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Opening the Doors to Justice - The Challenge of Strengthening Public Access

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"Mini-Conference" at the Second Meeting of the Task Force on Access to Justice under the UNECE Convention on Access to Information, Public Participation and Access to Justice (Aarhus Convention)

1 Task force mandate and recent activities

The second meeting of the Task Force on access to justice under the Aarhus Convention took place on 10-12 September 2007 in Geneva. The Task Force was established by the Parties to the Convention at their second meeting in May 2005 in Almaty, Kazakhstan, with the aim of addressing some of the practical issues and obstacles that occur in implementation of Article 9 of the Convention, which sets out the third pillar of the Convention, access to justice. As part of its mandate to "develop information and training or analytical material and activities at appropriate levels, and organize this work within the framework of the Convention's overall capacity building programme", the Task Force[1] had organised a workshop for the high-level judiciary in six Eastern European countries, namely Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, to raise awareness beneath the judiciary, build new links and capacities with courts and judicial training centres in the region and establish a network for future capacity building activities and facilitation of the implementation process of access to justice. The workshop took place in Kiev in June 2007, bringing together 35 judges and representatives of the national judicial training institutes. On the basis of presentations and hypothetical cases presented by a number of international experts the participants actively discussed obstacles to access to justice in the light of their national legislations and the Aarhus Convention.

2 "Mini-Conference": Experts' views on access to justice

Based on the good experiences made in the workshop in Kiev and acknowledging the key role of the judiciary and other players in the legal field, the Task Force had decided to invite a number of international experts, high level judges, representatives of judicial training institutes and representatives of ministries of justice next to the usual Task Force members to a special one-day "mini-conference" on the theme of '**Opening the Doors to Justice: The Challenge of Strengthening Public Access**' as part of the second meeting of the Task Force. The conference, consisting of presentations from various international experts as well as extensive plenary discussions, aimed at allowing the opportunity for a free exchange of opinions on the 'burning issues' in the implementation of the third pillar of the Convention between a wider range of stakeholders than normally participate in task force meetings and trigger new initiatives and cooperation between them. The conference was co-chaired by Prof. Vasyl Kostytsky, Academic Director of the Institute of Legislative Initiative and Legal Assessment; Incoming judge at the Constitutional Court of Ukraine and Prof. Marc Pallemaerts, Free University of Brussels, Belgium; Senior Fellow at the Institute of European Environmental Policy.

2.1 Administrative control, legal standing and effective remedies

As the first speaker of the morning session, Professor Ludwig Kraemer of the Universities of Bremen and Copenhagen, and former long-time judge at the Landgericht Kiel, Germany, presented an overview on the key challenges in implementing access to justice. He stressed the need to maintain and strengthen the judicial control of administrative acts. According to his opinion, it is up to the courts to objectively balance the interests of applicants who act altruistically for the protection of the general interest "environment" against the interests of operators, polluters and administrations.

Ms. Carol Hatton, WWF-UK, United Kingdom, then gave a presentation on 'Access for whom? – The issue of legal standing'. Referring to recent case law from the ECJ and a study by De Sadeleer et al (2002), she identified the standing criteria as a significant hurdle to access to environmental justice for NGOs. She stressed the need to finalise the draft EC Directive on access to justice in environmental matters and highlighted the important contribution the judiciary can make in adopting a broad interpretation of standing criteria. Regular monitoring and review in order to highlight good practice should be used to promote wide access to justice. 'Effective remedies – Do they exist?' was the topic of the following presentation of Professor Jan Darpö, University of Uppsala, Sweden. Pointing at systemic differences in each Parties' legal system and tradition, he stated that the need for effective remedies could differ from one system to another, depending upon some key issues. These circumstances made it necessary

[1] In cooperation with the Organization for Security and Cooperation in Europe.

to be very specific when discussing matters concerning "effective remedies", including time differentiation before and after activities have started and been terminated, which he illustrated with a number of case examples.

2.2 Public interest advocacy, costs and getting SLAPPed

Ms. Olha Melen of the International Foundation Environment-People-Law, Ukraine, spoke on 'Public interest advocacy: a key to better implementation?' Comparing several factors preventing individuals and NGOs from filing court cases she came to the conclusion that there was a higher probability that NGOs with a legal focus would initiate strategic lawsuits, compared with individuals. Public interest advocacies, therefore, were key players in the implementation of Article 9 of the Convention. She stressed the need to continue to file cases at courts despite the low success rate (mainly caused by obstacles such as legal standing), to develop a certain practice, both, for the public and for the courts.

Professor John Bonine of the University of Oregon, USA, addressed the issues of costs in access to justice and "Getting SLAPPed". He identified costs and strategic lawsuits against public participation (so-called SLAPP lawsuits) as crucial barriers through which governments and private businesses could undermine effective access to justice. Looking at different solutions applied globally, he finished with three recent cases[2] which represented important changes in court practice and could constitute important precedents for the future to lower the burden of costs for public interest parties.

2.3 Transboundary cases and challenges in the regions

During the afternoon session, Professor Jonas Ebbesson of the University of Stockholm gave a presentation on providing access to justice in transboundary cases. He stressed the applicability of the entire Convention in transboundary contexts and described the potential legal consequences of the non-discrimination principle, embedded in Article 3, paragraph 9, of the Convention. Furthermore, he emphasised the important role of courts in duly ensuring transboundary application, especially in absence of required national legislation.

Professor Svitlana Kravchenko of the University of Oregon and Dr. Csaba Kiss of the Environmental Management and Law Association from Hungary presented the implementation challenges in the regions. Professor Kravchenko reported on the main challenges identified by experts in the EECCA region in response to a questionnaire which included: the lack of judicial independence and awareness, limited number of licensed public interest lawyers, low number of court cases, the chilling effect of SLAPP suits, financial barriers and narrow standing for NGOs. She put forward several suggestions on how to overcome these obstacles, including fighting against corruption among the judiciary, provision of financial support to public interest environmental law NGOs, continuous judicial trainings, also within the Task Force and development of training materials. Dr. Kiss presented three independent multi-country assessments on access to justice focusing on the EU and Eastern Europe, undertaken by the Access Initiative (TAI), Justice and Environment (J&E), and the European Environmental Bureau (EEB). He described the remaining limitations to access to justice as identified by those studies and gave several recommendations to overcome those barriers such as promotion of independence and environmental law awareness of the judiciary, establishment of specialised environmental courts, establishment of state subsidies to address financial barriers and clarification with regard to direct applicability of the Convention in the national courts.

2.4 Judges and the Convention

Hon. Luc Lavrysen, Justice of the Constitutional Court of Belgium, and Hon. Vera Macinskaia, Justice of the Supreme Court of Moldova, spoke on the issue of judges and the Convention – how the judiciary can further the implementation of the third pillar from an EU and an EECCA regional perspective. Justice Lavrysen emphasised that the dissemination of adequate information to all relevant legal stakeholders should be a top priority. Also, the Aarhus Convention should be an important item in training activities for judges and other judicial officers. Furthermore, he underlined the important role constitutional as well as administrative courts could play in the enforcement of the Aarhus Convention. Justice Macinskaia presented recent developments in the legislation of Moldova, in particular with regard to legislation on access to information which had generated considerable jurisprudence on the matter.

[2] 2004 Privy Council/London decision ruled in a case where environmental NGOs had lost an appeal against a decision by the Court of Appeal of Belize that "because this was a public interest case there should be no order as to costs of the appeal"; http://www.elaw.org/assets/pdf/be.FinalOrderNoCosts.pdf.
2005, Corner House Research decision set the parameters for appropriate issuance of "protective costs orders" that ensured that if the NGO lost it would not have to pay the attorney costs of the other side. "The overriding purpose . . . is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance . . . ." R (Corner House Research) v Secretary of State for Trade & Industry [2005] EWCA Civ 192./ 2005, the European Court of Human Rights ruled that two citizens who were sued by a corporation for defamation had been denied the right to a fair trial and freedom of expression under Articles 6 and 10 of the European Convention on Human Rights because the Government of the United Kingdom refused to provide funding for their lawyers to defend them - European Court of Human Rights, Steel and Morris v. United Kingdom, App No 6841601, Judgment of 15 February 2005 (summarised in www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/ 133/133. pdf on p. 13).

High-level courts, such as Supreme Courts, played a special role in the EECCA region by analysing jurisprudence and providing guidance to the lower courts on specific issues. She also highlighted the importance of capacity building for the judiciary, in particular through exchange of experience among judges, and pointed to the recent regional judicial workshop on access to justice as a positive example of such efforts.

The two final presentations of the mini-conference focused on enhancing the capacity of judiciaries. Ms. Iryna Voytyuk, President of the Academy of Justice of Ukraine, described the role which judicial training institutes could play in promoting effective access to justice. Speaking on behalf of judicial training institutes from Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, she pointed out that the judicial training institutes were in a unique position to reach not only judges at all levels but also court officials and other legal professionals. The judicial training institutes relied on high-level judges, academics and international experts to deliver trainings on a national as well as a local level. Hon. William Birtles, Resident Judge at the Mayor's and City of London Court, United Kingdom, presented the activities of EUFJE, an association of judges aimed at promotion of international, European and national environmental law by facilitating awareness of judges in the matters of environmental law through exchange of experience and information on the relevant jurisprudence. The association took an active part in capacity-building efforts, including those of the Aarhus Convention's Task Force on Access to Justice (e.g. through contribution by the EUFJE members to the recent high-level judicial workshop in Kiev). Hon. Birtles suggested that the establishment of similar judicial networks with a focus on environmental law could be considered outside the EU region.[3]

3 Plenary discussion

The participants welcomed the involvement of new groups of stakeholders in the conference and the following Task Force meeting, allowing insights into issues of other players in the field and giving the meeting a new dimension and more active movement. It was emphasised that the judiciary and the ministries of justice in particular could and should play an important role in implementing access to justice. Whereas it was in the hands of the ministries of justice to push forward the implementation process within the national legislations, judges could use their independency and discretion as an effective tool for further facilitation of the process. Courts, in particular constitutional courts, could play an important role in the enforcement of the Aarhus Convention as they were in a position to combine provisions of their national constitution with relevant provisions of international treaties and check not only the constitutionality of federal or regional acts of parliament, but also their conformity with international provisions, such as those of the Aarhus Convention. However, it was pointed out that the dissemination of adequate information to all relevant legal stakeholders had to be a top priority to increase awareness and knowledge regarding the provisions of the Convention. In this respect, the importance of implementing the Aarhus Convention into the curricula of the national judicial training institutes as trainers of judges and other legal practitioners was specifically mentioned.

As a main conclusion of the mini-conference the participants agreed that the numerous obstacles to effective access to justice could only be eliminated if all parties involved, the judiciary and other legal practitioners, civil servants in the ministries of justice and environment and the administration, as well as non-governmental organisations in their role of bringing cases to courts, combined their efforts and started to work hand in hand towards one common goal: the provision of free access to justice and effective protection of the environment as a common interest.

4 Small steps towards access to environmental justice

The conference and following Task Force meeting showed that providing free access to justice remains a challenge. This corresponds with the findings of the Parties to the Convention in their national implementation reports submitted to the Secretariat under the Convention in 2005, stating that the implementation of the third pillar poses the biggest difficulties. In particular, the Parties noted that differences in legal systems, democratic traditions and cultures of the Parties made (any, but especially harmonised) implementation difficult. The situation may not have changed much. Obstacles such as the low level of judicial independence, absence of trust in the judiciary, slow pace of court proceedings, corruption, socio-economic problems and last but not least the low level of awareness, which were mentioned in the implementation reports, are still existing and were discussed in the conference. The next national implementation reports are due in December 2007. These new reports may show in more detail whether and how the Parties to the Convention progressed with regard to access to justice and serve as another basis to identify remaining obstacles and to work out solutions.

However, at both the conference and the task force meeting, small but positive steps in the right direc-

[3] All presentations in full as well as the official report of the 2nd Task Force meeting can be found at http://www.unece.org/env/pp/a.to.j.htm#Meetings.

tion could be recognised and a certain willingness of the different stakeholders to work together was indicated. It is now down to all these players to follow up on this indication and willingness and keep on walking forward. If we all do so, the doors to environmental justice and better protection of the environment may finally open.

For more information, please see:
http://www.unece.org/env/pp/welcome.html

Asia-Pacific Partnership on Clean Development and Climate: Blockade or Impetus for the International Climate Regime?♣

Christoph Holtwisch

♣ All sources for this summarising article are contained in the author's master thesis on the APP (in German) which is available as a pdf-file upon e-mail request: holtwisch@t-online.de.

1 Introduction

The *Asia-Pacific Partnership on Clean Development and Climate* [APP or AP6] is a very new phenomenon in international climate policy. It has important effects on the traditional climate regime formed by the UN *Framework Convention on Climate Change* [FCCC] and its *Kyoto Protocol* [KP]. From its own point of view, the APP is a grouping of key nations to address serious and long-term challenges, including anthropogenic climate change. The APP partners - Australia, China, India, Japan, South Korea and the USA - represent roughly half the world economy and population, energy consumption and global greenhouse gas emissions. For this reason, this "coalition of the emitting" is – and will be – a central factor in international climate policy.

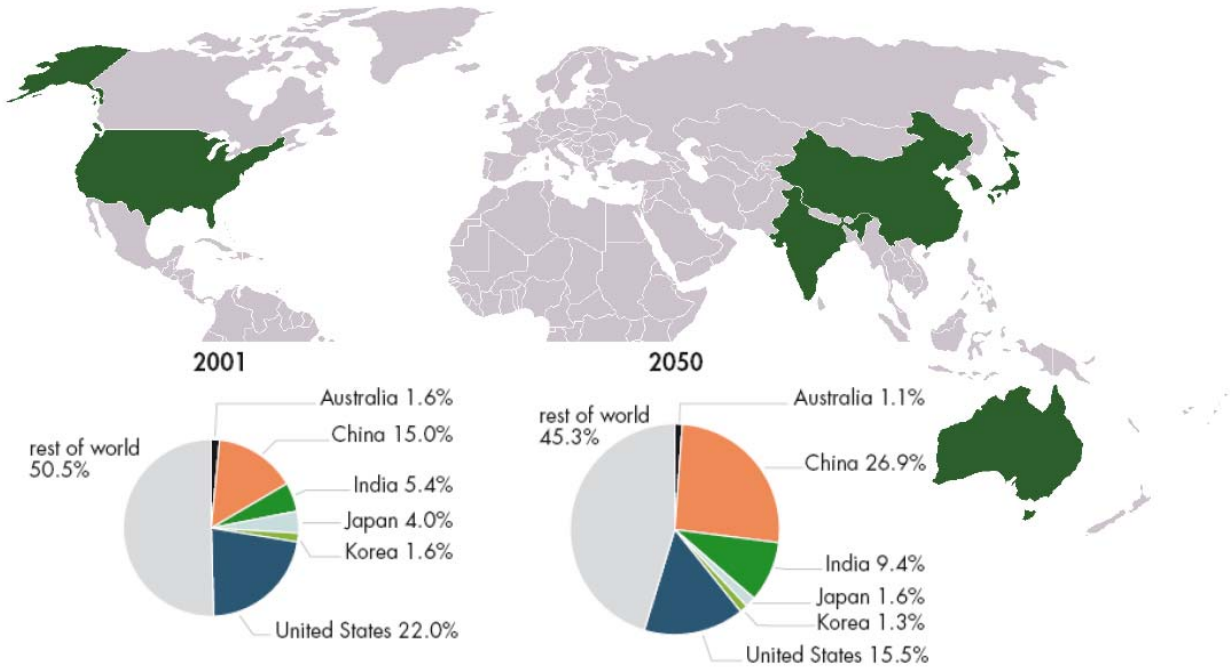

Figure 1: APP states and their (projected) global greenhouse gas emissions

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.
The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.
The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:
The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:
- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:
- **European environmental policy**
  - Research on implementation of European law
  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover
- Product policy/REACh
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conversation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the
- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industria Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

Elni Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.

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