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PROPOSAL TO CREATE AN ACCESS-TO-JUSTICE TASK FORCE

Prepared by the European ECO Forum

Introduction

1. The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is a unique document. Its three pillars address issues that form the foundation of civil society, codifying international standards regarding how authorities interact with citizens. Moreover, the unprecedented level of NGO involvement in the negotiation, and the move towards ratification and early implementation of the Convention sets a powerful example of cooperative interaction between governments and citizens' organizations. However, effective implementation can only be assured when citizens are fully aware of the Convention's content and are able to secure the rights it contains.

2. Access to justice is one of the fundamental means by which rights and obligations written on paper become enforceable and meaningful. Through effective court procedures, citizens may enforce and obtain implementation of the laws and standards established through democratic processes, and may also, for example, challenge powerful interests from a position of equality

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rather than weakness. Such abilities are fundamental to the rule of law and democracy as well as environmental protection. Thus, access to justice

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is one of the keys to the Convention's long-term success. However, to date few countries have focused their attention on the issue, and some have questioned the feasibility of substantial reform in this area. For these reasons, it is becoming increasingly clear that access to justice will be one of the most difficult areas of the Convention to implement, requiring substantial guidance and coordination. An access-to-justice task force is critical at this time to focus attention on this issue and provide a necessary resource towards proper incorporation of article 9 into national laws.

Background on access to justice and article 9

3. Numerous obstacles to access to justice currently exist in many Signatory countries. For example, citizens and NGOs often lack the "standing" required to bring a legal challenge to certain types of acts or omissions. Court fees, lawyers' fees, expert fees and other costs can also make it financially impossible for citizens and NGOs to take legal action. In some countries, courts lack the authority to issue injunctive remedies as part of their decisions. These and other barriers, including the inability of courts to adequately calculate environmental damages, excessive delays and corruption, all combine to exclude citizens and NGOs from the courts or prevent the courts from effectively rendering justice.

4. The access-to-justice provisions in article 9 are intended to address these issues. Each paragraph provides a mechanism for access to justice to safeguard the rights afforded in the other pillars of the Convention. Article 9, paragraph 1, sets forth review procedures relating to requests for information under article 4, while article 9, paragraph 2, describes procedures pertaining to the public participation requirements in article 6, as well as other relevant provisions of the Convention. Article 9, paragraph 3, establishes a review procedure for any act or omission contravening national environmental law, and article 9, paragraph 4, describes the minimum standards applicable to the procedures set out in article 9. Finally, article 9, paragraph 5, requires that Parties take certain steps to increase the availability of justice.

5. While these provisions set forth a general framework for access to justice, they do not provide the concrete means and requirements by which it is to be achieved. Rather, article 9 merely provides guiding principles to be elaborated by each country during implementation. While the other pillars of the Convention are more concretely stated, article 9 raises a number of issues involving civil and judicial procedure. Proper resolution of these issues will be critical if the broad principles set forth in article 9 are to be incorporated meaningfully into national law.

6. For example, while the sweeping access-to-justice standards set forth in article 9, paragraph 1 and 2, relate solely to other provisions of the Convention, article 9, paragraph 3, establishes a legal right to challenge both governments and private entities for any violation of national environmental law. Focused attention to this provision is essential to ensure that the expansive general right it confers is not diminished during incorporation into each country's procedural framework.

7. In addition to the need to establish concrete parameters for the principles set forth in article 9, it is also essential to interpret the sometimes legalistic and complex provisions of article 9. For example, review procedures under article 9, paragraph 1, are available to any person, while the review procedures under article 9, paragraph 2, are available only to those members of the public concerned who also satisfy the legalistic sufficient interest or maintaining impairment of a right requirements of article 9, paragraph 2 (a) or (b). Different interpretations of these provisions by legislative bodies and courts throughout the UN/ECE region may lead to very different outcomes, ranging from expansive citizen standing provisions to oppressive legal obstacles to citizens attempting to exercise their rights under the Convention.

8. For these reasons, incorporation of the obligations under article 9 into national law stands to be the most challenging aspect of implementation. Signatories will need practical guidance in order to fulfil their obligations under article 9 and reform their national institutions so that they promote access to justice.

Role of a task force on access to justice

9. Given these concerns and the fundamental importance of article 9 to the Convention, an access-to-justice task force is essential. This task force would assist governments and citizens to fully understand and implement article 9, thus ensuring the effective implementation of the entire Convention. Specifically, the task force could:

- Develop detailed explanations of the meaning and legal requirements of each review procedure under article 9;
- Organize workshops to convene Signatories, experts from leading institutes, and citizen activists working for access-to-justice reform;
- Assess the extent of current obstacles to access to justice in the Signatory countries and their practical effect on NGO and citizen advocacy efforts;
- Focus on the rights conveyed in article 9, paragraph 3, providing models and best practices to secure and strengthen these rights in concrete terms;

- Recommend minimum standards which each Signatory country should strive to achieve for each of the criteria in article 9, paragraph 4;
- Recommend the kinds of assistance mechanisms governments should employ to reduce and eliminate obstacles to access to justice, in accordance with article 9, paragraph 5;
- Explore the utility of an access-to-justice protocol;
- Conduct pilot projects to illustrate potential approaches to the application of access to justice;
- Support NGO networking activities to disseminate examples of best practices; and
- Undertake any other research and information dissemination needed on this topic.

10. Ratification and early implementation efforts are moving forward quickly, and expectations are building within Signatory countries about the Convention's ability to catalyse reform and productive interaction between governments and citizens. Yet, if access-to-justice reform lags behind other aspects of the Convention, the broader goals of the Convention will suffer as citizens realize that the Convention's promised rights remain unenforceable. An access-to-justice task force would undertake the crucial task of securing the Convention's stated rights, and would facilitate the Signatories' efforts to adopt the institutional changes that are necessary to the overall effectiveness of the Convention.
