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ORIGINAL: SPANISH



Intersessional meeting of the negotiating committee
of the regional agreement on access to information,
participation and justice in environmental matters
in Latin America and the Caribbean (virtual)

Tuesday, 31 January 2017

[This document has not been subject to editorial review]

MINUTES – SUMMARY OF THE MEETING

1. BACKGROUND

At the fifth meeting of the Negotiating Committee of the regional agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean held in Santiago from 21 to 25 November 2016, the countries decided to call an intersessional meeting of the Negotiating Committee (virtual) in January 2017. Pursuant to the Organization and Work Plan of the Negotiating Committee, no decisions are to be taken at virtual meetings.

As agreed by the Presiding Officers of the Negotiating Committee, the objective of the meeting was to present and discuss article 9 of the compilation text on access to environmental justice with the aim of identifying consensus and divergences that facilitate the negotiation at the next meeting of the Negotiating Committee (Brasilia, 20-24 March 2017). As agreed by the Presiding Officers, the discussion will be steered by Brazil and Chile.

Annex 1 contains the list of participants of the meeting.

2. DEVELOPMENT OF THE MEETING

In the opening remarks ECLAC expressed gratitude for the high participation and presented the objectives of the meeting.

The coordinators of the contact group on article 9 (Brazil and Chile) welcomed participants and explained how the session would be organized.

After a brief presentation of the process and the organization and calendar of the meetings of the Negotiating Committee, the contact group coordinators presented the central elements of article 9 according to the fifth version of the text compiled by the Presiding Officers, document that serves as a basis for the negotiations during the sixth negotiating round.

In their presentation, the contact group coordinators explained the provisions contained in the ten numerals of article 9 related to the following aspects: obligation to guarantee the right to access justice in environmental matters; mechanisms in cases of denial of access to information, participation and infringement of environmental rules and environmental damage; guarantees for access to justice (establishment of judicial or non-judicial specialized bodies, broad active legal standing and procedural measures); adequate measures to prevent any attack, threat, coercion or intimidation that any person or group may suffer while exercising the rights guaranteed by the agreement; measures to facilitate access to justice (mechanisms to eliminate or reduce obstacles, mechanisms to publicize the right of access to justice, use of new virtual, electronic or other mechanisms); special consideration of disadvantaged groups by establishing support mechanisms (including free technical and legal assistance), appropriate channels and assistance in case of difficulties with reading and writing; guarantees to ensure that adopted decisions are set out in writing, duly justified and available to the public; development of environmental law awareness and capacity-building programmes for the public, judicial and administrative officials, national human rights institutions; promotion of regional cooperation for the investigation, prosecution and punishment of environmental crimes and promotion of alternative dispute resolution mechanisms.

Afterwards, Dr. Cappelli, Senior Public Prosecutor from the Court of Rio Grande do Sul, Brazil, spoke about the essential elements of the regional agreement that would ensure the effective right to access justice in environmental matters. Dr. Cappelli referred to the need of adopting a broad concept of justice that includes judicial and non-judicial mechanisms; the need of having specialized and autonomous bodies; the importance of reducing cost barriers linked to access to justice (for example, that the agreement foresee free mechanisms); the essentiality of promoting preventive and anticipatory measures; the centrality of guaranteeing broad active legal standing, including collective actions; the establishment of a hierarchy between obligations stemming from environmental harm as follows (i) reparation, (ii) compensation, and (iii) damages, with the possibility of accumulation; the establishment of special rules in the environmental process for the reversal of the onus of proof or dynamic burden of proof; and the promotion of the *in dubio pro natura* principle in cases of legal uncertainty, as a principle of interpretation.

The representatives of the public, Gabriela Burdiles and Nicole Mohammed, presented the main priorities in access to environmental justice that, according to the elected representatives of the public, should be maintained and improved in the negotiation text. With regard to cost, they underscored their prohibitive character, making it necessary to eliminate procedural costs and to move towards free procedures. As for those that can appeal, they called for a broad interpretation of the right to bring an action and the possibility of initiating collective actions in the public or collective interest. They highlighted the need of establishing courts or other independent and specialized bodies, promoting protection measures for plaintiffs and environmental defenders, and establishing adequate, prompt and effective reparation frameworks. Furthermore, they argued that the regional agreement should favour effective and affordable precautionary or provisional measures, at no cost, as well as facilitation mechanisms that include the reversal of the onus of proof. Particular reference was made to the singularities of access to justice in the English-speaking Caribbean, which is based on the common law system. They said it was important to harmonize terms in the English version so that it would be understandable for all delegates, such as translating “*responsabilidad objetiva*” as strict liability. There were legislative developments and good practices in the region and, as a result, called for countries to be ambitious in their undertakings. References to national legislation should be deleted as a regional agreement was being negotiated which would, necessarily, be implemented within the framework of national legislation.

After the presentations, participants were invited to make questions or comments on article 9. Questions were asked on how Principle 10 of the 1992 Rio Declaration was being implemented in the signatory countries; the possible negative connotation of extra-judicial mechanisms; and the feasibility of having free access to justice.

Others pointed out that the reversal of the onus of proof could contradict some national constitutions and asked how to deal with this situation in the negotiation of article 9. Finally, questions were made on the mechanisms that communities affected by environmental harm could have to exercise their right to access justice considering the asymmetries that parties often experience in environmental processes. Clarification was also sought on what was meant by giving preference to collective actions.

On the prohibition of the reversal of the onus of proof, Dr. Cappelli indicated that it was not indeed possible in criminal matters, but that such rule was possible and desirable in civil and administrative procedures given the existing asymmetries between the plaintiff and the defendant. With regard to the extra-judicial mechanisms, she said that the text included the term non-judicial to refer to administrative mechanisms or other mechanisms. As for the way of ensuring no cost procedures and possible alternatives, she stated that even if free access to justice is essential, there were other ways that could facilitate access to justice such as technical or legal assistance mechanisms.

In relation to the information asymmetries and mechanisms to gather evidence, Dr. Cappelli stated that there are three ways to tackle them: (i) the reversal of the onus of proof; (ii) through support from other stakeholders such as universities that assist in estimating and determining proof; and (iii) through the technical capacity-building of experts. However, she said these were complementary. She also explained that preference to collective actions referred to their promotion to defend collective interests considering the matters at hand.

Finally, with regard to the relationship between political constitutions and how they are linked to access to justice, Dr. Cappelli explained that the decisions of judicial bodies should be duly justified and be coherent with national law. Principles such as the prevention and *in dubio pro natura* principles could help better interpret national legislation.

For their part, the representatives of the public asserted that free procedures were included in the Bali Guidelines, through the term “non prohibitive costs”. Different alternatives could also be explored such as “reasonable costs”.

The delegate from Chile replied to the question on how Principle 10 was being implemented by the countries and said that this was done through national constitutions, legislation, case law and international treaties. She said that regional agreement was necessary to deal with the specificities of environmental access to justice, given the particular nature of these processes.

3. CLOSING OF THE MEETING

To end the session, the contact group coordinators thanked participants for their attendance and ECLAC for its support in organizing the meeting. They reiterated their countries’ commitment with the negotiation process and recalled that the presentations would be available at the ECLAC webpage: <http://www.eclac.org/en/principle10>.

Anexo 1

LISTA DE PARTICIPANTES

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