to access to justice. In addition to the materials currently available through this website, the materials identified in the course of the analysis carried out by the secretariat (see paras. 61-63) that were available through the Internet would be added to the Clearinghouse. The secretariat pointed out that use of these mechanisms provided an effective and cost-efficient way to implement the mandate set out in paragraph 33 (g) of decision II/2 of the Meeting of the Parties. It invited the members of the Task Force to submit any information that they might consider relevant through the Clearinghouse.

71. During the discussion, it was suggested that the Clearinghouse could include more information on court decisions concerning provisions of the Convention. While it was noted that

[8] Such a compilation should not be regarded as implicitly putting forward an interpretation of article 9.

many of these decisions might only be available in the national language of the jurisdiction in question, the secretariat pointed out that this would not preclude their inclusion in the Clearinghouse provided that a few lines in English describing the decision were provided. With this in mind, the Task Force encouraged participants to submit information on any relevant court decisions to the Clearinghouse (aarhus.clearinghouse@unece.org).

VI. ALTERNATIVE DISPUTE RESOLUTION

72. The REC presented further information about the outcomes of the REC-OGUT joint project and in particular the workshop held in Budapest on 21-22 January 2007 on "Cooperative decision-making and conflict management in planning and environment" funded by the Austria, Finland, Germany and the Commission Internationale pour la Protection des Alpes. The workshop brought together practitioners, planners, developers, mediators, civil servants and NGOs to learn about successful mediation cases, exchange experiences, create a network of persons and institutions involved in environmental conflict management/mediation and establish links among existing networks. In addition to giving a comprehensive overview of the specific features and conditions of conflict resolution and mediation in Western Europe and Central and Eastern Europe, the workshop included training to develop the practical skills of mediators, including the study of case examples related to public participation and access to justice, which had been conducted upon the failure of or in parallel with administrative or judicial procedures.[9]

73. Germany drew the attention of the Task Force members to two projects within the EU Network for the Implementation and Enforcement of Environmental Law (IMPEL), which had been carried out since 2004 concerning informal resolution of environmental conflicts by neighbourhood dialogue and the development of a toolkit for the initiation and support of specific types of voluntary neighbourhood dialogue in environmental matters.[10]

74. Further information on ADR activities was presented in the following discussion and various opinions were expressed. From the ensuing discussion, it was clear that the concepts of ADR and mediation were not used uniformly and that various participants assessed their potential role for furthering the objectives of the Convention differently.

75. While appreciating the valuable presentations and the information that had been shared, the Task Force recognized the need for a more structured and analytical approach to exploring the use of ADR mechanisms and how their use could contribute towards the achievement of the objectives of the Convention. To this end, the Task Force encouraged interested members to indicate their interest, to pursue such work, possibly with a view to having a draft analysis ready for discussion at the next Task Force meeting. Two of the issues that could merit further analysis were:

(a) which are the available ADR mechanisms; and

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[9] For project website, see www.rec.org/REC/Programs/PublicParticipation/mediation/deafault.html

[10] Project website and final report: http://ec.europa.eu/environment/impel/workgroups.htm#3, http://ec.europa.eu/environment/impel/pdf/informal_dialogue04_05.pdf

(b) what is their potential role in relation to effective implementation of articles 6, 7, 8 and 9 respectively. The representatives of REC, the judicial training centre of Moldova and the Friends of the Irish Environment expressed their interest in being involved in the further work on this issue. The Chairperson mentioned that Austria, which was not represented at the meeting, had expressed a preliminary interest in the Task Force's further work on this issue.

VII. REMEDIES AND ASSISTANCE MECHANISMS

76. At its first meeting, the Task Force had invited those interested in sharing information on remedies in their respective systems to do so, inter alia, through the secretariat (ECE/MP.PP/WG.1/2006/4, para. 43). Following this invitation, WWF-UK had submitted a paper, but otherwise no such information had been received by the secretariat. Neither had any information been provided with regard to assistance mechanisms to overcome financial and other barriers. The meeting briefly discussed the main barriers to access to justice, recalling several specific obstacles mentioned at the previous meeting, including costs related to court and lawyers' fees, narrow standing criteria, and lack of awareness among the judiciary and other legal professionals throughout the region.

VIII. FUTURE WORK OF THE TASK FORCE

77. The Task Force discussed the future work on access to justice on the basis of a paper that had been prepared by the Chairperson entitled "Possible Future Work on Access to Justice under the Convention". The prevailing view among participants was that the Task Force should be continued. Some participants supported or could accept the idea of establishing a working group on access to justice, inter alia, as this would be a clear signal of political commitment to improve access to justice and a recognition of the fact that the implementation of the access to justice pillar is the most challenging to Parties. Other participants were opposed to the idea of establishing a working group.

78. When discussing the overall character of the Task Force's mandate, some participants were in favour of extending the mandate beyond work with a practical focus to include normative elements such as the development of guidelines. Other participants were strongly against the idea of incorporating into the mandate any normative elements such as guidelines or other elements that purported to interpret article 9. These participants emphasized that the mandate should have a practical focus and be left as it stands, or alternatively be focused on more detailed issues. Some participants stated that in their view the current mandate was not yet fulfilled and that accordingly the work remaining to be completed should be addressed before considering a new mandate. A large number of participants agreed on the development of good practice examples.

79. The Task Force then proceeded to discuss various proposals for future practical work. In this context, the Chairperson asked the participants if there was any opposition to the practical suggestions made in his paper on possible future work. In response, one participant requested that the contribution of articles (see subparagraph (f) below) should be made on a strictly voluntary basis. No other concerns were raised. However, the general point that practical work required resources was made. Furthermore, there was not enough time to discuss all the

suggestions in detail. The suggestions made, as elaborated through the discussion, were as follows:

(a) Sharing information, experiences and good practices: The Task Force should continue to provide a platform for sharing of information, experiences and good practices related to access to justice. In accordance with paragraph 28 of decision II/2, the Task Force should develop a portal for the exchange of jurisprudence for judges and interested parties of member states and others. The possibility of updating the *Handbook on Access to Justice* was mentioned.

(b) Capacity-building activities: The Task Force should continue to initiate capacity building activities for the judiciary, other legal professionals, and the public at large. Those activities should be carried out in the EECCA and SEE regions as well as the EU region, at the subregional and national levels. The need for sufficient funding for such activities to be provided by the Parties and other potential donors and/or in cooperation with other organizations was expressly raised. Specific training programmes for judges (and other legal professionals) on the Convention could be carried out by the JTIs, including the participation of international experts and high-level judges and making use of the experiences acquired by some JTIs and at the workshop in Kiev.

(c) Supporting public interest lawyers and their organizations: The Task Force should promote increased support for public interest lawyers and strengthening of capacities of NGOs. In this regard, the idea of an Aarhus Fund was put forward.

(d) Remedies: The Task Force should commission a number of in-depth studies in representative countries, addressing issues such as (a) available remedies and typical situations in which they apply; (b) the extent to which they work in practice; (c) obstacles; and (d) pre-requisites for efficiency. A synthesis report could then be produced in which generic conclusions could be drawn and discussed.

(e) Scientific and technical expertise in courts – use of non-legal experts: The Task Force should identify good practice with respect to ensuring that sufficient scientific and technical expertise is available to review bodies dealing with environmental cases. The Swedish environmental courts, having such expertise in-house, were mentioned in this respect, as well as the possibility to call on external experts.

(f) Articles on the Convention, emphasizing the third pillar, in law journals: The Task Force could look into what role it could take in promoting the publication of articles and options for their publication.

(g) Financial barriers: On the basis of the questionnaire prepared by the previous Task Force, it should deepen the analysis and broaden it to cover more countries. The additional and updated information should be used to identify further good practice examples. A Web-based questionnaire could be used for identifying financial barriers and cataloguing good practices.

80. A number of further areas of activity were suggested during the discussion but not discussed in detail:

(a) Inter-sessional questionnaires to develop national profiles : In order to address some of the above suggestions, in particular (d) and (g), it was proposed that the Task Force develop national profiles aimed at assessing implementation of the third pillar of the Convention by all Parties. This could be done through questionnaires sent out to the Parties in each intersessional period for comments on the implementation, good practices identified and obstacles to access to justice. The results of the questionnaires would then be made publicly available. The option to develop conclusions, recommendations or soft normative guidelines on the basis of the findings could be discussed at a later stage.

(b) Mandating the Task Force to review the national implementation reports and make specific recommendations on access to justice.

(c) Financial support for the preparation of NGO shadow reports on access to justice.

IX. ADOPTION OF THE REPORT

81. The Task Force reviewed and provided comments on a draft of the meeting report covering proceedings of the first two days of the meeting. As it had not been possible to cover the outcome of the final morning session in the draft that was circulated, it was agreed that the complete draft report should be sent to all participants by e-mail allowing two working days for comments. The Chairperson and the secretariat would then finalize the report for submission to the Working Group of the Parties.

X. CLOSING OF THE MEETING

82. The Chairperson thanked the participants, the secretariat and the interpreters, and closed the meeting.

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