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*To the Members of the Bureau of the Meeting of the Parties of the Aarhus Convention
about the mandate of the Task Force on access to justice*

Dear members of the Bureau, I address you in my role as Chair of the Task Force on access to justice concerning an issue between me and the secretariat that needs to be resolved.

One of the most important tasks of our body is to perform analytic studies about the implementation of the Aarhus Convention. Thus, since 2011 we have launched the following reports:

- *Access to Justice: Remedies* by Yaffa Epstein (2011) – cit Epstein 2011:1
- *On costs in the environmental procedure* by Jan Darpö (2011) – cit Darpö 2011
- *Approaches to access – Ideas and practices for facilitating access to justice in environmental matters in the areas of the Loser Pays Principle, legal aid, and criteria for injunctions* by Yaffa Epstein (2011) – cit Epstein 2011:2
- *Access to justice in environmental matters: available remedies, timeliness and costs* by Elena Laevskaya & Dmytro Skrylnikov (2012) – cit Laevskaya & Skrylnikov 2012
- *Study on standing for individuals, groups and environmental non-governmental organizations before courts in cases in environmental matters* by Dmytro Skrylnikov (2014) - cit Skrylnikov 2014
- *Study on the possibilities for non-governmental organizations promoting environmental protection to claim damages in relation to the environment in four selected countries; France, Italy, the Netherlands and Portugal* by Elena Fasoli (2017) – cit Fasoli 2017

As our mandate includes both to perform “analytical studies” and to “promote the understanding of relevant findings of the Compliance Committee of a systemic nature”, the discussion in all of these reports is rather wide, including references to national law, EU law and findings of the Compliance Committee. Commonly, they also include “Aarhus friendly” suggestions on how to improve the legislation in the Parties and recommendations of a more general nature.¹ In fact, there has never been any discussion about the precise delimitations of the studies, as the core idea of our work is not to provide with authoritative interpretations of the Convention, but only to facilitate the discussion on how to understand the obligations therein and how they are implemented in different Parties.

On the 11th meeting of the Task Force in February 2018, we decided to launch a study on access to justice in cases concerning environmental information. During the spring, a questionnaire was designed and sent to 13 Parties, representing different regions of the Convention. During the fall of 2018, responses to the questionnaires were submitted to the secretariat, from which I made a synthesis report (“draft 1”) to the 12th meeting of the Task Force in February this year. It may be noted that this draft was read and confirmed by a number of “friends to the Task Force”, stakeholders to the Convention with long experience of our work. Before disseminating draft to the delegates, it was also studied by the secretariat without any comment. However, at the meeting of the Task Force, two ENGOs objected to the report, as they thought it was too negative concerning the role of the Ombudsman institution in the Compliance Committee’s case C/2013/93. They also claimed that the report was outside of the mandate of the Task Force, as it addressed the interpretation of the Convention and the findings of the Compliance Committee. However, this intervention did not gain support by any of the other delegates at the meeting. For my own part, I told the meeting that I regretted the fact that the text regarding the findings in C /2013/93 had been perceived as being too evaluative and promised that this would be dealt with in the next draft of the study. Furthermore, I stated that my ambition with the text is to remain faithful to the Convention and the findings of the Compliance Committee, while leaving room for analysis and the drawing of conclusions from those sources of law, all in accordance with the mandate. Lastly, I noted that this approach had been the common ground for all analytic studies undertaken under the auspices of the Task Force since 2008, and that this wide room for discussion was essential for the functioning of our body.

After the meeting, I discussed the matter with Ella Behlyarova and we agreed that it was mostly a question about reformulation of the text, which would be quite easy to

¹ See for example the final part in Epstein 2011:1 (page 90) and all of Darpo’s report on costs (2011). Also Epstein 2011:2 discusses the law as it stands from different sources, among other cases from the Compliance Committee (see for example on page 6). As for Laevskaya & Skrylnikov 2012, it is full of recommendations (see page 17-19). Skrylnikov 2014 is mainly about implementation, although it also contains recommendations (see for example page 9). Finally, Fasoli 2017 deals mostly with the possibilities to obtain damages under national law, but is concluded with recommendations (pages 12-13).

handle in order to satisfy those from the ENGO community who had expressed concerns at the meeting. Thereafter, I made another version (“draft 2”), which I submitted to the secretariat. To the background of our discussion in February, I was therefore quite surprised by the response from the secretariat as this version was different from the one that we discussed at the meeting. This draft 2 was not evaluative as regards the role of the Ombudsman institution, but merely containing an analysis of the “law as it stands” in a loyal interpretation of the text of the Convention and the practise of the Compliance Committee. Despite this, the secretariat suggested major revisions of the text, erasing most of the conclusions. The secretariat also claimed that its intervention reflected the comments received from the stakeholders. This was not correct, as draft 2 took care of all comments received so far, except for the assertion from the two ENGOs concerning the mandate.

After a couple of more rounds between the secretariat and me on the draft, we can agree that we do not agree about the text and the mandate. According to the secretariat, the Task Force cannot express any views about the reading of Article 9.1 of the Convention, the findings of the Compliance Committee, EU law, case-law from the CJEU or in any other respect draw conclusions about the international obligations on access to justice in information cases. We are not even supposed to highlight that some parts of the Implementation Guide 2014 go beyond the text of the Convention (see the commented draft, however only in English). In my view, this is a new attitude from the secretariat, which so far never has protested when we have launched reports that are perceived as being Aarhus friendly.

This conflict about the mandate touches upon the basis of the work of the Task Forces. In my view, one cannot be “analytic” without understanding what the law says, and the “the law” is composed by the interaction between the text of the Convention, the Compliance Committee’s practise, together with case-law from the CJEU and national courts in the Parties. And as noted above, the role of the Task Force on access to justice is not to provide with authoritative interpretations, but to facilitate the discussion about the understanding of the Convention. Furthermore, it is my firm belief that there is a need for such a wide discussion, not least under a Convention which is the most important international instrument for transparency and public participation. The possibility for the Task Force to undertake such analytic studies is also vital in order to counteract tendencies towards a “closed society” within the Aarhus community, where only certain opinions are allowed to be voiced. In this context, it may be noted that the majority of the authors to the Implementation Guide 2014 are members of the Compliance Committee.

I have communicated this draft with some of my closest friends to the Task Force, among others Veit Koester, the former Chair of the Compliance Committee. We agree that the text is a cautious and loyal interpretation of the “law as it stands” – applying an ordinary method of legal scholarship – and thus loyal to the Convention and the findings of the Compliance Committee. If there is any hesitation as to

whether the text is in line with the mandate of Task Force, this must be decided in the normal procedure under the Convention. In my view, this means that the report to begin with must be discussed on the 13th meeting of the Task Force. At the end of the day, it is for the Meeting of the Parties to decide whether the text can be accepted or not. Thus, I ask the Bureau to decide that the report shall be posted as soon as possible in order for the delegates of the Task Force and other stakeholders to the Convention to study.

With kind regards,

Jan Darpö

The reception of the studies by the Task Force on its meetings

- *Access to Justice: Remedies* by Yaffa Epstein (2011)

Report from 4th meeting of the Task Force 7-8 February 2011

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.

- *On costs in the environmental procedure* by Jan Darpö (2011)

Report from 4th meeting of the Task Force 7-8 February 2011

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.

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.

- *Approaches to access – Ideas and practices for facilitating access to justice in environmental matters in the areas of the Loser Pays Principle, legal aid, and criteria for injunctions* by Yaffa Epstein (2011)

- *Access to justice in environmental matters: available remedies, timeliness and costs* by Elena Laevskaya & Dmytro Skrylnikov (2012)

Report from 4th meeting of the Task Force 7-8 February 2011

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 sub-region, 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*).

Report from 5th meeting of the Task Force 13-14 June February 2012

26. Ms. Elena Laevskaya, Associate Professor at the Law Faculty, Belarusian State University, informed participants about the context of the study that had been carried out on costs and remedies in the Eastern Europe, Caucasus and Central Asia subregion in 2011. Some of the main challenges identified through the study were: the lack of timely procedures due to the deadlines established by law and their application by courts, and their impact on whether a decision should have suspensory effect; the prioritization of economic over environmental interests in awarding injunctions; the lack of information about issued decisions; the fact that for some cases only an administrative appeal was possible, which could compromise the impartiality or independence of decisions as the review body often belonged to the same authority that issued the decision being challenged; the developing practice that decisions on specific activities were taken in the form of a normative instrument/law, significantly restricting possibilities to challenge the act; the high litigation fees faced by NGOs and the costs associated with the hiring of experts; and, importantly, the lack of knowledge regarding international agreements and citizens’ rights. While the application of the loser pays principle did not contradict the Convention, there was a problem with the significant costs that those bringing suits that were unfavourably decided. Presently, amendments were under way in the subregion and it was hoped that some of the challenges would be addressed.

28. In the following discussion, participants exchanged information on the costs regimes and legal aid in their countries. It was mentioned that in some jurisdictions the system did not promote, and one system did not even permit, the existence of public interest lawyers. In some countries of Eastern Europe, the Caucasus and Central Asia the unclear division of competences between economic and general courts had implications on effective access to justice under the Convention. It was recognized that legal aid schemes existed in almost all countries in the region. It was finally observed that in considering costs regimes in environmental matters, the focus had been placed on State-regulated legal aid and the issue of private legal aid or stakeholders’ insurance for legal aid had not been covered.

- *Study on standing for individuals, groups and environmental non-governmental organizations before courts in cases in environmental matters* by Dmytro Skrylnikov (2014)

Report from 7th meeting of the Task Force 24-25 June February 2014

10. Participants were also informed about progress made on the study on standing for individuals, groups and environmental NGOs in six countries of Eastern Europe, the Caucasus and Central Asia (Armenia, Azerbaijan, Belarus, Kazakhstan, the Republic of Moldova and Tajikistan), which the Task Force had decided to undertake at its fifth meeting (ECE/MP.PP/WG.1/2012/5, para. 29).

11. Mr. Dmytro Skrylnikov, a representative of the Bureau of Environmental Investigation (Ukraine), presented the following preliminary findings of the study and the Task Force further discussed the ways to address them: (...)

12. Following a discussion, the Task Force:

- (a) Welcomed the preliminary findings of the study and requested any comments to be submitted to the secretariat by 10 March 2014;
- (b) Requested the secretariat in consultation with the Chair of the Task Force to finalize the study before the fifth session of the Meeting of the Parties;
- (c) Encouraged national focal points to translate the study in the national languages, to inform the judiciary, judicial training institutions, prosecutors, public interest lawyers and other professionals about the study and to use its findings and conclusions to facilitate the national dialogues on access to justice matters.

- *Study on access to justice in environmental matters in South-Eastern Europe* by Csaba Kiss (2014)

Report from 7th meeting of the Task Force 24-25 June 2014

13. Participants were also informed about progress made on the study on access to justice in environmental matters in South-Eastern Europe (Albania, Bosnia and Herzegovina, Croatia, Kosovo (United Nations administered region, Security Council resolution 1244 (1999)), Montenegro, Serbia and the former Yugoslav Republic of Macedonia), which the Task Force had decided to undertake at its fifth meeting (ECE/MP.PP/WG.1/2012/5, para. 31).

14. Mr. Csaba Kiss, a representative of the Environmental Management and Law Association (Hungary) presented the progress of the work and the preliminary findings of the study regarding access to justice in cases related to access to information, public participation and violations of national law relating to the environment. In particular, standing in environmental cases in the region was primarily based on a traditional right- and legal interest-based approach, except for the cases involving violations of national law relating to the environment, where *actio popularis* was also known. Lack of timeliness and some costs issues potentially could constitute barriers to access to justice. Such issues included court fees proportionate to the value of the case, high costs for evidence and bonds and the absence of legal aid mechanisms in some countries as well as its non-applicability to support NGOs claims. The need to improve access by the public to the full information

on administrative and judicial review procedures, as well as to decisions of courts and other bodies on cases related to the environment, was also highlighted.

15. The Task Force:

(a) Welcomed the progress in the preparation of the study on access to justice in South-Eastern Europe;

(b) Took note that the advance version of the study, which would be made available before the fifth session of the Meeting of the Parties;

(c) Expressed its appreciation to the national focal points and national experts from Albania, Bosnia and Herzegovina, Montenegro, Serbia and the former Yugoslav Republic of Macedonia, as well as to the experts from Croatia and Kosovo (United Nations administered region, Security Council resolution 1244 (1999)), REC and OSCE Europe for their cooperation in carrying out the study and the consultation process on the national studies prepared within its framework.

16. In further discussion, some participants reiterated their support for treating environmental NGOs similarly to consumer protection organizations under national legislation, which might facilitate effective access to justice in environmental cases. That could have an influence on standing, the distribution of the burden of proof and court fees in environmental cases.

- *Study on the possibilities for non-governmental organizations promoting environmental protection to claim damages in relation to the environment in four selected countries; France, Italy, the Netherlands and Portugal* by Elena Fasoli (2017)

Report from 8th meeting of the Task Force 15-17 June 2015

38. In that connection, the Chair informed participants about the progress in carrying out a study on the possibilities for NGOs promoting environmental protection to claim damages on behalf of the environment in four selected countries (France, Italy, the Netherlands and Portugal).

39. A representative of the Queen Mary University of London reported on the preliminary observations from the synthesis report of the study mentioned by the Chair (...)

48. Following the discussion, the Task Force:

(a) Welcomed the progress in carrying out the study on the possibility for NGOs promoting environmental protection to claim damages on behalf of the environment in France, Italy, the Netherlands and Portugal, and invited national focal points and stakeholders to provide their comments to the secretariat on the draft outline and preliminary findings of the study by 15 July 2015;

- *The final report seems to have been posted without the Task Force having discussed it, although it was mentioned in the report from the 10th meeting of the Task Force in Geneva on 27-28 February 2017:*

34. The Chair reiterated that administrative and judicial review procedures should provide adequate and effective remedies in accordance with article 9, paragraph 4, of the Convention. To facilitate the information exchange, a number of analytic studies covering all subregions had been undertaken under the auspices of the Task Force. In the period 2014-2015, a study on the possibilities for environmental NGOs to claim damages in relation to the environment in France, Italy, the Netherlands and Portugal had been carried out under the auspices of the Task Force. Since then, some countries had further introduced relevant legislative proposals, especially with regard to class actions in environmental matters.