Meeting of the Parties to the Aarhus Convention

Task Force on Access to Justice
First meeting, Brussels, 10-11 March 2003

PROMOTING EFFECTIVE ACCESS TO JUSTICE UNDER THE AARHUS CONVENTION

Discussion paper prepared by the lead country

This paper has been prepared by the lead country with the assistance of the Université Libre de Bruxelles in order to facilitate discussions at the first meeting of the Task Force on Access to Justice. It is structured in accordance with the draft agenda of the meeting, which is itself based on the mandate of the Task Force as laid down in Decision I/5 of the Meeting of the Parties. The lead country proposes to focus discussions at the first meeting on the questions identified in paras. 3(b) and (c) of Decision I/5.

This paper does not aim to be exhaustive, but merely to flag a number of relevant questions which the Task Force may wish to address and to assist participants in preparing for the meeting. The lead country would welcome contributions from participants, in written or oral form, on the issues set forth in this paper and on other issues within the mandate of the Task Force which they deem relevant.

1. Overview of national law and practice and consideration of possible activities to support implementation of article 9, paragraph 3 of the Convention:

Art. 9, para. 3: *"In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."*

Implementation of Article 9, paragraph 3 of the Convention calls for attention to, *inter alia*, criteria for standing, the choice of administrative versus judicial procedures, the definition of actionable acts and omissions, and relevant violations of national environmental law. In addressing these topics, the Task Force may wish to bear in mind the following elements:

Criteria for standing:

Paragraph 3 of Article 9 refers to national law as regards any criteria for standing (cf. ' *[...], where they meet the criteria, if any, laid down in its national law, [...]'*). The Convention refers to national law in several of its provisions and different contexts, but it is open to discussion whether these references primarily allows for flexibility with respect to the means of implementation (but not to the extent to which the obligation in question must be met) or whether the reference introduces flexibility, not only in the choice of the means of implementing obligations, but also as to the scope and/or content of the obligation itself.

In the context of paragraph 3 of Article 9, two main questions seem specifically to arise: (1) which criteria are allowed? (2) how shall the criteria be laid down?

(1) The paragraph requires Parties to '*ensure*' access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities. Thus, it seems that the principle of access to the said procedures should in any case be guaranteed, and that the modalities of this principle, i.e. the possible criteria, should not undermine the principle. However, the wording of the relevant provisions ('*where they meet the criteria, if any, laid down in its national law'* (emphasis added)), is not unequivocal. The term 'where' might be taken to imply that the principle of access to the said procedures applies (only) if the members of the public meet the criteria, and thus that the principle is conditioned by the (potential) criteria. This would imply that the reference to national law would introduce flexibility, not only in the choice of the means of implementation (the possible criteria) of the obligation (ensuring access), but also as to the scope and/or content of the obligation (ensuring access) itself. On the other hand, it should be noted that, although it uses the wording 'where', the provision does not state that members of the public can file lawsuits if permitted by national law. Hence, the first interpretation of the reference to national law (flexibility in the means of implementation) could indeed seem the most appropriate in view of the spirit and purpose of the Convention, and the wording 'where' would allow for some flexibility only in the choice of the means of implementation.
(2) Legislation can be interpreted in various ways, restrictively or extensively. According to the national legislation of some signatories/parties to the Convention, an 'interest' must be proven for standing; but the national law often does not specify the scope and/or nature of this 'interest'. Further specification is provided through the case-law. Some domestic courts have interpreted this 'interest' restrictively in environmental matters. Should the notion of '*criteria, if any, laid down in (...) national law' be interpreted as referring only to criteria specifically* laid down in national statutory provisions or as referring also to any criteria resulting from the established case-law? Could the provisions of Article 9, para. 3 possibly be interpreted as requiring national judicial and administrative bodies to interpret national provisions governing access to justice extensively so as to ensure that the objective of access to justice is achieved in accordance with the spirit and purpose of the Convention? To what extent do national legal systems allow those bodies to take into account the provisions of the Convention directly?

Administrative versus judicial procedures:

The debate on administrative versus judicial procedures is hardly new, but has been reinvigorated by environmental cases. A core issue in the debate could be summed up as follows: Since it is difficult in some legal systems to admit that a judge (the judiciary power) sanctions the administration (the executive power), administrative procedures have been put in place within the administration so that it can decide whether or not to sanction itself.

In some countries, criteria for standing differ between administrative and judiciary procedures; the former sometimes being more flexible than the latter. In all countries, administrative procedures tend to be faster and less costly than judiciary procedures. However, although it may indeed be a rather effective way to solve an environmental matter in a relative short period of time, it should be borne in mind that administrative procedures may not always guarantee a fair trial, based on independence and impartiality. In this regard, it should be noted that, in contrast with paragraphs 1 and 2 of Article 9 ('[…] *another*

independent and impartial body established by law […]'), paragraph 3 of Article 9 does not explicitly require the 'administrative (...) procedures' it refers to to be 'independent and impartial'. Where, under paragraph 2 of Article 9, the existence of a preliminary review procedure before an administrative authority (i.e. an 'administrative procedure'), is not intended to replace the possibility of appeal to a court, paragraph 3 does allow Parties a choice between either administrative or judicial review procedures.

On the other hand, paragraph 4 of Article 9 (see below), requires all review procedures referred to in paragraphs 1, 2 and 3 of Article 9 to be fair and equitable. Thus, while the administrative procedures allowed by paragraph 3 of Article 9 do not seem to require the intervention of a third party (no formal requirement of independence and impartiality), they must nevertheless be fair and equitable in accordance with paragraph 4 .

In order to assess the meaning and scope of 'fair and equitable' in particular with regard to the 'administrative procedures' referred to in paragraph 3 of Article 9, guidance could be inferred from the way in which the European Court of Human Rights has interpreted the term 'fair' in Article 6, para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This interpretation would seem relevant to the implementation of Article 9, paragraphs 3 and 4 combined of the Aarhus Convention.

Actionable acts and omissions:

Paragraph 3 of Article 9 states that '[…] *acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*' (emphasis added) may be challenged.

This calls for the identification of the kinds of 'acts and omissions' that would be covered by the paragraph. A violation by a private industry of discharge limits stipulated in its permit might well be an 'act' contravening provisions of national law relating to the environment (see also below, on the expression 'national environmental law'). Likewise, transgression by a public authority of discharge limits set out in national law relating to the environment would be an 'act' contravening the provisions of the law. The expression 'omission' could appear more complex. 'Omission' by a public authority would include failure to implement or enforce environmental law – such as failure to sanction the above-mentioned violation of the permit. 'Omission' by a private entity could include failure to carry out an obligation stipulated in its permit. At any rate, it is clear from the wording of Article 9, paragraph 3 that legal action should be possible both against private persons and public authorities, whenever they contravene relevant provisions of national law.

Relevant violations of national environmental law:

In applying the provisions of Article 9, paragraph 3, Parties may feel the need to clarify what 'national environmental law' covers. In this respect, two questions can readily be identified: what is 'national' (a) and what is 'environmental law' (b)?

(a) In many of the signatories/parties to the Convention, much environmental law is not of national origin, but stems from requirements of European Community law. Most EU legal environmental requirements are laid down in Directives that have to be transposed into

national law. A violation of a requirement would thus be a violation of 'national' law. However, a few EU requirements regarding the environment are laid down in Regulations, which are directly applicable in the EU Member States. It seems desirable to examine whether these Regulations can be regarded as 'national' law, the violation of which would fall within the scope of the paragraph.

(b) An element that also needs attention is the definition of 'environmental law'. Broadened access to justice in environmental cases would of course not be effective if the definition of 'environmental law' is – remains or becomes – restrictive. It might be desirable to clearly distinguish the areas falling within the scope of 'environmental' law (soil, water, air,…) and the various forms of measures (legislative measures, governmental regulations, individual permits, environmental agreements,…) that would be considered as 'law'.

In addition, the relationship between paragraphs 2 and 3 of Article 9 would need to be clarified for the definition of 'environmental law'. According to paragraph 2 of Article 9, Parties shall ensure that members of the public concerned have '*access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention*'(emphasis added). The obligations in paragraph 3 of Article 9 apply '*in addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above,* (emphasis added). Both paragraphs thus mutually refer to each other, ostensibly with a view to avoiding conflict.

2. Overview of national law and practice and consideration of possible activities to support implementation of article 9, paragraphs 4 and 5 of the Convention:

Art. 9, paragraphs 4 and 5 :

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

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

Implementation of paragraphs 4 and 5 of Article 9 calls for attention to various topics such as the nature and adequacy of available remedies, the impact of procedural delays on the effectiveness and public access to judicial or administrative decisions taken as a result of review procedures. In addressing these topics, the Task Force may wish to bear in mind the following elements:

Effectiveness of remedies:

Effectiveness of remedies is of course conditioned by the speed at which complainants can actually obtain a hearing and a decision. The impact of procedural delays is discussed below. In the present section, the effectiveness of remedies is discussed considering the nature of the remedies themselves.

If a judgement is not likely to result in effective action to remedy the alleged harm, justice might not be sought through legal procedures. In environmental matters, the ability to provide effective remedies is of utmost importance and monetary compensation is often insufficient or may even be inadequate.

Paragraph 4 of Article 9 specifically mentions injunctive relief as an 'adequate and effective remedy'. Two types of injunctions can be differentiated, a temporary and a final. A temporary injunction imposes or prohibits a particular action until a final decision is issued. A final injunction is incorporated into the final decision, and may also impose or prohibit a particular action. Injunctive relief is effective in environmental matters in that it can maintain or restore the environment. However, recourse to injunctive relief, and thus its actual effectiveness, can be impaired by uncertainty regarding, *inter alia*, financial costs (e.g. bond payment, possible counterclaims from defendants), likelihood of the issuance of an injunction or proper enforcement of injunctions that are issued.

Timeliness of remedies:

One major obstacle to effective justice is the time required by judicial and administrative review procedures. Time is often of the essence in environmental cases where irreversible harm might be caused by illegal activities.

The requirement of a timely procedure stated in paragraph 4 of Article 9 could be compared to the 'reasonable-time' requirement stipulated in Article 6, paragraph 1 of the ECHR[1]. The European Court of Human Rights has extensively ruled[2] that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law (in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation).

The provisions of the Aarhus Convention are innovative and broader in scope than those of the ECHR in that it appears from paragraph 4 that the procedures referred to in paragraphs 1, 2 and 3 of Article 9 shall be timely regardless of their nature, whereas the 'reasonable-time' requirement stipulated in Article 6, paragraph 1 of the ECHR applies only to proceedings involving the determination of civil rights and obligations or of a criminal charge.

Public access to decisions:

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1 "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a (...) hearing within a reasonable time by [a] (...) tribunal (...)*" (emphasis added).

2 Cf., for a recent example, case no. 26614/95, *Humen v. Poland*, 15 October 1999, § 60.

Two types of requirements regarding public access to decisions *sensu lato* are laid down in Article 9: Paragraph 4 of Article 9 requires decisions of courts, and whenever possible of other bodies, to be publicly accessible. This requirement differs from that in paragraph 5 of Article 9 which requires parties to ensure that information is provided to the public on access to administrative and judicial review procedures (on the latter requirement, see also below, point 3). While paragraph 5 seems primarily designed to ensure that the public is duly informed of the existence and modalities of review procedures to which it can have recourse effective information on the said procedures could be understood as including information on the actual use(fullness) of the procedures; hence on former decisions taken as a result of them. Both requirements could also be linked to the requirements under Article 5 of the Aarhus Convention ('Collection and dissemination of environmental information'), and in particular under its paragraphs 3 and 7 (b). At any rate, it seems consistent with the purpose and spirit of the Convention that not only decisions of judicial bodies, but also those of administrative review bodies, be made as widely and easily accessible as possible.

None of these requirements are stipulated in the ECHR (which only requires certain judgements to be pronounced publicly[3]). The fact that a judgement is rendered publicly does not automatically ensure that it remains publicly accessible at a later time.

3. Needs and role of the public, the judiciary, the legal profession and possible development of information and guidance materials and training activities concerning non-legal obstacles to the effectiveness of access to justice:

The purpose under this agenda item is to address, in accordance with para. 3(c) of Decision I/5, the practical questions linked to implementing access to justice, such as the needs and roles of the parties involved (the public, the judiciary and the legal profession) and non-legal obstacles to the effectiveness of access to justice (costs, access to information and legal aid), as opposed to the formal legal requirements for the implementation of Article 9, paragraphs 3 to 5. Indeed, formal entitlement to a right (in the present case, access to justice guaranteed by law) is, in itself, no guarantee that the right will or can be carried out in practice. Paragraph 5 of Article 9 takes account of this reality by specifically mentioning 'financial and other barriers to access to justice'. Decision I/5 itself calls on the Task Force to "assess and address" the effectiveness of access to justice, including the impact of such matters as cost and delays, and the needs of a number of important stakeholders. In accordance with this mandate, the Task Force may wish to discuss the needs and role of the public, the judiciary and the legal profession and measures that may be taken to remove or reduce financial and other non-legal obstacles to the effectiveness of access to justice

Costs:

Costs associated to access to justice (e.g. court fees, attorneys' fees and expert fees and possible counterclaims from defendants) can represent a substantial barrier for the public, and thus hamper the actual access to justice. Various steps can be taken with a view to keeping court-related costs down, such as exemptions from paying court fees for certain categories of the public (e.g. NGOs) or for all members of the public bringing certain types of cases (e.g.

[3] Cf. Article 6, para. 1.

public interest cases). However, these exemptions may prove difficult or inadequate in countries where public funds are scarce (and where access to justice to enforce environmental law may be particularly useful, since enforcement by public authorities is difficult to finance). Steps can also be taken to help the public (or some members of the public) finance justice-related costs, such as attorneys' fees.

Access to information about review procedures:

As noted above, paragraph 5 of Article 9 requires parties to ensure that information is provided to the public on access to administrative and judicial review procedures, and this requirement could be linked to the requirements under Article 5 of the Aarhus Convention ('Collection and dissemination of environmental information'), in particular those stipulated in its paragraphs 3 and 7 (b). However, the focus under the present point is how to ensure actual provision of information to the public on the various review procedures. Indeed, paragraph 5 of Article 9 requires parties to ensure that information is provided to the public This would seem to require an active information policy on the part of public authorities, rather than the mere publication of the applicable statutory and regulatory provisions governing the relevant review procedures. Information should be available in a form that is readily comprehensible for the general public. Different forms of information may be appropriate for different target groups and situations.

Training of legal professionals:

The carrying out of the various provisions in Article 9 involves several professionals in addition to the judiciary, such as attorneys, civil servants (e.g. the 'administrative procedures' referred to in paragraph 3 of Article 9) and professionals sitting in 'other independent and impartial bodies established by law' (cf. paragraphs 1 and 2 of Article 9). Most of these professionals would need training in how to carry out and/or interpret the – often new – requirements of Article 9. In this context, there is an important role to be fulfilled by academia and other institutions involved in the training of legal professionals.

The importance of training and capacity building was duly recognized in the 'Johannesburg Principles on the Role of Law and Sustainable Development' adopted at the Global Judges Symposium held in Johannesburg, South Africa, from 18 to 20 August 2002. This document, reflecting the consensus of senior judges from all over the world, calls for '*the improvement of the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law, such as judges, prosecutors, legislators and others, to carry out their functions on a well informed basis, equipped with the necessary skills, information and material*' and for '*the strengthening of environmental law education in schools and universities, including research and analysis*'.

In order to help determine the actual nature of the information and training needs and the possible activities that could usefully be undertaken in this field, representative organisations of the professional and academic groups identified as stakeholders in Decision I/5 have been invited to participate in the work of the Task Force.

Legal aid:

The Aarhus Convention (Article 9, paragraph 5) requires Parties to consider "*the establishment of appropriate assistance mechanisms* (…)." The same paragraph also requires parties to '(…) *remove or reduce financial and other barriers to access to justice*'. Such removal or reduction could include the provision of free legal aid or other forms of – financial – assistance to members of the public wishing to exercise their right of access to justice with respect to environmental matters.

Indeed, some members of the public might not have the personal capacities of assessing whether or not the exercise of a given procedure is – legally – feasible or likely to result in a desired measure. Some members of the public might face difficulties in obtaining legal advice and assistance due to a lack of financial resources.

In order to address this question, the Task Force may wish to consider to what extent the established general systems of legal aid existing in most countries are adequate to meet the requirements of the Convention with respect to assistance mechanisms and to provide the necessary assistance to members of the public who may be in need of it. This involves consideration not only of the removal or reduction of financial barriers but also of the availability of specialized legal expertise.

Questions for discussion :

In considering the general issues outlined in this paper, the Task Force may wish to address the following questions regarding implementation of Article 9, paragraphs 3, 4 and 5 and the desirability of drafting recommendations on some or all of these issues for consideration by the Working Group of the Parties and, through it, by the Meeting of Parties to the Convention.

1) Overview of national law and practice and consideration of possible activities to support implementation of article 9, paragraph 3 of the Convention:

- ***Criteria for standing:*** *Which criteria would be allowed under paragraph 3? Does the reference to national law allow for flexibility in the means of implementation or for flexibility, not only in the means of implementation of the obligation, but also as to the scope and/or content of the obligation itself? In what form can the criteria be laid down?*
- ***Administrative versus judicial procedures:*** *Should the notion of 'fair and equitable' (paragraph 4 of Article 9) with respect to the 'administrative procedures' (paragraph 3 of Article 9), be inspired by the way in which the European Court of Human Rights has interpreted the term 'fair' (paragraph 1 of Article 6 of the ECHR)? What is the relevance of this interpretation to the implementation of Article 9, paragraphs 3 and 4 combined of the Aarhus Convention?*
- ***Actionable acts and omissions:*** *Which 'acts and omissions' would be covered by the paragraph? Would it be possible/desirable to draw up an indicative (non-exhaustive) list of actionable acts and omissions?*
- ***Relevant violations of national environmental law:*** *What fields of national law would be considered as 'environmental' within the meaning of paragraph 3 of Article 9? Does the definition of 'environmental information' in the Convention provide any useful guidance? What measures would be considered as 'national law'?*

2) Overview of national law and practice and consideration of possible activities to support implementation of article 9, paragraphs 4 and 5 of the Convention:

- ***Effectiveness of remedies:*** *Would it be possible/desirable to draw up guidelines or recommendations for the implementation of the injunctive relief mentioned in paragraph 4 of Article 9? Should other 'effective remedies' be identified?*
- ***Impact of delays:*** *What measures could be taken by Parties to ensure the timeliness of judicial and administrative review procedures? To what extent can the case-law on the interpretation of the 'reasonable-time' requirement stipulated in Article 6, paragraph 1 of the ECHR provide any useful guidance?*
- ***Public access to decisions:*** *What measures could be taken by Parties to ensure that decisions resulting from judicial and administrative review procedures within the scope of Article 9 are readily publicly accessible? To what extent can access to those decisions be ensured within the framework of measures taken by Parties pursuant to Article 5 of the Convention?*

3) Needs and role of the public, the judiciary, the legal profession and possible development of information and guidance materials and training activities concerning non-legal obstacles to the effectiveness of access to justice:

- ***Costs:*** *Should the Task Force identify the various systems in place in the signatories/parties to the Convention in view of listing options for keeping court-related costs down?*
- ***Access to information:*** *How to ensure that information on access to justice is actually provided?*
- ***Training of legal professionals:*** *Who are the professionals that would benefit from training with regard to Article 9? What should the content, form(s), and timing of the training be? Should the Task Force invite further input on this question from representatives of the legal professions with a view to assessing their needs? Is there any scope for collaborative international activities in this context?*
- ***Legal aid:*** *To what extent are existing legal aid mechanisms adequate to guarantee access to justice under the Convention? What other measures might be taken by Parties?*