Report by Mr. Jan Darpo
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Meetings of the Parties to the Aarhus Convention

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Interprefy

Introduction

This is my report on the outcomes of the work of the Task Force in the current inter-sessional period. In addition, I will also make some reflections on the progress made by the Task Force – as well as challenges in the work – over the 13 years of my chairmanship.

Report from the intersessional period 2018-2021

The current mandate was set out by decision VI/3 on promoting effective access to justice. The mandate allowed us to prioritize and further work on key issues in this area at each meeting. During this intersessional period, the Task Force held 3 meetings, namely the eleventh and twelfth meetings in Geneva on 27-28 February 2018[1] and on 28 February – 1 March 2019[2] respectively, and the thirteenth meeting of the Task Force held online on 15-16 February 2021[3]. Each meeting brought together more than 100 experts from the Parties to the Convention and other countries. Despite the COVID-19 pandemic in the last two years, the Task Force was able to fulfil its mandate. Overall, we have a record of experiences from a substantial number of experts, including representatives of the governments, members of the judiciary, NGOs, public litigation lawyers and partner forums dealing with access to justice issues.

In terms of other meetings, the Task Force also supported two meetings of the network of judiciary, judicial training institutions and other review bodies in the pan-European region, alongside several sub-regional and national events, and supported the preparations of the relevant thematic session of the Working Group of the Parties to the Convention related to access to justice on 28 October 2020[4].

As for substantive issues, the Task Force addressed the following subjects in line with decision VI/3[5]:

(a) **Access to justice in information cases** (para. 14 (a) (i));

(b) Acts or omissions that contravene permit requirements or laws relating to the environment with a focus on **cases relating to air quality** and **public interest litigation** (para. 14 (a) (ii));

With regard to access to justice in information cases, we finalized a report on the basis of a questionnaire and responses received with regard to 12 Parties from different sub-regions through open-ended consultations among Governments and different stakeholders. including: (a) the European Union together with six of its Member States, namely Germany, Ireland, Portugal, Slovakia, and Sweden; (b) Switzerland; (c) Serbia and Montenegro from South Eastern Europe; (d) the Republic of Moldova from Eastern Europe; (e) Georgia from the Caucasus and (f) Kazakhstan from Central Asia. The report underscored good practice and existing challenges in various jurisdictions to meet the requirements of article 9 (1) of the Convention and provided an informed basis for the discussion by the Task Force of measures required to improve work in this area. In brief, the existing challenges in different Parties primarily relate to the length of the procedure, weak enforcement and – to a certain extent – costs.

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[1] See meeting webpage: https://unece.org/environmental-policy/events/eleventh-meeting-task-force-access-justice-under-aarhus-convention
[2] See meeting webpage: https://unece.org/environmental-policy/events/twelfth-meeting-task-force-access-justice-under-aarhus-convention
[3] See meeting webpage: https://unece.org/environmental-policy/events/thirteenth-meeting-task-force-access-justice-under-aarhus-convention
[4] See meeting webpage: https://unece.org/environmental-policy/events/twenty-fourth-meeting-working-group-parties-aarhus-convention-hybrid (tab AJ session)
[5] See: http://www.unece.org/fileadmin/DAM/env/pp/mop6/Decison_Excerpts_EN/AarhusConv_MoP6_Decision_VI_3_AJ_e.pdf

Another area for the Task Force to focus on in this inter-sessional period was **access to justice in cases relating to air quality**. This subject was highlighted in separate agenda items on the 12th and 13th meetings of the Task Force, as well as on the thematic session on the 24th meeting of the Working Group of the Parties. On these meetings, a number of country reports and presentations were made, followed by a general discussion. The Task Force noted the increased number of cases across the Parties to the Convention aimed at challenging the content and scientific basis of air quality plans, zonal planning, location of measurement points, diesel car bans, and individual development projects that might cause exceedance of ambient air quality standards. In several situations, such public interest cases face serious barriers related to the proceedings and available remedies. These and other legal actions to challenge environmental decision-making show that that **public interest litigation in environmental matters has been instrumental** in progressing environmental rights of access to information, participation and access to courts. Other subject areas for such litigation concern issues such as biodiversity loss, water quality and climate change.

During the meetings of the Task Force, we have also taken stock of the experiences of Parties and stakeholders in implementing supporting tools as multi-stakeholder dialogues, e-justice and capacity-building initiatives to promote access to justice in environmental matters.

Finally, the Task Force has continued strengthening cooperation with relevant international forums dealing with access to justice, including UNEP, OHCHR, UNODC, UNDP, OSCE, IUCN and the Council of Europe. In particular, in order to contribute to an in-depth review of Sustainable Development Goal 16, the UNECE in cooperation with UNEP and other organisations – including the European Union Forum of Judges for the Environment (EUFJE) and the Association of European Administrative Judges (AEAJ) – convened a judicial colloquium back-to-back with the thirteenth meeting of the Task Force in 2019.[6] The objective of the colloquium was to strengthen the capacity of the judiciary to effectively handle cases related to environmental matters.

General experiences 2008-2021…

I have been chairing the Task Force on access to Justice between 2008 and 2021. My general experience of the work and activities of this body under the Aarhus Convention is overall very positive.

The aim of the Task Force is to provide a unique multi-stakeholder forum for experts from governments, civil society, members of the judiciary, legal professionals, international and regional organizations and other stakeholders. As the legal frameworks for judicial and administrative review in environmental matters vary among Parties, I truly believe that this sharing of experiences, learning from good practice and discussing different issues has been helpful in the understanding of the crucial importance of access to justice in environmental decision-making. The strength of our meetings has been the open atmosphere in which the delegates have been able to air all kinds of questions related to the third pillar of the Convention. This may also be the main reason for the positive outcome of our work in the evaluation that was performed in 2013. We have also seen a gradual increase of the participation in the eleven Task Force meetings I have chaired over the years, which of course is very satisfactory.

In addition to setting up these meeting, the Task Force has focused on the performance of analytical and support material on important issues under the Convention. To date, there are 15 studies from different sub-regions available on the Task Force studies webpage.[7] We have also organised a jurisprudence database in which cases from regional and national courts on access to justice in different environmental matters have been posted. Since its establishment in 2010, the database has continuously developed and is today populated with about 110 cases.[8] In addition, the Task Force and I as the chair have organised or participated in a couple of training activities, among others in Almaty in 2012 and Tblisi in 2015. These events have been very interesting as they have given lots of insight about the access to justice challenges at regional level.

Overall, the cooperation with the secretariat has run smoothly, albeit from time to time with some delay as their workload is very heavy and the resources meagre.

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[6] See meeting webpage: https://unece.org/environmental-policy/events/2019-judicial-colloquium .

[7] See https://unece.org/env/pp/analytical-studies-on-access-to-justice .

[8] See https://unece.org/env/pp/tfaj-case-law-related-convention

...and some concerns

Having said this, I would also like to highlight some tendencies within the Aarhus community which are worth paying attention to for the future. In all kinds of administrative bodies, there is a risk of a culture of its own, due to bureaucratic traditions and amplified by a heavy workload and time pressure. The obvious remedy against such tendencies are transparency and open discussion, which is one of the guiding principles of Aarhus. There have, over the years, been occasions when my view on matters has differed from those of the secretariat. Most of those differences have been solved in a positive atmosphere of mutual understanding. However, there is one exception to this concerning the information study the Task Force on Access to Justice performed in 2018-2019.

As mentioned above, 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 six reports on our own accord covering subjects such as standing for the public concerned in national courts, remedies, costs, the loser pays principle and legal aid, as well as the possibility for ENGOs to claim damages on behalf of the environment. 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",[9] the discussion in all of these reports is rather wide, including references to national law, EU law and case-law of the CJEU and the European Court of Human Rights, as well as the findings of the Compliance Committee. Commonly, they also include suggestions on how to improve the legislation in the Parties and recommendations of a more general nature. There has never been any discussion about the precise delimitations of the studies, as the core idea of our work is not to provide 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.**

In the beginning of the current intersessional period, it was decided that we should undertake a study dealing with procedural matters concerning requests for, and review of, environmental information relating to both Article 4 and Article 9.1 of the Convention. This process started in 2017 and the study was discussed on the eleventh, twelfth and thirteenth meetings of the Task Force, after which the study was concluded in the spring of 2021.[10] At the twelfth meeting of the Task Force in the beginning of 2018, two ENGOs voiced concerns that the report was too negative in respect of the role of the Ombudsman institution in Communication C/2013/93. The ENGOs also claimed the report exceeded the mandate of the Task Force, as it addressed the interpretation of the Convention and the findings of the Compliance Committee. These views were not echoed by any of the other delegates at the meeting. For my own part, I expressed regret that the text regarding the findings in C/93 had been perceived as being too evaluative and undertook to address that issue in the next draft of the study. Furthermore, I confirmed that the ambition of the text was 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 had been a common approach for all of the 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 having discussed the text with the secretariat after the meeting, we agreed that I would rephrase some of the observations in the report. In version 2, I explain the law as it stands today, using ordinary sources of law such as the text of the Convention, decisions made by the Compliance Committee, and taking into account state practise and "soft law sources" such as the Implementation Guide 2014. I checked this version with a group of friends of the Task Force – including the late Veit Koester, former chair of the Compliance Committee – and we agreed that the text was loyal to the Convention and the Compliance Committee's finding and did not draw any controversial conclusions. It was therefore quite surprising when the secretariat – having accepted the first version of the report and not expressing any concern until the two ENGOs intervened – reacted strongly against the text, claiming that no body under the Convention, except the Compliance Committee, is mandated to express a view about the understanding of the Aarhus text and the

[9] The mandate as set out in decision VII/3 on promoting effective access to justice; https://unece.org/env/pp/tfaj-mandate

[10] See paragraph 33 in the report; https://unece.org/fileadmin/DAM/env/pp/wgp/WGP-23/ODS/ECE_MP.PP_WG.1_2019_4_E.pdf

practice created thereunder. The secretariat therefore suggested major revisions, erasing two thirds of the text in the analytic part and inserting observations of various proportions. Amongst others the secretariat did not allow (bullet points with my remarks in italics):

- The statement that Article 9.1 contains both a procedural and a substantive aspect, as this is not expressly mentioned in the provision.
  - *This is only a matter of describing that the provision contains both requirements for the process of handling requests for information (procedural aspect) and criteria for refusal (substantive aspect).*
- Any conclusions on the Compliance Committee's findings, except for mere citations.
  - *To compare different decisions by the Compliance Committee and draw conclusions from should not be controversial if that analysis is performed with loyalty to the findings.*
- The view that the Implementation Guide 2014 goes beyond the text of Article 9.1, as this "is clearly interpreting the requirements of the Convention, which is outside the scope of the mandate". Instead, the controversial passage of the Guide should be cited.
  - *Guidance documents of different status are frequent in the field of environmental law. The Implementation Guide is one such document and is often referred to by the national and regional courts of the Parties. Its content is however not binding and must obviously be open for discussion, especially at points where it is ambiguous.*
- Conclusions about the position of EU law, as "that is for the EU's own institutions to decide".
  - *The study described how the autonomous expression "court or tribunal" has been interpreted in case-law under EU law and the European Convention of Human Rights, which obviously also is interesting from an Aarhus perspective.*
- The labelling of case-law of the CJEU as "state practice" according to Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT).
  - *It is common ground in international law that the VCLT is generally applicable to all international agreements, including the Aarhus Convention.*

It is hard to see any explanation for the secretariat views. This attitude was new and had never before been applied to our studies. According to my contacts active in the international arena, this approach appears to differ from those associated with other international environmental agreements, where the debate can be quite lively.

After a couple of further exchanges between myself and the secretariat on the draft, we agreed that we would "agree to differ" about the text and the mandate of the Task Force. As this issue engages the basic principles of transparency and openness under the Convention, I asked for a meeting with the Bureau in June 2019.[11] At this meeting, I tried to clarify my position with the help of a Swedish delegate to the Convention. However, the Bureau convened on the matter in a second (virtual) meeting in September that year and thereafter again delegated the matter to the secretariat. The secretariat once again pressed for major revisions to the text, which I continued to oppose. This controversy continued during the fall of 2019, but at the end of the day the secretariat gave up their objections. The study could therefore be concluded in January 2020 without any major revisions or changes in substance. This version was presented at the thirteenth meeting of the Task Force in February 2021 and thereafter published.

I leave it to the reader to evaluate the study on access to justice in information cases. In my view, the text and the analysis clearly is in line with the mandate of the Task Force. Moreover, I believe the ability of the Task Force to undertake analytic studies is vital in order to encourage debate within the Aarhus community – and that such debate is healthy. And after all, the Aarhus Convention is about transparency and environmental democracy, something which requires room for debate also within the Convention.

[11] For a more comprehensive overview of the process of the study on access to justice in information cases and a description of the previous studies that have been performed by the Task Force, see my letter to the Bureau on 18 June 2019 which is posted on; http://jandarpo.se/articles-reports/ (Also annexed here)

Into the future

The Task Force has always been given a broad mandate covering key elements of Article 9 of the Aarhus Convention on access to justice. In my view, this body has found its form as a platform for open discussion and analysis. For the future work, I think it is important that the Task Force combines the chosen theme with a horizontal focus on the key elements on access to justice in environmental matters: standing, scope of review, costs, remedies and timeliness. In this context, it can study the results of successful litigation in different Parties to the Convention and what actors and conditions that were conducive for this. Obviously, the Task Force should continue to promote tools supporting effective access to justice, including multi-stakeholder dialogues, e-justice initiatives, collective redress, as well as support of networking within the judiciary, judicial training institutions and other review bodies in the pan-European region. To this background, I kindly request the Meeting of the Parties to support the future mandate of the Task Force as set out in draft decision VII/3 on promoting effective access to justice.

Also, I would like to express my deep appreciation to the experts from the Parties, partner organizations and stakeholders who have supported the work of the Task Force throughout these years in delivering the results and implementing the mandate of the Task Force. The secretariat has been instrumental in this task, for which I am sincerely grateful.

And finally, I would like to express my warmest gratitude to Ms Maryna Yanush, my supporting and helping hand at the secretariat throughout all these years. Maryna is a wonder of expedience, bright and positive, inventive as the very best research assistants a rock to hold on when it is blowing. I wish you the best of luck in all your future endeavours!

In addition to these closing words, I would like to welcome my successor. If the Meeting of the Parties so decides, the chair will be awarded to Luc Lavrysen, an eminent scholar and judge who without any doubt will take on this task with excellence.

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Stockholm 18 June 2019

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.[12] 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

[12] See for example the final part in Epstein 2011:1 (page 90) and all of Darpö'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).

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 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 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).

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.

Jan Darpö

Från: Ella Behlyarova <ella.behlyarova@un.org>
Skickat: den 13 juni 2019 14:07
Till: Jan Darpö; Maryna Yanush
Ämne: Study on access to justice in information cases - comments by ACS
Bifogade filer: 2019_A2J_Info_Draft 3_ACS_rev.docx

Dear Jan,

Please see attached our comments and some revisions on the study. We tried to provide more detailed explanations throughout the text.

As you will notice comments/revisions are mostly concern some editorial issues/quotes, and also interpretation of the Convention or CC findings. We will be grateful if you could keep our comments for internal use for the next revised draft as it will safe time for reviewing the text. If our comments are still not satisfactory to you, as discussed, since this concerns the mandate of the Task Force, we will inform the Bureau as to seek its view on the matter.

As for the WGP, we will do our best to allocate a bit more time, but, as you know this is a very compex meeting with strict time allocation as different chairs/speakers are arriving/connecting at the certain time. There is therefore no much flexibility with timing, unfortunately, but we will do our best (by liaising with the Chair on shortenning items on AI and GMOs possibly).
Please do not hesitate to let us know if you need any additional clarifications.

With kind regards,
Ella

From: Jan Darpö <Jan.Darpo@jur.uu.se>
Sent: Wednesday, 12 June, 2019 12:37
To: Maryna Yanush <maryna.yanush@un.org>
Cc: Ella Behlyarova <ella.behlyarova@un.org>
Subject: SV: 12TFAJ draft report for your kind feedback

THANKS, Maryna (cc Ella), even though this was extremely late for a protocol from a meeting in February. I take it for granted that this delay is none of your responsibilities, but a question about distribution of resources within the secretariat. I also take it that you have communicated with all the speakers about their part of the protocol in order to avoid any misunderstandings concerning the content.

In general, I have made small editions to the text using TC.

However, I have some general remarks about the agenda item about the study about A2J in information cases. First, I have corrected the report in those instances where it does not reflect the discussion at the meeting. Further, the interventions from ClientEarth and Earth Justice (Yves) needs to be reported, as well as my reply. I propose that you continue after paragraph 38 with their statements, after which I will formulate in writing what I said at the meeting.

All the best,
Jan D

1.2 Article 9.1 of the Aarhus Convention in text and practise

Article 9.1 first sentence

The study has triggered a couple of questions concerning the ~~understanding~~ implementation of Article 9.1 of the Convention that can usefully be highlighted already in the beginning. The aim here is, however, not to give clear answers to the issues raised, but rather to provide a platform for further discussion. As with the previous studies performed by the Task Force on Access to Justice, ambiguities in the text of the Convention will be pointed at, along with ongoing issues, and conclusions will be drawn from existing legal sources using a traditional method of law. The responsibility for resolving any issues raised obviously lies in the hands of other bodies, namely the Compliance Committee and the Meeting of the Parties to the Convention.

As noted in the beginning of this report, the first sentence of Article 9.1 requires Parties to the Convention to provide the person requesting environmental information with recourse to challenge the authority's decision on the matter *in a court of law or another independent and impartial body established by law*. The same expression can be found in Article 9.2 of the Convention and is reflected in the EU's implementation legislation on Article 9.1, namely Article 6 of the Environmental Information Directive (2003/4, EID[2]). It is widely believed that this expression equates to "any court or tribunal" in Article 267 TFEU, as well as "an independent and impartial tribunal established by law" in Article 6 ECHR, requiring a fair trial.[3] It also goes without saying that these expressions are "autonomous", meaning that the national label on the reviewing body is of no importance when evaluating its independence and impartiality.[4] As a consequence, the first sentence of Article 9.1 calls for a review mechanism performed by such a body, irrespective of how it is named in the national legal system.

Furthermore, Article 9.1 requires that *any person* has access to a court or tribunal in order to challenge a refusal on a request for environmental information. To date, the Compliance Committee has found non-compliance under Article 9.1 concerning who entitled to make such a request in only one case and that was the early Communication ACCC/C/2004/1.[5] As already noted, this general picture is confirmed in the present study as there are no issues reported concerning applicants for environmental information in this respect. In fact, as all members of the public irrespective of nationality, residence or other belonging ~~are~~ were reported to be allowed to make such a request without stating an interest, one can even question whether it is appropriate to label this as "standing". In the Implementation Guide 2014, a similar line of reasoning is made by reference to Article 4 and also the definition of "the public" in Article 2.4.[6]

Kommenterad [A2]: Focus of the study is on implementation

Kommenterad [A3]: We ensured correct references

Kommenterad [A4]: The sentence is drafted as a universal statement, but the report can only comment on what was reported in the survey.

Kommenterad [A5]: The TF has no authority to interpret CC's findings. In its findings on C1, the Committee found Kazakhstan had denied the communicant, an environmental NGO "standing" under art 9(1).

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[2] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

[3] See for example The Aarhus Convention – An Implementation Guide, UNECE 2nd ed. 2014, at page 189.

[4] For a discussion about the meaning of the expression *court of law or another independent and impartial body established by law*, see the Aarhus Convention – An Implementation Guide, UNECE 2nd ed. 2014, at pages 188-189.

[5] ACCC/C/2004/1 (Kazakhstan), ACCC/C/2008/30 (Republic of Moldova), ACCC/C/2012/69 (Romania) and ACCC/C/2013/93 (Norway) seem to be the most important cases on access to environmental information, however mostly dealing with the definition of environmental information, grounds for refusal, timeliness and weak enforcement.

[6] The Implementation Guide at p. 191.

Although not explicitly stated in the first sentence of Article 9.1, the review required here covers *both procedural and substantive issues* under Article 4.[7] As one cannot really draw a clear distinction between the two aspects, it is hard to imagine what a review covering only one of them would actually look like. Although this issue has not really been examined by the Compliance Committee, the Court of Justice of the European Union (CJEU) confirmed in case C-71/14 *East Sussex* (2015) – which concerned the requirements for access to environmental information according to the EID (2003/4) – that judicial procedures in the Member States must enable the national court "*to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness*" of an administrative decision to deny such access.[8] Although this court has no direct competence to interpret the Aarhus Convention, its case-law on the implementation in the Member States provides us with "state practice" concerning the obligations therein.[9]

Article 9.1 second sentence

According to the second sentence of Article 9.1 of the Aarhus Convention, if the review under the first sentence of Article 9.1 is provided by a court of law, the unsuccessful applicant shall also have access to an expeditious procedure for *reconsidering by a public authority* or *review by an independent and impartial body other than a court of law*. The understanding of *what body* and *in what way* the alternative procedure shall be performed is thus of importance here. According to the text, it shall either consist of "reconsideration by a public authority" or a "review by an independent and impartial body other than a court of law". This issue was raised in ACCC/C/2013/93, where the Compliance Committee found that the Norwegian Parliamentary Ombudsman of the Party concerned (*Sivilombudsmannen*) can be regarded asconstituted a review procedure within the scope of the second sentence of article 9.1 of the Conventionsuch a compliant mechanism, as it constitutes "an inexpensive, independent and impartial body established by law through which members of the public can request review of an information request made under Article 4 of the Convention".[10] Here, it can be noted that the recommendations by this bodythe Parliamentary Ombudsman are not binding, although normally respected by at least the authorities.[11] In ACCC/C/2013/93, the time taken for the Ombudsman's review was at issue. However, even though the Ombudsman was accepted as such, the procedure was not timely. When deciding this, the Compliance Committee applied both the requirement for expediency in the second sentence of Article 9.1 and the general timeliness criteria in Article 9.4. All in all, the time span between the request to the Ombudsman for review of the Government's refusal to disclose the information and the final recommendation was two and a half years, which was found to be in breach of the requirements in article 9.1, second sentence, to be "expeditious" and in article 9.4 to be "timely"Convention.[12] In finding this, the Committee particularly noted that nowhere in the complaint proceedings did the Ombudsman instruct the Ministry to handle the information

Kommenterad [A6]: Art 9(1) does not differentiate between substantive and procedural issues. The TF has no authority to interpret the Convention.

Kommenterad [A7]: Art 9(1) does not differentiate between substantive and procedural issues. This would be why the CC has not looked at this issue. It is not supposed to. The statement provides misperception of CC findings.

Kommenterad [A8]: It is not clear from the quote whether this was an example of substantive or procedural review. From this quote, the court could have been talking about applying either the relevant procedural or substantive EU law.

Kommenterad [A9]: Footnote is deleted as it is not relevant anymore since the text was redrafted. In addition, the footnote focuses on how the treaty should be interpreted which is outside the TF mandate.

Kommenterad [A10]: We have fixed all citations to follow Compliance Committee format throughout the text, including footnotes.

Kommenterad [A11]: We fixed the established editorial approach to refer to the Party concerned.

Kommenterad [A12]: The CC did not say it was a "compliant mechanism". It found non-compliance.

Kommenterad [A13]: The text of the footnote is not consistent with the facts of the case (see paragraph 27-33 of the Committee's findings). While the Ombudsman found the Ministry's reconsideration "somewhat general", it did not consider its recommendations not followed.

Kommenterad [A14]: The sentence makes it sound like, because the procedure was not timely in the particular case, it is not a procedure under the second sentence of art 9.1.

Kommenterad [A15]: This is important to clarify, as it shows the Committee requires review procedures under the second sentence of 9.1 to comply with both requirements.

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[7] The Implementation Guide at p. 191.

[8] C-71/14 *East Sussex* (2015), p. 58.

[9] Article 31(3)(b) of VCLT, see Wouters, J & Ryngaert, C & Ruys, T & De Baere, G: International law – A European perspective. Hart Publishing 2018, pp. 100-103.

[10] ACCC/C/2013/93 (Norway), para 86.

[11] In this case, however, the body holding the information within the administration was the Government of the Party concerned and it never fully complied with the Ombudsman's recommendations.

[12] ACCC/C/2013/93 (Norway), paras 87-92.

request with expediency. However, while finding that the Party concerned had failed with the requirements to be expeditious and timely, the Committee ~~closed the case~~ did not make ~~without any~~ recommendations to the Party concerned, as there was no evidence that the non-compliance was due to a systematic error. ~~Even so~~Based on ACCC/C/2013/93, a reasonable conclusion ~~to be drawn from the reasoning in this case~~ is that an Ombudsman institution can be accepted as a ~~complaint~~ review mechanism under the second sentence of Article 9.1.

The rationale for the Committee's standpoint seems to be that as long as the Party provides the appellant with the possibility of appealing to a court or tribunal, the expeditious procedure according to the second sentence of Article 9.1 may well be performed by an independent body issuing recommendations. This reasoning is also in line with the fact that according to the text in this provision, it alternatively suffices for the Parties to provide the information seeking public with access to *administrative reconsideration* to meet the demand for an expeditious procedure. Such a procedure within the administration exists in most modern countries and is today recognised as "good governance" in administrative law. It may be undertaken by a higher level within the hierarchy of that authority or even by a special organ created for this purpose, but it is always done "within the administration". ~~From the perspective of Article 6 ECHR and Article 267 TFEU, it is highly doubtful whether this kind of second opinion by the administration would ever meet the requirements of being "independent and impartial". On the other hand, there is no such requirement according to the second sentence of Article 9.1. A certain demand for objectivity can be retrieved from the fact that Article 9.4 also applies to these alternative procedures. How far this will be drawn cannot be foreseen, as the Compliance Committee in C/2013/93 applied some of the criteria therein (timeliness), but not all (injunctive relief). And even if all of the criteria in Article 9.4 apply to the second sentence of Article 9.1, the text in the provision bars too far-reaching interpretations, as it makes a clear division between administrative reconsideration and review by an independent and impartial body.~~

Against this background, ~~it is somewhat surprising that the Implementation Guide 2014 seems to understand that the independence and impartiality requirement in the second sentence of Article 9.1 applies to both administrative reconsideration and review procedures (emphasis added):[13]~~

~~Many ECE countries have some kind of general administrative reconsideration or appeals process for governmental decisions. This administrative process often functions more rapidly than an appeal to a court and is often free of charge. *Applied to review of requests for information, so long as the body is independent and impartial and established by law, such a process could satisfy the requirements of the Convention.*~~

~~Even if one can sympathize with this conclusion, it is hard to see that it is compatible with a straight-forward reading of the text in the Convention.~~ A reasonable conclusion is ~~therefore~~ that it suffices for the Parties to have a system where the authorities' decision to refuse the disclosure of environmental information is reconsidered within the administration, however under the condition that that procedure meets the Article 9.4 requirements. Thereafter the discontented applicant must rely on the possibility to go to court.

Article 9.1 third sentence

In the third sentence of Article 9.1 thereafter it says that final decisions under Article 9.1 shall be *binding on the public authority holding the information*. This raises the question if all

~~[13] The Aarhus Convention – An Implementation Guide, UNECE 2nd ed. 2014, at page 192.~~

Kommenterad [A16]: This is a misunderstanding of the Committee's procedure.
The Committee did not "close the case". It adopted findings of non-compliance.

Kommenterad [A17]: "Even so" implies that not making recommendations waters down the Committee's jurisprudence on article 9.1. That would misrepresent the situation.

Kommenterad [A18]: In paragraph 86 of the findings, the Committee makes a clear finding that the Ombudsman is a review mechanism under the second sentence of article 9.1.

Kommenterad [A19]: It is not appropriate for TF to be talking about what would or would not meet EU law. That is for the EU's own institutions to determine.

Kommenterad [A20]: Just above, the text is talking about Ombudsman, which the second section of article 9.1 makes explicitly clear are required to be independent and impartial.

Kommenterad [A21]: This misunderstands article 9.4. All procedures under article 9 (including these ones) are expressly required to be fair and equitable.

Kommenterad [A22]: It implies that the CC decided not to apply the requirement for injunctive relief – when in fact the issue of injunctive relief was not raised by the communicant, which is accordingly why it was not considered by the Committee.

Kommenterad [A23]: All the requirements in article 9.4 apply to article 9.1 and there is no legal basis for any other interpretation. It is not appropriate for TF to introduce any doubt regarding interpretation of the Convention.

Kommenterad [A24]: The deleted text is clearly interpreting the requirements of the Convention, which is outside the scope of the TF's mandate.

In any event, the quoted sentence of the IG in italics does not refer to article 9.1, second sentence, but rather to satisfying the requirements of article 9.1, **first sentence**. Thus, there is no incompatibility with the Convention.

Kommenterad [A25]: Interference with interpretation of the Convention – exceeds the mandate of the Task Force.

Kommenterad [A26]: Even if the preceding para is deleted, this concluding sentence still works as a continuation from the discussion on administrative reconsideration on the preceding page.

kinds of decisions can be characterised as "final" as soon as the deadline for appeal has expired, irrespective of whether it is an administrative decision or a court judgment. According to the text in the third sentence, the binding requirement applies to all final decisions under Article 9.1, even those which result from a reconsideration procedure within the administration or a review by an independent body outside that administration. Thus, the wording indicates that it does not matter which body took the decision, and when, as all final decisions according to the established definition above must be binding on the authority. This is also how administrative reconsideration processes normally function, as the second decision replaces the first one from the information holding authority.

However, such a viewpoint does not seem to follow the Compliance Committee's findings in Communication ACCC/C/2013/93, as recommendations by an Ombudsman were accepted. Instead, from that case one may conclude that the binding requirement only applies to final decisions under the first sentence of Article 9.1. This is also the impression when reading the findings of the Compliance Committee in ACCC/C/2008/30, where it was stated (emphasis added):[14]

> If a public agency has the possibility not to comply with a final decision of a court of law under article 9, paragraph 1, of the Convention, then doubts arise as to the binding nature of the decisions of the courts within a given legal system. Taking into account article 9, paragraph 1, which implies that *the final decisions of a court of law or other independent and impartial body established by law are binding upon and must thus be complied with by public authorities,* the failure of the public authority to fully execute the final decision of the court of law implies non-compliance of the Party concerned with article 9, paragraph 1, of the Convention.

In the European Union as set out by Article 6 of EID (2003/4), the binding criteria also applies only to review decisions by a court of law or another independent and impartial body. The same line of reasoning is furthermore confirmed in the Implementation Guide 2014.[15] Based on the above, it can be concluded that the Ombudsman institution or an Information Commissioner may be regarded as review procedures according to the first sentence of Article 9.1, but only if its decisions are binding on the information holding authority. On the other hand, when these institutions can issue recommendations only, they still may well be accepted as alternative complaint procedures under the second sentence of that provision.

[14] ACCC/C/2008/30 (Republic of Moldova), para. 35.

[15] The Aarhus Convention – An Implementation Guide, UNECE 2nd ed. 2014, at page 189, see also at p. 193 about the requirement according to Article 9.1 to provide with – in addition to any advisory processes – a possibility for the applicant to obtain a decision which is binding upon the information holding authority.

Jan Darpö
Chair of the Task Force on Access to Justice under the Aarhus Convention
Contacts: Mob: 0046 739 137824, e-mail: jan.darpo@jur.uu.se
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2019-06-19

Draft report (version 2) prepared by the Chair of the Task Force on Access to Justice under the Aarhus Convention

Access to Justice in Information Cases

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1.2 Article 9.1 of the Aarhus Convention in text and practice

Article 9.1 first sentence

The study has triggered a couple of questions concerning the ~~understanding~~ implementation of Article 9.1 of the Convention that can usefully be highlighted already in the beginning. The aim here is, however, not to give clear answers to the issues raised, but rather to provide a platform for further discussion. As with the previous studies performed by the Task Force on Access to Justice, ambiguities in the text of the Convention will be pointed at, along with ongoing issues, and conclusions will be drawn from existing legal sources using a traditional method of law. The responsibility for resolving any issues raised obviously lies in the hands of other bodies, namely the Compliance Committee and the Meeting of the Parties to the Convention.

As noted in the beginning of this report, the first sentence of Article 9.1 requires Parties to the Convention to provide the person requesting environmental information with recourse to challenge the authority's decision on the matter *in a court of law or another independent and impartial body established by law*. The same expression can be found in Article 9.2 of the Convention and is reflected in the EU's implementation legislation on Article 9.1, namely Article 6 of the Environmental Information Directive (2003/4, EID[2]). It is widely believed that this expression equates to "any court or tribunal" in Article 267 TFEU, as well as "an independent and impartial tribunal established by law" in Article 6 ECHR, requiring a fair trial.[3] It also goes without saying that these expressions are "autonomous", meaning that the national label on the reviewing body is of no importance when evaluating its independence and impartiality.[4] As a consequence, the first sentence of Article 9.1 calls for a review mechanism performed by such a body, irrespective of how it is named in the national legal system.

Furthermore, Article 9.1 requires that *any person* has access to a court or tribunal in order to challenge a refusal on a request for environmental information. To date, the Compliance Committee has found non-compliance under Article 9.1 concerning who entitled to make such a request in only one case and that was the early Communication ACCC/C/2004/1.[5] As already noted, this general picture is confirmed in the present study as there are no issues reported concerning applicants for environmental information in this respect. In fact, as all members of the public irrespective of nationality, residence or other belonging ~~are~~ were reported to be allowed to make such a request without stating an interest, one can even discuss whether it is accurate to label this as "standing". In the Implementation Guide 2014, a similar line of reasoning is made by reference to Article 4 and also the definition of "the public" in Article 2.4.[6]

Kommenterad [A1]: AC secretariat: Focus of the study is on implementation

Kommenterad [A2]: AC secretariat: The sentence is drafted as a universal statement, but the report can only comment on what was reported in the survey.

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[2] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

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[4] For a discussion about the meaning of the expression *court of law or another independent and impartial body established by law*, see the Aarhus Convention – An Implementation Guide, UNECE 2nd ed. 2014, at pages 188-189.

[5] ACCC/C/2004/1 (Kazakhstan), ACCC/C/2008/30 (Republic of Moldova), ACCC/C/2012/69 (Romania) and ACCC/C/2013/93 (Norway) seem to be the most important cases on access to environmental information, however mostly dealing with the definition of environmental information, grounds for refusal, timeliness and weak enforcement.

[6] The Implementation Guide at p. 191.

Although not explicitly stated in the first sentence of Article 9.1, the review required here covers *both procedural and substantive issues* under Article 4.[7] As one cannot really draw a clear distinction between the two aspects, it is hard to imagine what a review covering only one of them would actually look like. Although this issue has not really been examined by the Compliance Committee, the Court of Justice of the European Union (CJEU) confirmed in case C-71/14 *East Sussex* (2015) – which concerned the requirements for access to environmental information according to the EID (2003/4) – that judicial procedures in the Member States must enable the national court "*to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness*" of an administrative decision to deny such access.[8] Although this court has no direct competence to interpret the Aarhus Convention, its case-law on the implementation in the Member States provides us with "state practice" concerning the obligations therein.[9]

Article 9.1 second sentence

According to the second sentence of Article 9.1 of the Aarhus Convention, if the review under the first sentence of Article 9.1 is provided by a court of law, the unsuccessful applicant shall also have access to an expeditious procedure for *reconsidering by a public authority* or *review by an independent and impartial body other than a court of law*. The understanding of *what body* and *in what way* the alternative procedure shall be performed is thus of importance here. According to the text, it shall either consist of "reconsideration by a public authority" or a "review by an independent and impartial body other than a court of law". This issue was raised in ACCC/C/2013/93, where the Compliance Committee found that the Parliamentary Ombudsman of the Party concerned constituted a review procedure within the scope of the second sentence of article 9.1 of the Convention, as it constitutes "an inexpensive, independent and impartial body established by law through which members of the public can request review of an information request made under Article 4 of the Convention".[10] Here, it can be noted that the recommendations by the Parliamentary Ombudsman are not binding, although normally respected by at least the authorities. In ACCC/C/2013/93, the time taken for the Ombudsman's review was at issue. However, even though the Ombudsman was accepted as such, the procedure was not timely. When deciding this, the Compliance Committee applied both the requirement for expediency in the second sentence of Article 9.1 and the general timeliness criteria in Article 9.4. All in all, the time span between the request to the Ombudsman for review of the Government's refusal to disclose the information and the final recommendation was two and a half years, which was found to be in breach of the requirements in article 9.1, second sentence, to be "expeditious" and in article 9.4 to be "timely"Convention.[11] In finding this, the Committee particularly noted that nowhere in the complaint proceedings did the Ombudsman instruct the Ministry to handle the information request with expediency. However, while finding that the Party concerned had failed with the requirements to be expeditious and timely, the Committee did not make recommendations to the Party concerned, as there was no evidence that the non-compliance was due to a

Kommenterad [A4]: AC secretariat: Art 9(1) does not differentiate between substantive and procedural issues. The TF has no authority to interpret the Convention.

Kommenterad [A5]: AC secretariat: Art 9(1) does not differentiate between substantive and procedural issues. This would be why the CC has not looked at this issue. It is not supposed to. The statement provides misperception of CC findings.

Kommenterad [A6R5]: **TF Chair: The comment is hard to understand as the Compliance Committee will obviously look into the matter if it is raised. One such example may be that a member of the public claims that Party to the Convention only allows review of procedural issues under Article 9.1…**

Kommenterad [A7]: AC secretariat: It is not clear from the quote whether this was an example of substantive or procedural review. From this quote, the court could have been talking about applying either the relevant procedural or substantive EU law.

Kommenterad [A8]: AC secretariat: Footnote is deleted as it is not relevant anymore since the text was redrafted. In addition, the footnote focuses on how the treaty should be interpreted which is outside the TF mandate.

Kommenterad [A9R8]: **TF Chair: So according to the secretariat, it's outside of TFs mandate to make a reference to the Vienna Convention on the Law of Treaties...?**

Kommenterad [A10]: AC secretariat: The sentence makes it sound like, because the procedure was not timely in the particular case, it is not a procedure under the second sentence of art 9.1.

Kommenterad [A11]: AC secretariat: This is important to clarify, as it shows the Committee requires review procedures under the second sentence of 9.1 to comply with both requirements.

[7] The Implementation Guide at p. 191.

[8] C-71/14 *East Sussex* (2015), p. 58.

[9] Article 31(3)(b) of VCLT, see Wouters, J & Ryngaert, C & Ruys, T & De Baere, G: International law – A European perspective. Hart Publishing 2018, pp. 100-103.

[10] ACCC/C/2013/93 (Norway), para 86.

[11] ACCC/C/2013/93 (Norway), paras 87-92.

systematic error. Based on ACCC/C/2013/93, a reasonable conclusion is that an Ombudsman institution can be accepted as a review mechanism under the second sentence of Article 9.1.

The rationale for the Committee's standpoint seems to be that as long as the Party provides the appellant with the possibility of appealing to a court or tribunal, the expeditious procedure according to the second sentence of Article 9.1 may well be performed by an independent body issuing recommendations. This reasoning is also in line with the fact that according to the text in this provision, it alternatively suffices for the Parties to provide the information seeking public with access to *administrative reconsideration* to meet the demand for an expeditious procedure. Such a procedure within the administration exists in most modern countries and is today recognised as "good governance" in administrative law. It may be undertaken by a higher level within the hierarchy of that authority or even by a special organ created for this purpose, but it is always done "within the administration". ~~From the perspective of Article 6 ECHR and Article 267 TFEU, it is highly doubtful whether this kind of second opinion by the administration would ever meet the requirements of being "independent and impartial".~~ ~~On the other hand, there is no such requirement according to the second sentence of Article 9.1.~~ ~~A certain demand for objectivity can be retrieved from the fact that Article 9.4 also applies to these alternative procedures.~~ ~~How far this will be drawn cannot be foreseen, as the Compliance Committee in C/2013/93 applied some of the criteria therein (timeliness), but not all (injunctive relief).~~ ~~And even if all of the criteria in Article 9.4 apply to the second sentence of Article 9.1, the text in the provision bars too far-reaching interpretations, as it makes a clear division between administrative reconsideration and review by an independent and impartial body.~~

Against this background, ~~it is somewhat~~ confusing ~~that the Implementation Guide 2014 seems to understand that the independence and impartiality requirement in the second sentence of Article 9.1 applies to both administrative reconsideration and review procedures (emphasis added):[12]~~

~~Many ECE countries have some kind of general administrative reconsideration or appeals process for governmental decisions. This administrative process often functions more rapidly than an appeal to a court and is often free of charge. *Applied to review of requests for information, so long as the body is independent and impartial and established by law, such a process could satisfy the requirements of the Convention.*~~

~~Even if one can sympathize with this conclusion, it is hard to see that it is compatible with a straight-forward reading of the text in the Convention.~~ aA reasonable conclusion is ~~therefore~~ that it suffices for the Parties to have a system where the authorities' decision to refuse the disclosure of environmental information is reconsidered within the administration, however under the condition that that procedure meets the Article 9.4 requirements. Thereafter the discontented applicant must rely on the possibility to go to court.

Article 9.1 third sentence

In the third sentence of Article 9.1 thereafter it says that final decisions under Article 9.1 shall be *binding on the public authority holding the information*. This raises the question if all kinds of decisions can be characterised as "final" as soon as the deadline for appeal has expired, irrespective of whether it is an administrative decision or a court judgment. According to the text in the third sentence, the binding requirement applies to all final decisions under Article 9.1, even those which result from a reconsideration procedure within

~~[12] The Aarhus Convention – An Implementation Guide, UNECE 2nd ed. 2014, at page 192.~~

Kommenterad [A12]: AC secretariat: It is not appropriate for TF to be talking about what would or would not meet EU law. That is for the EU's own institutions to determine.

Kommenterad [A13]: AC secretariat: Just above, the text is talking about Ombudsman, which the second section of article 9.1 makes explicitly clear are required to be independent and impartial.

Kommenterad [A14R13]: TF Chair: ???

Kommenterad [A15]: AC secretariat: This misunderstands article 9.4. All procedures under article 9 (including these ones) are expressly required to be fair and equitable.

Kommenterad [A16R15]: TF Chair: ???

Kommenterad [A17]: AC secretariat: It implies that the CC decided not to apply the requirement for injunctive relief – when in fact the issue of injunctive relief was not raised by the communicant, which is accordingly why it was not considered by the Committee.

Kommenterad [A18R17]: **TF Chair: It was common ground for all parties involved in the case that the Sivilombudsmannen can only issue non-binding recommendations, and there is no reason to believe that the Compliance Committee would have thought differently id the question was actually raised (see Implementation Guide 2014). In any event, one cannot deny that the text draws a reasonable conclusion from the case, and this goes to the heart of the discussion between me and the secretariat. The issue is not about the correct interpretation of CCs findings, but about whether the Task Force is allowed to draw conclusions from them using an ordinary method of law (loyal to the text of the Convention and the CC findings)…**

Kommenterad [A19]: AC secretariat: All the requirements in article 9.4 apply to article 9.1 and there is no legal basis for any other interpretation. It is not appropriate for TF to introduce any doubt regarding interpretation of the Convention.

Kommenterad [A20]: AC secretariat: The deleted text is clearly interpreting the requirements of the Convention, which is outside the scope of the TF's mandate.

In any event, the quoted sentence of the IG in italics does not refer to article 9.1, second sentence, but rather to satisfying the requirements of article 9.1, **first sentence**. Thus, there is no incompatibility with the Convention.

TF Chair: This is not correct, the paragraph is a general statement about administrative reconsideration, a phenomenon that is merely mentioned in the second sentence of Article 9.1. However, I changed the wording from "surprising" to "confusing"…

Kommenterad [A21]: AC secretariat: Interference with interpretation of the Convention – exceeds the mandate of the Task Force.

Kommenterad [A22R21]: **TF Chair: So according to the secretariat, it's outside the mandate of the Task Force to highlight ambiguities in the Implementation Guide..?**

Kommenterad [A23]: AC secretariat: Even if the preceding para is deleted, this concluding sentence still works as a continuation from the discussion on administrative reconsideration on the preceding page.

the administration or a review by an independent body outside that administration. Thus, the wording indicates that it does not matter which body took the decision, and when, as all final decisions according to the established definition above must be binding on the authority. This is also how administrative reconsideration processes normally function, as the second decision replaces the first one from the information holding authority.

However, such a viewpoint does not seem to follow the Compliance Committee's findings in Communication ACCC/C/2013/93, as recommendations by an Ombudsman were accepted. Instead, from that case one may conclude that the binding requirement only applies to final decisions under the first sentence of Article 9.1. This is also the impression when reading the findings of the Compliance Committee in ACCC/C/2008/30, where it was stated (emphasis added):[13]

> If a public agency has the possibility not to comply with a final decision of a court of law under article 9, paragraph 1, of the Convention, then doubts arise as to the binding nature of the decisions of the courts within a given legal system. Taking into account article 9, paragraph 1, which implies that *the final decisions of a court of law or other independent and impartial body established by law are binding upon and must thus be complied with by public authorities,* the failure of the public authority to fully execute the final decision of the court of law implies non-compliance of the Party concerned with article 9, paragraph 1, of the Convention.

In the European Union as set out by Article 6 of EID (2003/4), the binding criteria also applies only to review decisions by a court of law or another independent and impartial body. The same line of reasoning is furthermore confirmed in the Implementation Guide 2014.[14] Based on the above, it can be concluded that the Ombudsman institution or an Information Commissioner may be regarded as review procedures according to the first sentence of Article 9.1, but only if its decisions are binding on the information holding authority. On the other hand, when these institutions can issue recommendations only, they still may well be accepted as alternative complaint procedures under the second sentence of that provision.

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[13] ACCC/C/2008/30 (Republic of Moldova), para. 35.

[14] The Aarhus Convention – An Implementation Guide, UNECE 2nd ed. 2014, at page 189, see also at p. 193 about the requirement according to Article 9.1 to provide with – in addition to any advisory processes – a possibility for the applicant to obtain a decision which is binding upon the information holding authority.