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Fourth session

Chisinau, 29 June–1 July 2011

Item 4 (d) of the provisional agenda

Substantive issues: access to justice

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

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Introduction

1. The fourth meeting of the Task Force on Access to Justice, established by the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) at its second session (decision II/2), was held in Geneva on 7 and 8 February 2011.¹
2. The meeting was attended by experts designated by the Governments of Armenia, Belarus, Croatia, Cyprus, the Czech Republic, Denmark, France, Georgia, Hungary, Ireland, Italy, Kyrgyzstan, Latvia, Slovakia, Spain, Sweden and Uzbekistan. The representative of Ireland participated in his capacity as the Chair of the Task Force on Public Participation in Decision-making.
3. The European Commission was present on behalf of the European Union (EU). A representative from the office of the European Ombudsman was also present.
4. A representative of the Regional Environmental Center for Central and Eastern Europe, as well as representatives of Aarhus Centres in Georgia and Kyrgyzstan, attended the meeting.
5. The following non-governmental organizations (NGOs) were represented: “Biosophia” Environmental NGO (Armenia); Environment-People-Law (Ukraine); Environmental Management Law Association and the Access Initiative (EMLA & TAI Europe); GLOBE Europe (Republic of Moldova); Green Salvation (Kazakhstan); “Greenwomen” Analytical Environmental Agency (Kazakhstan); Independent Ecological Expertise (Kyrgyzstan); Resource and Analysis Center “Society and Environment” (Ukraine); Russian Association of Indigenous Peoples of the North (Russian Federation); St. James’s Research (United Kingdom of Great Britain and Northern Ireland); Swedish Society for Nature Conservation (Sweden); Union for Defence of the Aral Sea and Amadarya River (Uzbekistan); “Volgograd Ecopress” Information Centre (Russian Federation); WWF²-Georgia (Georgia); WWF¹-UK (United Kingdom); and Youth of the 21st Century (Tajikistan).
6. Also present at the meeting were a number of international experts, high-level judges and representatives of judicial training institutions from Armenia, Azerbaijan, Belarus, France, Georgia, Kazakhstan, Republic of Moldova, Sweden and United States of America.
7. A representative of Crop Life International also attended the meeting.

I. Opening of the meeting and adoption of the agenda

8. The Task Force Chair, Mr. Jan Darpö (Sweden), opened the meeting. The Task Force adopted its agenda.

¹ Documents for the meeting and presentations are available online at:
<http://www.unece.org/env/pp/a.to.j.htm>.

² The World Wildlife Fund.

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

9. Further to the mandate of the Task Force in paragraph 16 (a) (ii) of decision III/3 of the Meeting of the Parties, and the decision of the Task Force at its third meeting (14–15 October 2009) on the development of the portal for the exchange of jurisprudence concerning the Convention for use by judges, legal professionals, academics and other stakeholders (ECE/MP.PP/WG.1/2010/6, para. 25), the Chair outlined the work undertaken during the past year in cooperation with the secretariat, the national focal points and stakeholders to the Convention. The secretariat provided a demonstration of how to access information on jurisprudence in the Aarhus Clearinghouse.

10. The Task Force welcomed the development of the database. It agreed that the database should continue to be populated beyond the fourth session of the Meeting of the Parties (MOP-4) (Chisinau, 29 June–1 July 2011) to ensure sustainability of the project and called upon countries and stakeholders to provide more cases to the database. In order to ensure quality and objective summaries of the various inputs, the Chair would commit to review the cases before their inclusion in the Aarhus Clearinghouse. The Task Force agreed on this proposal.

11. Participants exchanged information about recent developments, including judicial reforms at the national level. In an increasing number of countries in the region, court decisions were already available in electronic databases. The Task Force agreed that individual Parties should be encouraged to make decisions of courts, and whenever possible of other bodies, publicly available, as required by article 9, paragraph 4, of the Convention.

12. The Task Force requested the secretariat to explore whether it was feasible that the section on jurisprudence in the Clearinghouse could be directly linked to national databases related to jurisprudence and whether appropriate search functions could be further developed.

III. Capacity-building and outreach

13. The Chair together with the secretariat informed the Task Force that a regional workshop for the high-level judiciary in Central Asia, which was initially scheduled to take place from 25 to 27 August 2010, had been postponed for several organizational reasons.

14. The Task Force agreed that judiciary trainings were of key importance. It reiterated that it would be useful to have a subregional workshop in Central Asia after MOP-4, and noted that the material for the workshop should benefit from the analytical studies (see paras. 25–35 below). The workshop might be organized with the cooperation of other organizations active in the field, such as the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe, the EU and judicial training centres, as appropriate.

15. The Task Force also agreed that public interest lawyers needed to be included more in the work on access to justice and requested the secretariat to explore the possibility of organizing a seminar for public interest lawyers back to back with the next meeting of Task Force.

16. On outreach, the secretariat reported that, since the third meeting of the Task Force, the secretariat had engaged in broadly disseminating material related to the Convention to national and international agencies related to ombudsman services, judicial training and consumer affairs. All material relating to the Task Force meeting, including the outcomes of the analytical studies, would be shortly posted on the Convention website.

17. Ms. Aida Iskoyan, Head of the Environmental Law Research Centre at Yerevan State University Faculty of Law, and the Convention's national focal point for Armenia, gave a presentation on the role of judicial education and the Aarhus Convention. Since 2007, the judicial school of Armenia had organized continuous training courses for practicing judges. The training included the course "Judicial Protection of Environmental Rights and the Aarhus Convention", which focused on questions of procedural law and the Convention, such as standing of NGOs, and the relationship between the access to justice pillar and the implementation of the other two pillars of the Convention, namely, access to information and public participation. The course also discussed reasons for the small number of environmental cases in Armenian courts and the general obstacles to the implementation of the access to justice provisions of the Convention in the country. Also highlighted was the role of judges in the lawmaking process related to environmental issues.

18. The role of international organizations in providing training for judges in Armenia was also highlighted, as well as the first training for judges and attorneys organized in the country by an NGO, with the support of the OSCE Office in Yerevan. Such training activities were in particular beneficial for participants from the region because, despite the increased number of training activities in the capital, violations of the legislation relating to the implementation of the Aarhus Convention had been recorded in particular in that region. In addition, updates of the collection of environmental laws of Armenia are regularly published, while a state information system of judicial acts and court decisions had been established with the financial support of the World Bank (www.datalex.am).

19. Three main obstacles to the implementation of the Convention in Armenia were a lack of awareness among civil servants, judges, lawyers and NGOs; a lack of financing; and a lack of courses or teaching on environmental law, including the Convention, in higher education. Therefore, to strengthen the implementation of article 9 of the Convention, the involvement of all stakeholders, such as representatives of all branches of Government, NGOs, law enforcement agencies and the ombudsman, in the process of the law reform on access to justice was needed, as well as the consistent implementation of the substantive and procedural law in that area. The importance of regional conferences, seminars and round tables was also stressed in that connection.

20. Mr. Ian Harden, Secretary General in the office of the European Ombudsman, gave a presentation on the European Ombudsman and the Aarhus Convention, explaining the nature, functioning, competences and limitations of the mechanism. The Ombudsman, established by the Maastricht Treaty in 1993, was elected by the European Parliament and constituted an external mechanism, which was independent and impartial, with the power to investigate and report on complaints against public authorities. The Ombudsman investigated "maladministration", including illegality at the EU level (institutions, bodies, offices and agencies, with the exception of the Court of Justice in its judicial role) with the aim to achieve win-win outcomes. "Maladministration" did not encompass review of the validity of EU legislation, but included the interpretation given by EU institutions and bodies. In exercising his powers, the Ombudsman could see all documents, require officials to answer questions, make recommendations and publicize his findings. Matters that were, or had been, before a court, could not be dealt with by the Ombudsman, and the Ombudsman did not have the power to issue legally binding decisions.

21. A complaint to the European Ombudsman could be submitted by any citizen of the EU or any natural or legal person residing or having its registered office in a member State, while the Ombudsman could also investigate on his own initiative. In 2008, a Memorandum of Understanding with the European Investment Bank determined that the own-initiative power would be used to deal with complaints from non-citizens residing outside the EU. There was no requirement to be personally affected and public interest complaints were possible.

22. Mr. Harden then gave an overview of the EU legislation relating to the Aarhus Convention and pointed to the Commission's role as "guardian of the Treaties", according to EU primary law. To date, there have been no complaints to the European Ombudsman based on the internal review or public participation provisions of the Aarhus Regulation,³ which applied to the EU institutions. The European Ombudsman, however, regularly dealt with complaints against institutions which had refused public access to documents, and had applied the relevant provisions of the Aarhus Regulation when environmental information was concerned. Examples of cases in which the European Ombudsman had supervised the Commission as "guardian of the Treaties" were then presented. Those concerned infringement by the member States of the Directive on public access to information⁴ and on public participation in plans and programmes relating to the environment.⁵

23. The mandate of the Ombudsman's office was general and its resources limited. Its role was to conduct systemic inquiries and, in certain areas, the Ombudsman had been active during the legislation process, opposing aspects of proposed amendments. It was not excluded that a number of decisions issued by the Ombudsman relating to specific legislation might trigger its amendment.

24. The Task Force agreed that more experiences should be shared with agencies/institutions carrying out activities related to the Convention, such as the European Ombudsman, and highlighted the importance of judicial education. It recognized the need to institutionalize the Aarhus Convention relating to capacity-building for judges and prosecutors, such as by introducing the topic in the curricula of trainings for the judiciary and in higher education. It also observed that the higher the level of the judges, the more difficult it was to approach them and encourage them to do additional training. Finally, the role of NGOs and international financing institutions in promoting the Convention was mentioned.

IV. Analytical studies

25. At its third meeting, the Task Force had decided to prioritize analytical studies on the issue of costs and financial arrangements (including litigation costs, legal aid and support for public interest lawyers) and the issue of remedies (including injunctive relief and the issue of timing) (ECE/MP.PP/WG.1/2010/6, para. 29).

A. Remedies in non-Eastern European, Caucasian and Central Asian countries

26. An expert, Ms. Yaffa Epstein, had been contracted to carry out a study on remedies in countries of the region that were not in Eastern Europe, the Caucasus and Central Asia. The expert had been working in close collaboration with the Chair of the Task Force and the

³ Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p.13.

⁴ Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003, on public access to environmental information, OJ L 41, 14.2.2003, p.26.

⁵ Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003, providing for public participation in drawing up certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC with regard to public participation and access to justice, OJ L 156, 25.6.2003, p.17.

study was broadly based on secondary sources available in the English language. An advance copy of the study had been distributed to all participants and would be finalized after integrating the comments of the Task Force.

27. The expert looked at two key issues: improving injunctive procedures, including consideration of the suspensive effect; and promoting efficient resolution of disputes through administrative procedures, including tribunals, quasi-judicial bodies and the ombudsman. The study reviewed the system in 28 Parties to the Convention. The barriers identified to effective injunctive relief could be summarized as follows: overly restrictive criteria or overly restrictive interpretation of the criteria; vagueness of the criteria; bond requirements for obtaining an injunction; the threat of lawsuits; lack of independent injunctive procedures; obstacles to enforcement; and lack of awareness among the public about their legal rights. The expert also addressed some potential barriers to the effectiveness of the ombudsman institution as an Aarhus Convention remedy, among them: discretionary powers over the launch of investigations; a lack of resources; a lack of suspension of administrative decision or judicial appeals period; a lack of independence; and a lack of environmental knowledge. In the end, it was noted that where suspensive effect was unavailable, precise injunctive criteria were particularly important. It was suggested that such criteria for injunctions should be developed that would comply with the Aarhus Convention. In addition, it was suggested that best practices for facilitating efficient resolution through administrative procedures, including quasi-judicial procedures and tribunals, should be explored.

28. The Task Force welcomed the work conducted by the expert. The inclusion of the institution of ombudsman as part of the administrative system was appreciated, but it was noted that the institution could not be seen as a substitute to fill a gap of inadequate judicial remedies. It was agreed that comments should be sent to the expert during the next two weeks to complete the country sections and finalize the study.

B. Costs in non- Eastern European, Caucasian and Central Asian countries

29. The Chair reported that he had been working on the study on costs in the non-Eastern European, Caucasian and Central Asian countries, but had not advanced very far. Using the collected material, the Chair had therefore prepared a memorandum of his own on costs, which had been distributed to participants. The memorandum attempted to adopt the same approach as the Compliance Committee had used in case ACCC/C/2008/33, namely to look at the “cost system as a whole and in a systematic manner”. Thus, when deciding what was “prohibitively expensive”, attention had to be paid to the uncertainty of facing an economic risk. Furthermore, what was “fair” should be decided from the viewpoint of the public concerned. Costs also had to be seen in the context of the cost of living in the country in question.

30. Using the foregoing as a starting point, the main issues on costs in the environmental procedure could be described as the following: court fees; loser pays principle; experts’ and witnesses’ fees; and bonds for obtaining an injunction. The memorandum also touched upon some mitigating factors, such as protective costs orders, court discretion in dealing with costs, legal aid, pro bono services and other arrangements. Finally, it was suggested that further studies should be undertaken on certain issues that were clearly crucial to providing adequate access to justice in environmental procedures and about which knowledge was limited. Such key issues which would merit further consideration were the “value of the case”, the loser pays principle, cost recovery for authorities, bonds for injunction and, finally, financial arrangements, legal aid and legal assistance.

31. The Task Force agreed that the consideration of financial barriers and the memorandum by the Chair was a good start for further consideration. In the discussion, it was argued that the loser pays principle should be looked at more thoroughly; that legal aid should be seen not only as Government-provided legal aid, but also as encompassing pro bono services; and that the term “costs” should include damages sought from the public in strategic lawsuits against public participation, sometimes known as SLAPPs.

C. Costs and remedies in countries of Eastern Europe, the Caucasus and Central Asia⁶

32. Two experts, Ms. Elena Laevskaya and Mr. Dmytro Skrylnikov, had undertaken an analytical study on costs and remedies in the countries of Eastern Europe, the Caucasus and Central Asia. The two experts were coordinating with 12 experts identified in each country of the region. Questionnaires had been disseminated to the 12 experts to fill out and an informal meeting of all experts had taken place in Geneva on 7 February 2011 to discuss the progress of the project. The study would be presented as an advance copy at the MOP-4 and would then be finalized.

33. The two experts presented the methodology of the study; the status quo and the structure, including overview of the system on access to justice in environmental matters, in each country; and the challenges encountered during that demanding process. They thanked the 12 national experts who had responded to the questionnaire with detailed information on the legislation and practice in each country. The questionnaire related to three major areas — remedies, timeliness and costs — with the objective of identifying barriers to effective access to justice. One of the difficulties of the study was that the three main areas identified could not be seen in isolation; the experts had had to look at the national decision-making in the areas of the environment to acquire a general picture and define the bodies that made a decision and the bodies that were designated to consider appeals. In some cases the fact that there was no information might indicate that barriers actually existed, while in other cases ongoing legislative amendments were making the collection of information difficult. At the present stage of the study, some conclusions could be made, similar to the trends identified by the analytical studies in the non-Eastern European, Caucasian and Central Asian region.

34. The Task Force welcomed the presentation and discussed some issues raised. It was suggested that the role of judicial remedies and the jurisprudence of supreme courts should be looked into and that case law should be included, if possible. With respect to defining “decisions”, participants commented on the complexity of the matter in the subregion, where many decisions were taken which were not of an authorizing nature and an additional positive expert appraisal was needed. Experts and the Task Force also discussed trends that could be addressed by way of recommendations to the countries, when the study was completed, concerning, among others, suspensive effect and actions to obtain remedy by a person or a group in the name of the collective interest (also known as *actio popularis*).

35. Ms. Svitlana Kravchenko, a member of the Aarhus Convention Compliance Committee, speaking in her capacity as an expert, briefed the Task Force about the recent jurisprudence of the Compliance Committee on access to justice and the impact of its recommendations on Parties’ implementation.

⁶ Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Republic of Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

V. Future work on access to justice

A. Follow-up to the work on costs and remedies

36. The Task Force discussed proposals for future work. A number of participants agreed with the Chair in emphasizing that the Task Force should not lose momentum in its work, but instead now had to make use of the material collected and the experience gained. It was also important to proceed swiftly with further studies in order identify areas that should be subjected to deeper analysis. Some participants considered that that might be premature until the study on costs and remedies in the subregion had been concluded, and that to ensure consistency between the studies on the countries of Eastern Europe, the Caucasus and Central Asia and non-Eastern European, Caucasian and Central Asian countries, recommendations should be first made on the basis of the studies currently being carried out. The following issues were mentioned as possible topics of future analysis: mitigating factors and the loser pays principle; public funding; legal aid (especially relating the work by public interest lawyers); developing criteria for injunctions (taking into account how to balance environmental and economic considerations); standing; and timeliness.

37. The Task Force decided to build on the existing material on costs and remedies and to develop a set of good practices and analyses on the following priority issues: the loser pays principle; legal aid and other methods of funding for public interest lawyers and NGOs; and criteria for injunctions. It also agreed that the Chair and the secretariat would further explore the modalities of the follow-up work, taking into account availability of resources and timing.

38. The Task Force further agreed that, with regard to other topics to be analysed in the future, it would look at the challenges on access to justice as identified by the Aarhus Convention Compliance Committee and the analytic studies on costs and remedies; and, in the longer term, at the issues of standing and timeliness.

39. Finally, the Task Force agreed that in carrying out those tasks the activities of the Task Force on Public Participation in Decision-making should be taken into account.

B. Draft decision on promoting effective access to justice

40. The Chair of the Task Force presented a draft decision on promoting effective access to justice (ECE/MP.PP/WG.1/2011/L.2), prepared by the Bureau of the Parties with the assistance of the secretariat and after consultation with the Chair. The document had been submitted to the thirteenth meeting of the Working Group of the Parties (9–11 February 2011) for its consideration, with a view to approving it for submission and adoption by MOP-4.

41. The Task Force welcomed the text of the draft decision, suggested nominal editorial changes to the text and entrusted the Chair to report to the Working Group of the Parties on the outcomes of the discussion.

42. The Task Force also agreed that it was important to ensure that in the future Governments nominated experts from the justice sector to participate in the work of the Task Force.

43. The Chair then invited participants to join a mailing list for the exchange of ideas on substantive issues related to the work of the Task Force on promoting access to justice.

VI. Other business

44. The representative of EMLA & TAI Europe presented an initiative to promote the negotiation by 2012 of binding regional instruments on access rights — in other words, on access to information, public participation and access to justice, as defined by the Aarhus Convention. The Task Force agreed that this was a political issue that could not be dealt with by an expert body, such as the Task Force, and suggested that support for the proposal should be sought from the coming meeting of Working Group of the Parties and later by the Meeting of the Parties to the Convention.

VII. Adoption of conclusions and closing of the meeting

45. The Task Force revised and adopted the major outcomes and decisions presented by the Chair at the meeting and requested the secretariat, in consultation with the Chair, to finalize the report and to incorporate the adopted outcomes and decisions in it. The Chair thanked the participants, the secretariat and the interpreters, and closed the meeting.
