UNITED NATIONS

E

Economic and Social Council

Distr.
RESTRICTED

CEP/AC.3/10
7 July 1997

ORIGINAL : ENGLISH

ECONOMIC COMMISSION FOR EUROPE

COMMITTEE ON ENVIRONMENTAL POLICY

Working Group for the preparation
of a draft convention on access
to environmental information and
public participation in
environmental decision-making

REPORT OF THE FIFTH SESSION

1. The fifth session of the Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making took place in Geneva from 18 to 20 June 1997.

2. It was attended by delegations of: Albania; Armenia; Austria; Belarus; Belgium; Bulgaria; Croatia; Czech Republic; Denmark; Estonia; Finland; France; Georgia; Germany; Hungary; Italy; Kazakstan; Kyrgyzstan; Latvia; Lithuania; Netherlands; Norway; Poland; Portugal; Republic of Moldova; Romania; Russian Federation; Slovenia; Spain; Sweden; Switzerland; Turkey; Ukraine; United Kingdom and Uzbekistan.

3. The Commission of the European Communities was also represented.

4. Representatives of the United Nations Conference on Trade and Development (UNCTAD) and United Nations Environment Programme (UNEP) also attended.

5. The following non-governmental organizations were represented: Environmental NGOs Coalition; International Council of Environmental Law (ICEL); Regional Environmental Center for Central and Eastern Europe (REC) and World Conservation Union (IUCN).

6. The Working Group adopted the agenda as contained in document CEP/AC.3/9.

7. The Meeting was informed that the Convention on Environmental Impact Assessment in a Transboundary Context would enter into force on 10 September 1997 and that the first meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes would take place in Helsinki (Finland) from 2 to 4 July 1997.

8. The delegations of the Czech Republic and of the United Kingdom circulated proposals (see annexes I and II to the present report).

9. The Chairman recalled the Working Group's decision at its fourth session (CEP/AC.3/8, para. 12) to convene an informal meeting before the fifth session.

10. Mr. Pallemaerts (Belgium) introduced the report of the informal meeting (see annex III below). He drew the attention of the Working Group to the fact that the informal meeting was expected to prepare options with respect to article 6 on "access to justice" taking into account the comments made at the fourth session of the Working Group. All delegations taking part in the discussion expressed their appreciation to Mr. Pallemaerts for the valuable work done.

11. The Chairman informed the Working Group that he had requested the delegation of Italy to prepare, with the support of other interested delegations, options with respect to article 1 on "definitions" and article 2 on "general provisions" taking into account comments made at different sessions of the Working Group, in due time before the sixth session. It was agreed that an informal meeting would be held on 7 and 8 July 1997 to this end. He also informed the Working Group that he had requested a small drafting group to prepare a consolidated version of the convention in the light of the work undertaken at all the sessions of the Working Group, for consideration at its seventh session. The small drafting group would meet on 11-15 August 1997 and consist of Ms. Dade (Albania), Mr. Koester (Denmark), Ms. Tanon (France), Mr. Meyer-Rutz (Germany), Mr. F. La Camera (Italy), Mr. Jendroska (Poland), Mr. Matveev (Russian Federation) and Mr. McGlone (United Kingdom). A representative from the Environmental NGOs Coalition was invited to participate as an observer, and a representative from the Commission of the European Communities would participate at the invitation of the Chairman.

12. The Working Group considered articles 7 to 18. Delegations taking part in the discussion provided comments without prejudice to the positions that they might take in the future (see annex IV below). The delegation of France circulated proposals (see annex VI below).

13. The Working Group adopted its report on Friday, 20 June 1997.

Annex I

PROPOSAL BY THE DELEGATION OF THE UNITED KINGDOM FOR A NEW PARAGRAPH FOR ARTICLE 4

Each Party shall:

(a) Publish the facts and the analyses of facts which it considers relevant and important in framing major environmental policy proposals;

(b) Publish or otherwise make available explanatory material on its dealings with the public in matters falling within the scope of this Convention, except where such publication might prejudice the confidentiality of information that may be withheld under article 3(2); and

(c) Publish in an appropriate form information on:

(i) What public services relating to the environment are provided by government at a national, regional and local level, what targets are set, what standards of service are expected and the results achieved; and

(ii) How public services relating to the environment provided by government at a national, regional and local level are administered, and what complaints and redress procedures are available.

Annex II

PROPOSAL AND COMMENTS BY THE DELEGATION OF THE CZECH REPUBLIC

The comments and suggestions of the Czech Republic are based on the draft elements for the convention (CEP/AC.3/R.1), on the revised version of articles 1, 3 and 4 of the convention (as included in the report of the fourth session (CEP/AC.3/8)) and on draft articles 3 to 8 submitted by the small drafting group (CEP/AC.3/R.4).

The Czech Republic is working on a draft act on access to environmental information within the framework of its approximation efforts. The draft will follow principles of the draft convention and EC Directive 90/313/EEC on the freedom of access to information on the environment. The Czech delegation holds that the revised version of article 1 is preferable to the original text of the draft, particularly option I for subparagraph (a) and separate subparagraphs (b) and (c). Nevertheless, it would prefer a more general specification of the term “environmental information”. A very detailed definition might lead to overlapping and inaccuracy. It would provoke never-ending discussions on the meaning of the word “environment”. The definition of the term “environmental information” should be always linked, at least in respect to subparagraph (a), with the definition of “environment” in accordance with national legislation. Therefore, the Czech delegation suggests a more general definition of “environmental information”.

Suggestions by the delegation of the Czech Republic:

Article 1

“Environmental information” shall mean any information in written, visual, aural, electronic or any other material form related in any way to the state of the environment or its particular elements and natural resources and to their development or to anything that may or is likely to affect them. Types of environmental information are also draft texts of legislation, concepts, decisions or others strategic documents that are under preparation by public authorities and that concern the environment, and all the documents describing the state of the environment or its particular elements and natural resources and information on emissions and the impact of activities on environment.

“To provide access to environmental information” shall mean to transmit environmental information to natural or legal persons in aural, written, visual, electronic or any other material form.

Article 3

1. (b) Without an interest having to be stated or proved. The person shall state in the request whether or not the information is being requested for business reasons.

2. Each Party may allow a request for environmental information to be refused if:

(b) The request is manifestly unreasonable or formulated in too general a manner or otherwise insufficient and the person who requested the information has not amended or clarified it according to the suggestions of the public authority within a certain period of time;

(c) The request is formulated in a manifestly provocative or obstructive manner and the person who requested for environmental information already had it at his disposition;

(d) Providing environmental information would require a special survey, calculations or processing which would limit the ability of the public authority concerned to achieve other tasks.

2A. Each Party may allow a request for environmental information that is held by a public authority to be refused if disclosure of the information would adversely affect:

(d) Commercial and industrial confidentiality, provided that:

(i) The body whose economic interest may be threatened by the disclosure of the environmental information presents, within two weeks after being requested to do so by the public authority, sufficient arguments explaining what kind of damage might be caused by the disclosure;

(ii) The requested information does not relate to emissions or to another impact on the environment;

(g) The environment to which the information relates.

Time limits

The delegation of the Czech Republic proposes that the time limits for supplying information should be as short as possible but maximum four weeks. It should be possible to extend the period by one or two weeks respectively, if the volume and complexity of the requested information so warrant.

The time limit for refusing a request should be two weeks.

The information should be released immediately and without delay if the release of information is likely to prevent or mitigate an imminent threat to health or the environment.

Right to specify the form of the information

Overlapping with the issue of access to documents, there was a discussion on the new article 3.1(c) (a revised version of article 3.7(d) in CEP/AC.3/R.1) which would give the applicant the right to specify the form in

which the information should be provided, if it is available in that form. The Czech delegation fully supports this option. One of the main reasons why this clause is so important to the public is to prevent a situation where large amounts of information were available in both paper and electronic form and the public authority opted to make it available only in paper form at considerable expense (albeit still a “reasonable” charge in relation to the amount of copying) instead of providing it at low cost in electronic form. The Czech delegation also strongly supports the deletion of the wording “unless making it available in that form would be an excessive or unreasonable burden on the public authority”.

3A. The right of the public authority to refuse a request for environmental information lapses when the reason for refusing it no longer exists.

6. Each Party shall ensure that the refusal or partial refusal of a request for environmental information:

(a) Is made in writing by the public authority which refused to provide the requested information, or by the public authority superior to that which refused the request;

(b) Is made in a form [of administrative decision] which enables the person whose request for information was refused or partially refused to appeal against the refusal [and to challenge the refusal at judicial level],

(c) Includes all the reasons for the refusal in accordance with paragraph 2 and 2A;

(d) Provides information on access to the judicial or administrative review procedure in accordance with paragraph 8 or this article.

Regarding paragraph 7, the Czech delegation supports the original text in CEP/AC.3/R.1. The charge may include the actual cost of reproducing and transmitting the information it should not include the costs of compiling or retrieving the information. Access to the environmental information which is contained in public registers should be free of charge. A schedule of actual charges and maximum charges that set a ceiling on what may be charged by the public authority should be published.

Article 4

1. (c) The public is aware of the level of public authority which holds certain types of environmental information and of the form in which the information is available.

3. Each Party shall, at regular intervals not exceeding one year, publish and disseminate national reports on the state of the environment in its territory and on its contributions, at the legal, environmental, economic, and institutional level, to solving global environmental problems, such as climate change, acidification, protection of the ozone layer, protection of biodiversity, etc.

6. Each Party shall take legal, administrative and other measures to ensure that entities whose activities have a significant adverse impact on the environment make information on this impact publicly available.

Article 5

1. Each Party shall take the necessary legal, administrative and other measures to ensure that the public can participate in environmental decision-making, particularly on proposed activities listed in annex I, without having to prove an interest and in accordance with its national legislation.

2. Each Party shall take the necessary legal, administrative and other measures to ensure that competent public authorities notify the public who is likely to be affected by or who has an interest in the environmental decision-making, by public notice or individually, as appropriate, early in the environmental decision-making procedure. The public authorities shall also notify citizens' environmental organizations that have requested to be notified of all proposed activities within specified categories in accordance with the request. The notification shall contain, inter alia, information on:

The Czech delegation supports the wording of the small drafting group (CEP/AC.3/R.4)

3. The public participation procedures shall include reasonable time-frames for different phases, which will allow sufficient time for the public to prepare and participate effectively and continuously throughout the environmental decision-making.

4. Each Party shall take the necessary legal, administrative and other measures to ensure that public participation commences early in the environmental decision-making procedure, at a stage when projects and priorities are still being identified and options and alternatives are still open.

5. Notwithstanding the provisions of article 3 of this Convention, competent public authorities shall ensure that the relevant information, including information such as economic and financial analysis of the proposed activity, is made accessible to the public for inspection free of charge, as soon as it becomes available, in order to supplement the information under paragraph 2 of this article. The relevant information shall include as a minimum:

(a) A report of preliminary consultations if they have taken place;

(b) A survey of the relevant documents specifically related to the activity which are not available to the public;

(c) Any available information on potential sources of emissions and significant effects of the emissions on the environment;

(d) The application for a decision;

(e) Expert opinions on the proposed activity by authorities concerned with protecting particular environmental elements or natural resources;

(f) Opinions of other persons participating in the decision-making procedure.

6. Each Party shall take the necessary legal, administrative and other measures to ensure that public participation in environmental decision-making allows the public:

(a) To be heard;
(b) To propose alternatives, including the “zero” alternative;
(c) To make objections;
(d) To submit comments on the proposed activity before the decision is made;
(e) To express its views at a public hearing of which it has been properly notified;
(f) To propose measures to mitigate significant adverse impacts; and
(g) To propose measures to monitor the impacts of the decision including public participation in the monitoring.

7. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

8. Each Party shall also ensure that the public is promptly informed of the decision when it is taken, of the extent to which comments and objections made by the public have been taken into account, and of the reasons and considerations on which the decision is based.

9. Each Party shall ensure that, after the decision has been made, the public has recourse to administrative and/or judicial proceedings in order to challenge acts or failures to act by public officials and to appeal against the decision.

10. Each Party shall ensure that persons involved in public participation in environmental decision-making are not penalized in any way for their involvement in activities that are otherwise lawful.

11. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1 of this article, the provisions of paragraphs 2 to 10 of this article are applied mutatis mutandis .

12. Each Party shall ensure that an environmental impact assessment procedure at the national, regional and local levels is undertaken in accordance with the provisions of appropriate international regulations.

Article 7

The Czech delegation does not consider the article 7 on public participation in procedures concerning general rules as suggested by the small

drafting group (CEP/AC.3/R.4) to be appropriate. It is not clear what "general rules" means. It may mean drafts of legislation, for example, or strategic documents, such as policies, strategies, plans or programmes. For this purpose it seems more appropriate to oblige Parties to apply the environmental impact assessment procedure, as is already the case in the Czech Republic following the 1992 Act on the Environment.

Therefore, the Czech delegation suggests the following wording for article 7:

1. Each Party shall ensure that the environmental impact assessment procedure is applied to drafts of legislation which may have an impact on the environment and to the preparation of its strategic documents, such as policies, development concepts, strategies, plans and programmes, in accordance with the national legislation.

2. Each Party shall particularly ensure that the public is informed early in the stage of preparation or drafting of strategic documents or legislation and that it is given an opportunity to submit written comments on the draft text, in accordance with the national legislation.

Annex III

REPORT OF THE INFORMAL MEETING ON "ACCESS TO JUSTICE"

1. The group agreed that there were three different issues regarding access to justice which needed to be addressed:

(a) Review mechanism for administrative decisions relating to access to information;

(b) Review mechanism for environmental decisions which would be subject to public participation requirements under the convention;

(c) Access to justice in environmental matters generally (i.e. access to justice for purposes other than those of the specific review mechanisms referred to above).

2. With regard to issue (a), there was general agreement that a review mechanism should be provided for in the convention. There was consensus that final administrative decisions on requests for access to information should be subject to review by a court or other independent and impartial body in countries where such a body was already established and operational, but that contracting parties should have the option to provide for a preliminary review of such decisions by an administrative authority. There was also general agreement that, for the review mechanism to be effective, the review body deciding in the last instance should have the authority to compel the public authority holding the information to comply with its decision. However, the delegation of the Russian Federation indicated that any review mechanism should be subordinated to the relevant constitutional and legal provisions of each contracting party. It stressed that the Convention's provisions on review mechanisms should not be legally binding, but should be in the nature of recommendations to the contracting parties.

3. There was general agreement that the review mechanism or combination of mechanisms provided by national legislation, should be fair, open, transparent, equitable and not prohibitively expensive. However, some delegations considered that these were general criteria applying to any form of judicial or administrative review, and would therefore not need to be explicitly stated in the convention. Some delegations suggested that an alternative option might be to refer in the Convention to existing, internationally recognized standards, for instance those laid down in the European Convention on Human Rights. It was also suggested that, in addition to the criteria set out in the Guidelines on access to environmental information and public participation in environmental decision-making adopted at the Ministerial Conference in Sofia, Bulgaria (October 1995), specific reference should be made to the need for the review mechanisms to be timely. There was general agreement that access to the review mechanism should be reserved to those persons/organizations whose request for access to environmental information had been refused, whether in part or in full, ignored or inadequately answered by a public authority.

4. With respect to issue (b), there was also general agreement that a review mechanism should be provided for in the convention. There was consensus that administrative decisions on specific activities subject to public participation requirements under article 5 of the convention should also be subject to review by a court or other independent and impartial body, but that contracting parties should have the option to provide for a preliminary review of such decisions by an administrative authority. Most delegations considered that a similar mechanism should be provided for the review of the legality of other environmental decisions subject to public participation requirements under other provisions of the convention. However, one delegation indicated that any review mechanism should be subordinated to the relevant constitutional and legal provisions of each contracting party. There was general agreement that the review mechanism or combination or mechanisms provided by national legislation, should generally comply with similar substantive criteria as those referred to in paragraph 2 above, subject to the same reservations. There was general agreement that access to the review mechanism should be open to all persons/organizations that had the right to participate in the decision-making procedure itself. However, some delegations maintained that such persons/organizations would have to assert impairment of their individual rights.

5. With regard to issue (c), some delegations considered that the convention should not contain any provisions on access to justice other than provisions on the review mechanisms referred to in paragraphs 2 and 3, since such an addition would be inconsistent with the agreed scope of the convention. Other delegations, however, were of the opinion that it would be appropriate for the convention to include other provisions on access to justice, beyond those on the review mechanisms referred to above. It was suggested by some delegations that such provisions could include a right for NGOs and/or individuals meeting particular criteria to challenge unlawful acts or omissions by private persons or public authorities which contravened specific provisions of national environmental law. The Environmental NGOs Coalition requested that such provisions should also extend to individuals without impairment of their financial interests or health.

6. There was consensus that all the provisions regarding “access to justice” should be put together in one article in the convention.

7. The informal meeting prepared a consolidated version of the article on access to justice as included in annex V below.

Annex IV

COMMENTS ON ARTICLES 7 TO 18 AS INCLUDED IN DOCUMENT CEP/AC.3/R.1

Article 7

1. One delegation expressed the view that there was no need for an article on the Meeting of the Parties in the convention. All other delegations reserved their position in this regard and indicated that they were in favour of such an article. It was also mentioned that a separate article on strengthening cooperation under the convention should be prepared. The Working Group agreed to put this article in square brackets for the time being. Should there be an article on “Meeting of the Parties”, the following comments were made:

Paragraph 1

2. It was agreed that the frequency of the meetings of the Parties would have to be further considered. It was suggested that these meetings should be held once every two or three years. The role of non-governmental organizations in these meeting was underlined and it was agreed that the rules of procedure should allow for their participation. It was also suggested that the third sentence would need further consideration.

Paragraph 2
Subparagraph (b)

3. It was suggested that article 7 of this convention should be replaced by a provision that would require Parties to transmit copies of laws and regulations implementing the convention to the Executive Secretary of the United Nations Economic Commission for Europe.

Subparagraph (d)

4. Some delegations suggested deleting this subparagraph, while others expressed their interest in such a provision. It was decided to put square brackets around the text.

Subparagraph (e)

5. It was suggested that “and establish subsidiary bodies” should be deleted on the understanding that the rules of procedure for the meetings would cover this issue.

Subparagraph (f)

6. All delegations in favour of retaining article 7 attached great importance to this issue and indicated that a separate provision should be drawn up, improving the existing text and using examples from other international agreements. The delegation of Belgium and the Environmental

NGOs Coalition indicated their willingness to provide the secretariat with proposals. One delegation expressed its willingness to consider proposals in this respect.

Subparagraph (g)

7. Some delegations suggested deleting this subparagraph. Others indicated that it would have to be included in article 4. It was also suggested that the substance of this subparagraph could be included in an annex to the convention. The Environmental NGOs Coalition indicated that it would endeavour to provide a text for such an annex at the sixth session of the Working Group.

Article 8

8. The Working Group agreed to put square brackets around this article. In this connection it was suggested that an article on cooperation would require parties to cooperate on a bilateral and multilateral basis to implement this convention.

Article 9

9. The following alternative wording for this article was suggested: “The Executive Secretary of the Economic Commission for Europe shall transmit to the Parties information received in accordance with the provisions of this Convention”.

Article 10

10. The Working Group agreed to put square brackets around the text.

Article 11

11. As an alternative it was suggested that an article including only paragraphs 1, 3 and 5 of the present text should be prepared. In this connection it was pointed out that the convention should include a provision to allow non-ECE member countries to become party to it.

Article 12

12. Some delegations suggested that a compliance mechanism should be included in this article. Others held that the issues related to compliance should be dealt with in a separate article. One delegation said that it would be desirable to exclude from the draft convention all items concerning settlement of disputes on the understanding that these questions should be dealt with on the basis of common international law. The Working Group agreed to put square brackets around the text of this article.

Article 16

13. It was suggested that square brackets should be put around “sixteenth” and “[ten]” should be inserted.

Article 17

14. It was agreed to put square brackets around “three” and that there was a need for a longer withdrawal period.

Annex V

ARTICLE ..... ACCESS TO JUSTICE

(1) [Subject to national legislation,] Each Party shall ensure that any person who considers that his/her request for information under article 3 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, shall have access to a review procedure before a court of law or another independent and impartial body established by law.

OPTION I

[This provision shall not exclude the possibility of a review procedure before an administrative authority [provided that such procedure is without prejudice to the right of the public to direct recourse to judicial review procedures at any moment] [and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law].]

OPTION II

[Each Party shall ensure that such a person shall also have access to a procedure for reconsideration by the same public authority, where the administrative law of that Party so provides, or to a preliminary review by an impartial body other than a court of law.]

The review procedure or procedures shall provide adequate and effective remedies 1/ and be fair, open, transparent, equitable, [timely] and not prohibitively expensive. The [final] decision shall be given or recorded in writing, reasoned and binding on the public authority holding the requested information.

(2) [Subject to national legislation,] Each Party shall ensure that the members of the public who have the right to participate in a decision-making procedure in accordance with article 5 2/ [and other relevant provisions of this Convention] [and whose [individual] rights have been impaired] shall 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 5 [and other relevant provisions of this Convention].

This provision shall not exclude the possibility of a review procedure before an administrative authority [provided that such procedure is without prejudice to the right of the public to direct recourse to judicial review procedures at any moment] [and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law].

The review procedure or procedures shall provide adequate and effective remedies, 1/ including [temporary and final] injunctive relief as appropriate, and be fair, open, transparent, equitable, timely and not prohibitively expensive.

OPTION I

(3) [In addition and without prejudice to the review procedures referred to in paragraph 1 and 2 above, each Party shall ensure that, where they meet the criteria laid down in its national law, individuals and/or organizations shall have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities which contravene provisions of its national environmental law. These procedures shall provide adequate and effective remedies including [temporary and final] injunctive relief as appropriate, and be fair, open, transparent, equitable, timely and not prohibitively expensive.]

OPTION II

(3) [The public shall have access to administrative and judicial procedures to challenge acts or omissions by public authorities which contravene the provisions of this Convention.]

(4) Each Party shall ensure that information is provided to the public on access to administrative and judicial review and [should] [shall] encourage the provision of legal aid to the public in these procedures. [In order to further the effectiveness of the access to justice provisions contained in this article, each Party shall ensure that its courts may remove or reduce the financial barriers to individuals and NGOs exercising the rights of access to justice and seeking injunctive relief.] 3/

(5) The public shall have access to administrative and judicial procedures within the scope of this article without distinction as to citizenship, nationality or domicile.

Notes:

1/ Effective remedy should be translated in French as “recours effectif”.

2/ Depending on the final version of article 4, it may also be necessary to make reference to certain provisions of that article.

3/ This paragraph may have to be moved to article 4.

Annex VI

PROPOSAL BY THE FRENCH DELEGATION FOR PROVISIONS ON THE IMPLEMENTATION OF THE CONVENTION

Article

IMPLEMENTATION

(To be reviewed in relation to obligations under art. 2)

Parties shall submit a report on their implementation of each of the obligations of the Convention, through their institutional and legal regulations as well as their administrative practice.

A first report is due within a year of the entry into force of the Convention with regard to particular Party. The Conference of the Parties determine how it is to be updated.

(Provision allowing some NGOs, which may be accredited for that purpose, to contribute to national reports or to submit their own report).

The Conference of the Parties shall establish a regular, open and transparent review procedure for these reports, and for complaints about any failure to implement the Convention fully according to rules to be defined.

Article

COOPERATION

Parties shall cooperate to implement the principles laid down in the Convention, and share their practical experience in this regard, within the framework of the Economic Commission for Europe and other competent multilateral organizations.

Article

CONFERENCE OF THE PARTIES

(See art. 7 as set out in CEP/AC.3/R.1)

1. (Second sentence) Thereafter, conferences of the Parties shall be held as necessary. (Third sentence to be deleted.)

2. Delete the following subparagraphs: b, c, d, f and g.